GRUTTER’S FIRST AMENDMENT

Paul Horwitz

[pages 461–590]

Abstract: In Grutter v. Bollinger, the Supreme Court noted that universities “occupy a special niche” in the First Amendment, and suggested that they are entitled to a substantial degree of institutional autonomy. This Article evaluates the First Amendment implications of this ruling. It explores three possible First Amendment readings of Grutter. First, Grutter may be viewed as a charter of institutional autonomy for universities. That reading carries a variety of implications, not all of which may be equally pleasing to Grutter’s supporters. Second, Grutter may be read as advancing a substantive view of academic freedom based on its value to democratic deliberation. This ruling carries significant implications too, but it is hard to square with the larger body of First Amendment jurisprudence or with the concept of professional academic freedom itself. A third reading of Grutter’s First Amendment carries more profound and attractive implications: it suggests the Court may be willing to abandon its preference for neutral rules over social facts in First Amendment jurisprudence, and to take seriously the role of “First Amendment institutions.”

NOTES

EVENING THE PLAYING FIELD: TAILORING THE ALLOCATION OF THE BURDEN OF PROOF AT IDEA DUE PROCESS HEARINGS TO BALANCE CHILDREN’S RIGHTS AND SCHOOLS’ NEEDS

Anne E. Johnson

[pages 591–623]

Abstract: The Individuals with Disabilities in Education Act (the “IDEA”) is a broad federal mandate intended to make a “free appropriate public education” available to all disabled students. More importantly, however, the IDEA encourages schools to enable parents to collaborate with their child’s educators. In the event that parents and educators disagree about a child’s educational plan, the IDEA channels this conflict through an administrative appeals process. But despite the fact that the IDEA’s due process hearing is one of its most prominent procedural safeguards, the IDEA fails to specify which party bears the burden of proof during the proceedings. The existing conflict of authority regarding the allocation of the burden of proof at due process hearings must be resolved in order achieve the IDEA’s mandate. A modified burden-shifting scheme would best mirror the IDEA’s delicate balancing of
the rights of disabled children and the need to impose a realistic mandate on school districts.

SEX, BUT NOT THE CITY: ADULT-ENTERTAINMENT ZONING, THE FIRST AMENDMENT, AND RESIDENTIAL AND RURAL MUNICIPALITIES

Matthew L. McGinnis

[pages 625–659]

Abstract: Adult entertainment’s status as protected First Amendment speech has resulted in a confusing series of U.S. Supreme Court cases evaluating the zoning of adult businesses. Cases discussing the requirement that municipalities provide alternative avenues of communication for adult businesses have raised many questions as to how rural and residential municipalities may satisfy this obligation. This Note identifies three solutions that would help frame this inquiry. First, state or county legislative bodies should adopt countywide or statewide location restrictions on adult businesses. Second, courts should employ a regional analysis of the alternative avenues requirement when evaluating adult-entertainment zoning restrictions. Third, courts should undertake a supply-and-demand analysis when assessing what constitutes sufficient alternative avenues of communication. Adoption of these solutions would help to ensure that the First Amendment obligations of rural and residential municipalities reflect the unique burdens of such municipalities while maintaining appropriate protection for free speech.

GPS TRACKING TECHNOLOGY: THE CASE FOR REVISITING KNOTTS AND SHIFTING THE SUPREME COURT’S THEORY OF THE PUBLIC SPACE UNDER THE FOURTH AMENDMENT

April A. Otterberg

[pages 661–704]

Abstract: The Fourth Amendment to the U.S. Constitution guarantees freedom from government intrusion into individual privacy. More than two hundred years after the time of the Framers, however, the government possesses technologies, like GPS tracking, that allow law enforcement to obtain ever-greater amounts of detail about individuals without ever setting foot inside the home—the area where Fourth Amendment protections are highest. Despite the dangers GPS tracking and other technologies present to individual privacy, the U.S. Supreme Court’s Fourth Amendment jurisprudence frequently fails to acknowledge any semblance of privacy in the public sphere. This Note argues that rather than defining Fourth Amendment privacy based on purely physical boundaries, a proper analysis would protect those features of society that provide privacy. By recognizing that features other than physical boundaries can generate privacy, this analysis would ensure the Fourth Amendment continues to preserve individual privacy even in the face of sophisticated new technologies.
**Abstract:** In *Grutter v. Bollinger*, the Supreme Court noted that universities “occupy a special niche” in the First Amendment, and suggested that they are entitled to a substantial degree of institutional autonomy. This Article evaluates the First Amendment implications of this ruling. It explores three possible First Amendment readings of *Grutter*. First, *Grutter* may be viewed as a charter of institutional autonomy for universities. That reading carries a variety of implications, not all of which may be equally pleasing to *Grutter*’s supporters. Second, *Grutter* may be read as advancing a substantive view of academic freedom based on its value to democratic deliberation. This ruling carries significant implications too, but it is hard to square with the larger body of First Amendment jurisprudence or with the concept of professional academic freedom itself. A third reading of *Grutter*’s First Amendment carries more profound and attractive implications: it suggests the Court may be willing to abandon its preference for neutral rules over social facts in First Amendment jurisprudence, and to take seriously the role of “First Amendment institutions.”

**Introduction**

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* Associate Professor, Southwestern University School of Law. Much of the work for this Article was completed during a year as Visiting Assistant Professor at the University of San Diego School of Law, which I thank for resources and support. I am grateful to the faculties of the University of San Diego School of Law, the Southwestern University School of Law, and the New England School of Law for the opportunity to present earlier drafts of this Article, and to Larry Alexander, Carl Auerbach, Chris Cameron, George Dargo, David Fontana, Danielle Hart, Kelly Horwitz, Mike Ramsay, Angela Riley, Connie Rosati, Maimon Schwarzchild, Kelly Slater, Steve Smith, Fred Zacharias, and others for useful comments, and Adam Cohen and Andy Hayden for research assistance. Special thanks go to the library staff of the University of San Diego School of Law.
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INTRODUCTION

No shortage of ink has already been spilled on the U.S. Supreme Court’s decisions in the affirmative action cases, Grutter v. Bollinger and Gratz v. Bollinger. And little imagination was needed to predict how much of that commentary would run—as praise for the Court’s cautious, Solomonic balancing of the conflicting concerns of formal equality and racial justice, or as condemnation of an unprincipled, unsound departure from fundamental principles of equal justice under law. In any event, the subject of the symposia, colloquia, special

2 See, e.g., Joel L. Selig, The Michigan Affirmative Action Cases: Justice O’Connor, Bakke Redux, and the Mice That Roared but Did Not Prevail, 76 TEMP. L. REV. 579, 579 (2003); Deborah Jones Merritt et al., Growing Beyond Grutter, JURIST (Sept. 5, 2003), at http://jurist.law.pitt.edu/forum/symposium-aa/merritt.php (“Some praised Grutter and its companion case, Gratz v. Bollinger, as a lawyerlike compromise. Others scorned the opinions as a patchwork that confused admissions officers and the public.”); E-mail from Walter Dellinger, Head of National Appellate Practice, O’Melveny & Myers, and Douglas B. Maggs Professor of Law, Duke University, to Dahlia Lithwick, Senior Editor of SLATE (June 25, 2003, 08:44 PST), at http://slate.com/id/2084657/entry/2084857 (praising Grutter and Gratz precisely for their Solomonic wisdom and arguing that “[w]hen it comes to an issue like this . . . Supreme Court adjudication isn’t the same as excelling at Logical Puzzles 101 . . . [because] the most logical answers aren’t necessarily the right ones”); see also Neal Devins, Explaining
issues, and other countless discussions devoted to these cases\textsuperscript{3} has been clear: \textit{Grutter} and \textit{Gratz} belong to Fourteenth Amendment case law, subgenus affirmative action.

I propose to leave that debate to one side. Notwithstanding the expertise and good intentions of many of those constitutional scholars who have joined one side or another of the affirmative action debate, a good deal of the discussion of \textit{Grutter} and \textit{Gratz} has simply rehearsed positions long since fixed on this issue. Perhaps it is in the nature of the subject. As a matter of policy and morality, affirmative action does not lend itself to a principled resolution that easily can command popular consensus. As a matter of constitutional law, the capacious terms of the Constitution, the meandering course of the Court’s opinions, and the opaque nature of the Court’s discussions invariably lead the legal debate back to the intractable moral and political questions.\textsuperscript{4} Discussion about affirmative action may simply be one more illustration of a basic principle of legal discourse—that the political heat of an issue is inversely proportional to the light that legal debate can shed upon it.

This Article, then, is \textit{not} a brief for or against affirmative action, in higher education or elsewhere. It is not, at least in express terms, a

\begin{itemize}


\textsuperscript{4} For broadly similar conclusions from differing points along the political spectrum, see Richard A. Posner, \textit{The Problematics of Moral and Legal Theory} 139–40 (1999); Cass R. Sunstein, \textit{One Case at a Time: Judicial Minimalism on the Supreme Court} 117–36 (1999).
Fourteenth Amendment article at all. The question raised by this Article is quite different.

To uncover that question, it may help to recall that Grutter addressed the constitutionality of affirmative action not once and for all, but in a limited context. It asked only whether there is a “compelling state interest in student body diversity” in “the context of higher education.”5 The answer to that Fourteenth Amendment question—whether the University of Michigan Law School’s (the “Law School”) race-conscious admissions policy withstood the strict scrutiny required by the Court’s equal protection jurisprudence—depended in turn on certain important assertions about the First Amendment. Briefly restated, the Court reasoned as follows:

- Universities “occupy a special niche in [the] constitutional tradition” of the First Amendment.6
- That special role provides universities a substantial right of “educational autonomy,” within which public higher educational institutions are insulated from legal intrusion.7 Within that autonomous realm, universities are entitled to deference when making academic decisions related to their educational mission.8
- Educational autonomy includes “[t]he freedom of a university to make its own judgments as to . . . the selection of its student body.”9 More specifically, a public university has a compelling interest in selecting its student body in order to ensure a “robust exchange of ideas,”10 which may be achieved by selecting a “diverse student body.”11
- The Court’s scrutiny of the Law School’s admissions program, although ostensibly strict in nature, must take into account this compelling First Amendment-based interest.12
- Ergo, the Law School’s race-conscious admissions policy withstands Fourteenth Amendment strict scrutiny, given the compelling state

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5 Grutter, 539 U.S. at 328.
6 Id. at 329.
7 Id.
8 See id.
9 Id. (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)) (internal quotation marks omitted).
11 Id.
12 See id.
interest of “student body diversity”\(^\text{13}\) and the level of deference accorded the university in tailoring its admission policies.

Much debate over the University of Michigan decisions has passed lightly over these assertions or focused on them primarily for their role in the larger Fourteenth Amendment discussion. But the implications of this decision—that “attaining a diverse student body is at the heart of [a university’s] proper institutional mission,” and that there is a strong First Amendment interest in “educational autonomy”—ought to be of equal interest to First Amendment scholars.\(^\text{14}\)

If history is any guide, however, *Grutter* is unlikely to attract much sustained attention as a First Amendment case. Consider the fate of *Regents of the University of California v. Bakke*.\(^\text{15}\) Although *Bakke* has entered the legal canon and gained public notoriety for its central role in the affirmative action debate, Justice Lewis Powell’s pivotal opinion in that case is also grounded in the First Amendment, as the *Grutter* Court recognized.\(^\text{16}\) As one of the leading students of the relationship between American constitutional law and academic freedom has observed, *Bakke* represented a significant shift in the constitutional law of academic freedom: a shift from a concept of academic freedom as an individual right, to “a concept of constitutional academic freedom as a qualified right of the *institution* to be free from government interference in its core administrative activities, such as deciding who may teach and who may learn.”\(^\text{17}\)

Yet *Bakke* receives virtually no mention in any of the leading First Amendment treatises and casebooks.\(^\text{18}\) Indeed, most of these promi-
ntent texts deal briefly or not at all with the entire subject of academic freedom, on which both Bakke and Grutter are grounded.\textsuperscript{19} Nor have the law reviews done much to fill the gap. Although there is obviously an extraordinary amount of legal scholarship dealing with Bakke as a Fourteenth Amendment case and a significant but somewhat isolated volume of legal scholarship dealing with academic freedom on its own terms, very few scholars have dug deeply into the question of the relationship between Bakke—and now Grutter—and the First Amendment.\textsuperscript{20} And those few treatments generally have not pressed the question whether the First Amendment principles announced in Bakke, and reaffirmed in Grutter, have (or should have) any application beyond the narrow context of race-conscious admissions policies in public higher education. That general reluctance to make a home for Bakke and its newest progeny in First Amendment scholarship, let alone to deal seriously with its implications, is unfortunate.

This Article aims to fill that gap. It proposes to take Grutter seriously as a First Amendment case. It asks the following: What does Grutter’s First Amendment mean? What are the implications of its approach?


\textsuperscript{20} A few treatments of this issue in the wake of Grutter have trickled out during the long gestation of this Article. See generally J. Peter Byrne, The Threat to Constitutional Academic Freedom, 31 J.C. & U.L. 79 (2004); Luis Fuentes-Rohwer & Guy-Uriel E. Charles, In Defense of Deference, 21 Const. Comment. 133 (2004); Richard H. Hiers, Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion?, 30 J.C. & U.L. 531 (2004); Katyal, supra note 19; Edward N. Stoner II & J. Michael Showalter, Judicial Deference to Educational Judgment: Justice O’Connor’s Opinion in Grutter Reapplies Longstanding Principles, as Shown by Rulings Involving College Students in the Eighteen Months Before Grutter, 30 J.C. & U.L. 583 (2004); Leland Ware, Strict Scrutiny, Affirmative Action, and Academic Freedom: The University of Michigan Cases, 78 Tul. L. Rev. 2097 (2004). Although these articles (and particularly the articles by Professors J. Peter Byrne and Neal Katyal) are instructive, all of them focus primarily on the reading of Grutter discussed in infra notes 212–396 and accompanying text, and not on other possible First Amendment readings of Grutter, as this Article does. In addition, Professors Katyal, Leland Ware, and Luis Fuentes-Rohwer and Guy-Uriel E. Charles focus mostly on the implications of the First Amendment reading of Grutter for racially sensitive admissions policies, and not on the broader implications of Grutter as a First Amendment case.

For some pre-Grutter attempts to address these issues, see generally Alfred B. Gordon, When the Classroom Speaks: A Public University’s First Amendment Right to a Race-Conscious Classroom Policy, 6 Wash. & Lee Race & Ethnic Anc. L.J. 57 (2000); Darlene C. Goring, Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body Is a Permissible Exercise of Institutional Autonomy, 47 U. Kan. L. Rev. 591 (1999).
The answers to that question are surprisingly wide-ranging. *Grutter*, if read for all it is worth as a First Amendment opinion, yields a wide harvest of potential implications for a variety of subjects, some closely related to the First Amendment and others ranging farther afield in constitutional law.

This Article offers three possible First Amendment readings of *Grutter* and explores the implications of each of them. The first reading suggests that *Grutter* provides First Amendment support for a strong principle of institutional autonomy for academic institutions. Read in this light, *Grutter* has a variety of interesting, sometimes contradictory implications:

- Notwithstanding the contrary case law, *Grutter* suggests that universities may be entitled to greater latitude in formulating speech codes to address racist, sexist, or other harassing speech on campus. 
- *Grutter* offers new avenues for universities that, on academic grounds, wish to curtail some forms of religious speech on campus.
- As some litigants quickly recognized, *Grutter* may help fuel arguments against the Solomon Amendment, which forbids law schools that receive public funding from barring on-campus recruiting by the military. Thus, a recent decision by the U.S. Court of Appeals for the Third Circuit invalidating the application of the Solomon Amendment against law schools, although not resting solely on *Grutter*, was substantially buttressed by Justice Sandra Day O’Connor’s decision in that case.21 But a serious reading of *Grutter* also suggests that many of the plaintiffs in the Third Circuit case, and a number of plaintiffs in similar cases, lack standing to assert claims against the Solomon Amendment that are grounded expressly on *Grutter*’s reading of academic freedom. And it raises broader questions about whether the Third Circuit’s decision would support a variety of outcomes that its proponents might find less palatable.
- Ironically, *Grutter* supports universities’ opposition to legislation that would purport to enshrine the principles of academic freedom in the law.
- Despite the leading case on the subject, *Grutter* suggests that universities may be able to justify the maintenance of race-based scholarship programs.

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• *Grutter* invites universities (or other higher educational institutions, such as military academies) to revisit the constitutionality of publicly supported single-sex schools. It also may provide a basis for arguments in favor of the maintenance of racially exclusive institutions of higher education, without specific regard to the race involved.

Looking at this list of possible extensions of *Grutter* makes a few things clear. First, each of these prospects should prove attractive to at least some constitutional scholars. Second, it is unlikely that any individual scholar will find all of them attractive. Third, some who support one of the potential outcomes listed above will find others on the list utterly repugnant to their understanding of the First Amendment or other constitutional values. Yet, on this reading, all of these applications of *Grutter*’s First Amendment are compelled equally by the logic of the decision.22

These applications should persuade First Amendment scholars that they need to make a proper home in their work for *Bakke* and *Grutter*. Whatever explains the failure in First Amendment scholarship to examine fully the implications of *Bakke*’s institutional autonomy theory of academic freedom, and now its sequel in *Grutter*, the omission should be remedied.

This is not the only available reading of *Grutter*’s First Amendment, however. A second reading of *Grutter* is grounded on a substantive vision of academic freedom, and not simply on a morally neutral support for institutional autonomy. On this reading, the Court in *Grutter* treated academic freedom as serving larger democratic values, rather than narrower truth-seeking values.24

This substantive reading of *Grutter*’s First Amendment is interesting, and troubling, for several reasons. First, in advancing a substantive, democratically oriented vision of academic freedom, *Grutter* presents interesting conflicts with the Court’s broader rejection of a substantive democratic or republican conception of free speech—or, alternatively, it suggests that the Court paid little attention to the significance of its own First Amendment language in *Grutter*. This reading thus raises interesting questions of consistency between the

22 See infra notes 208–396 and accompanying text.

23 I stress the importance of the word “logic” here. I do not mean to suggest that all of these implications will follow from *Grutter*—only that they could follow from *Grutter*, if its First Amendment discussion is taken seriously. See infra notes 346–359 and accompanying text.

24 See infra notes 397–437 and accompanying text.
approach taken to the First Amendment in that case and the approach taken elsewhere in First Amendment doctrine.\textsuperscript{25} Although an argument could be made that \textit{Grutter}'s view of the First Amendment is consistent with the approach taken elsewhere by some of the majority, one or more of the Justices in the majority clearly adopt a different approach in most of their First Amendment jurisprudence.\textsuperscript{26} Conversely, a number of the Justices who dissented in \textit{Grutter} have been described elsewhere as taking a strong view on the importance of intermediary institutions in the law—\textsuperscript{27}a position that is arguably consistent with the majority in \textit{Grutter} and inconsistent with the dissenters' position in that case.

Third, this substantive reading of \textit{Grutter}'s First Amendment underscores the vexing questions that the law of constitutional academic freedom presents more generally. As this Article suggests, neither the Supreme Court nor the lower courts have ever explained fully the scope and meaning of constitutional academic freedom—or, rather, the courts have alternated between extraordinarily sweeping statements and narrow, qualified statements about the First Amendment bounds of academic freedom. Nor have legal scholars been able to lend the order and coherence to this area that the Court has not.\textsuperscript{28} Thus, if the substantive reading of academic freedom in \textit{Grutter} seems inconsistent or insecure, it is because the Court has offered no clear explanation of what constitutional academic freedom is or ought to be. Moreover, whatever meaning \textit{constitutional} academic freedom may have, it is clear that the \textit{professional} conception of academic freedom on which the Court has drawn is itself constantly changing and contested.

One response to either of these readings of \textit{Grutter} is that the Supreme Court never meant anyone to take \textit{Grutter} (or \textit{Bakke} before it) seriously as a First Amendment case, and will simply ignore the First Amendment implications of \textit{Grutter} in future cases.\textsuperscript{29} Perhaps \textit{Bakke} and

\textsuperscript{25} See infra notes 397–437 and accompanying text.
\textsuperscript{26} See infra notes 438–471 and accompanying text.
\textsuperscript{28} See Byrne, supra note 17, at 320 ("One reason that institutional academic freedom remains little more than a potential constitutional right is that it has not been explained satisfactorily by legal scholars."); see also Frederick Schauer, \textit{Towards an Institutional First Amendment}, 89 Minn. L. Rev. (forthcoming 2005), available at http://ssrn.com/abstract=668521 (date posted Feb. 18, 2005).
\textsuperscript{29} Professor Byrne suggests the same thing about \textit{Bakke}'s First Amendment implications:

\textit{An early reader of Bakke could be pardoned if she doubted that the Court was serious about a First Amendment right of institutional academic freedom.}
Grutter, in their First Amendment dimensions at least, are the proverbial tickets good for one trip only.\(^3\) Thus, the relative lack of attention to Bakke’s First Amendment implications, and what I venture to predict will be a similar silence with respect to Grutter’s meaning as a First Amendment case, may be simply a tacit acknowledgement that the First Amendment aspects of these cases are mere makeweights, best left forgotten lest they complicate matters if imported into other areas.

If that were the only conclusion that could be drawn from the relative neglect of the First Amendment consequences of Bakke and Grutter, it would still deserve public comment. Recent history suggests that constitutional scholars do not care much for restricted-ticket cases.\(^3\) Less trivially, however, it is surely worth pointing out that the Court and constitutional scholars alike have treated Bakke seriously (and will do the same for Grutter) as a case about affirmative action, while paying far less careful attention to the First Amendment implications of those cases. The first two readings of Grutter that I offer here, with all their implications, problems, and potential, suggest that this relative inattention has been a mistake.

But these readings of Grutter are not the only way to understand the First Amendment implications of the case. A third reading of Grutter is also available, one that ultimately forms the most important contribution of this Article. In this reading, Grutter, with its expansive deference to educational institutions, is a rare case in the Supreme Court’s recent First Amendment jurisprudence—because it takes institutions seriously in the First Amendment.\(^3\)

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Was it not merely a chimera of a doctrine, affirmed only for that day, to provide an acceptable ground on which Justice Powell could preserve affirmative action while condemning racial preferences? Byrne, supra note 17, at 315. Professor Byrne further suggests that the principle has had at least some vitality beyond Bakke. See id. at 316.

\(^3\) See, e.g., Mark G. Yudof, The Three Faces of Academic Freedom, 32 Loy. L. Rev. 831, 855–56 (1987) (suggesting that Bakke is a ticket good for one trip only in terms of its First Amendment implications).


\(^3\) For excellent discussion of this issue, see generally Roderick M. Hills, Jr., The Constitutional Rights of Private Governments, 78 N.Y.U. L. Rev. 144 (2003); Frederick Schauer, Principles, Institutions, and the First Amendment, 112 Harv. L. Rev. 84 (1998).
For the most part, the Court’s First Amendment jurisprudence in recent decades has proceeded along very different lines. The Court has refused to confer rights on the press that differ from those enjoyed by other speakers, notwithstanding the separate presence of the Press Clause in the First Amendment.\(^{33}\) It has focused increasingly on content-neutrality as the linchpin of free speech analysis, including much speech by religious individuals and institutions.\(^{34}\) It has refused to single out religious conduct for special accommodation against generally applicable rules.\(^{35}\) All of these developments speak to the same trend. The Court repeatedly has sought to use generally applicable principles, such as neutrality and equality, as its guiding principles in First Amendment jurisprudence.

Although that approach may have much to recommend it, it also serves to blind the Court to the real-world context in which many speech acts take place. In particular, it blinds the Court to the importance of the institutions in which so much First Amendment activity—worship, study, debate, reporting—occurs. The Court’s failure to observe “the increasingly obvious phenomenon of institutional differentiation” may hamper its ability to appreciate fully the extent to which different institutions might require different responses when First Amendment issues arise.\(^{36}\)

*Grutter*’s First Amendment approach thus stands out as a rare, though not unprecedented, exception to the Court’s generally institution-indifferent approach.\(^{37}\) By recognizing the special status of universities in our society and attempting to carve out special rules applying to them alone, the Court has departed sharply from its usual practice.

For that reason, *Grutter*’s First Amendment demands careful attention. I argue that this institution-sensitive approach can be rationalized and ordered according to a number of basic principles that should guide the Court if it continues to move in this direction. Moreover, this approach is not limited to universities alone, but applies equally to a variety of other First Amendment institutions that play a crucial role in the formation of public discourse. At the same time, this reading raises a number of important questions about the potential pitfalls of an in-


\(^{36}\) Schauer, *supra* note 32, at 87.

\(^{37}\) See infra notes 496–504 and accompanying text.
stitution-sensitive approach to the First Amendment in the context of educational institutional autonomy—pitfalls that in some ways are exemplified by *Grutter* itself. Although I believe this institution-sensitive reading of *Grutter* has much to recommend it as a shift in First Amendment doctrine, and strongly argue for that approach here, the concerns it presents deserve attention as well.

Part I of this Article provides some necessary background. It discusses the development of the concept of academic freedom outside the courts, and describes some of the contending justifications for what I call professional academic freedom. The second half of Part I discusses the development of the constitutional law of academic freedom, tracing its development from the early cases to *Bakke* and *Grutter*. Part II fleshes out the possible implications of *Grutter*. It begins by imagining some of the possible implications if, as one reading of *Grutter* suggests, the Court has concluded that universities must be given substantial deference in taking steps in service of any proper academic goal. It then discusses the ramifications of a second possible reading of *Grutter*—one in which the Court did not simply defer to the academic judgment of the Law School, but positively endorsed a substantive, democratically oriented conception of academic freedom. Finally, Part III discusses the First Amendment implications of *Grutter*’s willingness to take universities seriously, and accord them special status, as First Amendment institutions.

I. PROFESSIONAL AND CONSTITUTIONAL ACADEMIC FREEDOM

A. The Roots of Professional Academic Freedom

Any proper discussion of the nature and scope of academic freedom as a constitutional value must begin far beyond the Constitution itself. Although the Supreme Court has largely developed the notion

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38 See infra notes 45–207 and accompanying text.
39 See infra notes 45–101 and accompanying text.
40 See infra notes 102–207 and accompanying text.
41 See infra notes 208–471 and accompanying text.
42 See infra notes 208–396 and accompanying text.
43 See infra notes 397–437 and accompanying text. As a normative matter, it bears emphasis that I am not endorsing either of these readings of *Grutter*, let alone endorsing each of the sometimes conflicting ramifications of these readings. Rather, the task of Part II is to explore these possible readings of *Grutter* and their implications. See infra notes 208–471 and accompanying text. By contrast, Part III does champion *Grutter* as a case about taking First Amendment institutions seriously. See infra notes 472–575 and accompanying text.
44 See infra notes 466–569 and accompanying text.
of academic freedom as a constitutional value over the past fifty years, it was not writing on a blank page.\textsuperscript{45} Academic freedom in the United States is the product of almost 150 years of discussion and development within the academy itself. To understand the growth of constitutional academic freedom, then, we must begin with an understanding of the professional notion of academic freedom.

This Section therefore offers a brief history of the development of academic freedom outside the courts. It is a decidedly truncated version of a complicated story.\textsuperscript{46} Even a brief recitation of this history, however, suggests three significant conclusions. First, academic freedom, even in its professional setting, comprises a set of shifting, contested norms and values. Second, and relatedly, efforts by courts to define any single set of values as fundamental to academic freedom are thus likely to be unavailing. To the extent the Supreme Court has attempted to construct a stable definition of constitutional academic freedom on the foundation provided by the understanding of professional academic freedom, it has built on unsteady ground. It should be unsurprising, then, that even the concept of constitutional academic freedom discussed below has morphed quietly from one form to another, depending on the underlying professional justification selected by the Court.

Finally, this Section should make clear the dangers of a single-minded focus on the judicial conception of academic freedom. By employing the customary judicial language of rights, the courts have neglected the responsibilities that accompany academic freedom. In fact, academic freedom typically is accompanied by a set of professional norms and rules that may constrain academics’ speech more than other individuals’ speech. Although this final point is not of immediate con-

\textsuperscript{45} See infra notes 102–207 and accompanying text.

cern, it may ultimately play an important role in framing an institutionally based vision of the constitutional role of academic freedom.\textsuperscript{47}

The development of the professional conception of academic freedom in the United States begins in the period following the Civil War. Prior to that time, academic freedom would have been a difficult concept to grasp.\textsuperscript{48} Colleges were far smaller institutions, with far more modest goals. Learning consisted of rote instruction within a limited curriculum.\textsuperscript{49} Instructors were expected to hew close to those subjects, and performed little if any research and independent scholarship.\textsuperscript{50} Students themselves were assumed to be “wayward and immature,”\textsuperscript{51} and in need of the close supervision of their instructors, which further curtailed professors’ research time and confined them to the role of guardians and drillmasters.\textsuperscript{52} Finally, the colleges were under the close control of lay governing bodies.\textsuperscript{53} Taken together, these institutional factors left little room for the development of the sort of robust scholarship and public activity that might require the establishment of a set of principles of academic freedom.\textsuperscript{54}

For a variety of reasons, circumstances changed in the post-Civil War period.\textsuperscript{55} One significant factor that contributed to the growth of an American conception of professional academic freedom was the influence of the German universities, which recognized a strong, if limited, set of principles governing academic freedom. That influence was “transplanted onto American soil” by American students and academics who studied in Germany in significant numbers in the mid- to late-nineteenth century.\textsuperscript{56}

For German universities of the era, academic freedom consisted of three central principles. First, \emph{Lehrfreiheit}, roughly translated as “teaching freedom,” distinguished academics, who were civil servants,

\textsuperscript{47} See infra notes 472–575 and accompanying text.
\textsuperscript{48} See Byrne, supra note 17, at 269.
\textsuperscript{49} See, e.g., id.; Finkin, supra note 46, at 822.
\textsuperscript{50} See Hofstadter & Metzger, supra note 46, at 279; Byrne, supra note 17, at 269; Metzger, \textit{Profession and Constitution}, supra note 46, at 1267–68 (noting that American college professors in this era had been “pedagogues pure and simple”).
\textsuperscript{51} Hofstadter & Metzger, supra note 46, at 279.
\textsuperscript{52} See id. at 280–81.
\textsuperscript{53} See Finkin, supra note 46, at 822.
\textsuperscript{54} See, e.g., Hofstadter & Metzger, supra note 46, at 279; Byrne, supra note 17, at 268–69.
\textsuperscript{55} For a more extended discussion, see Hofstadter & Metzger, supra note 46, at 320–412; Byrne, supra note 17, at 269–73.
\textsuperscript{56} Metzger, \textit{Profession and Constitution}, supra note 46, at 1269; see also Hofstadter & Metzger, supra note 46, at 367–412; Finkin, supra note 46, at 822–29.
from other government employees. Under this principle, professors could pursue their teaching and scholarship “without seeking prior ministerial or ecclesiastical approval or fearing state or church re-
proof.”  

Significantly, Lehrfreiheit was a “distinctive prerogative of the academic profession” in Germany and not a subpart of the civil liberties generally enjoyed by German citizens.  

Lernfreiheit, roughly translated as “learning freedom,” amounted to an acknowledgement that German university students were to be treated as “mature and self-reliant beings, not as neophytes, tenants, or wards.” Thus, students were free of the supervisory rules that governed American college students of the same period. German students were free to choose their own courses, largely free of attendance or examination requirements, free to live in lodgings of their own choosing, and free to govern their own lives.

Finally, German universities enjoyed the right of Freiheit der Wissen-
schaft: the right of academic self-governance. Notwithstanding the status of the German university as a state-funded institution, with substantial state control over appointments, universities were entitled to make their own decisions on internal matters under the direction of the sen-
ior faculty. The concept of academic self-governance that undergirds Freiheit der Wissenschaft is recognizable as a forerunner of the emphasis on institutional autonomy that developed in the courts’ discussions of academic freedom and that culminated in Grutter v. Bollinger.

Although the American conception of academic freedom had its roots in the German university system of the nineteenth century, it was not until early in the twentieth century that it had its proper birth, with the establishment of the American Association of University Professors (the “AAUP”) and the drafting of its 1915 Declaration of Principles (the “Declaration”). Some aspects of the Declaration are of particular relevance here. First, as Walter Metzger notes, the drafters of the Declaration “evolved a functional rather than idealistic

57 Metzger, Profession and Constitution, supra note 46, at 1269; see also Hofstadter & Metzger, supra note 46, at 386–87.
58 Hofstadter & Metzger, supra note 46, at 387.
59 Metzger, Profession and Constitution, supra note 46, at 1270.
60 See, e.g., id.
61 See Finkin, supra note 46, at 823; Metzger, Profession and Constitution, supra note 46, at 1270.
62 See, e.g., Metzger, Profession and Constitution, supra note 46, at 1312–19.
63 For this history, see, for example, Hofstadter & Metzger, supra note 46, at 468–506; Byrne, supra note 17, at 276–79; Metzger, Profession and Constitution, supra note 46, at 1267–85.
rationale for freedom of teaching and research.”64 That function revolved around the search for truth.65 The primary purpose of the university was to “promote inquiry and advance the sum of human knowledge.”66 Modern academic scholarship had an “essentially scientific character”67 that could best thrive if researchers were afforded “complete and unlimited freedom to pursue inquiry and publish [their] results.”68

To be sure, the Declaration recognized that teaching was also a significant function of the university, and that academic freedom could be justified on the grounds that professors needed the latitude to speak with “candor and courage” if they were to serve as adequate role models.69 But this value was decidedly secondary. First and foremost, the Declaration advanced the view that “free employment of the scientific method would lead to the discovery of truths that exist autonomously in the world.”70 To the extent the university served a broader democratic function, it was not to serve as a mirror of society, or a breeding ground of future leaders, but as a think tank: universities would serve as a source of experts who could help legislators resolve “the inherent complexities of economic, social, and political life.”71 Here, too, academic freedom was needed, if legislators were to trust in the “disinterestedness” of the academic experts’ research and conclusions.72

Thus, the first important conclusion one can draw from the Declaration is that academic freedom in America, at least as understood in its early stages, was fundamentally a truth-seeking device. No broader social or democratic values were served by it, except to the extent that society benefited from a corps of disinterested experts.

64 Metzger, Profession and Constitution, supra note 46, at 1274.
65 See Byrne, supra note 17, at 279 (indicating that “the American tradition of academic freedom emerged from the professional organization of scholars dedicated to the scientific search for truth”).
67 Byrne, supra note 17, at 277.
68 Am. Ass’n of Univ. Professors, supra note 66, reprinted in Freedom and Tenure, supra note 66, at 398.
69 Id., reprinted in Freedom and Tenure, supra note 66, at 398.
70 Byrne, supra note 17, at 277.
71 Am. Ass’n of Univ. Professors, supra note 66, reprinted in Freedom and Tenure, supra note 66, at 398.
72 Id., reprinted in Freedom and Tenure, supra note 66, at 399; see also Derek Bok, Beyond the Ivory Tower: Social Responsibilities of the Modern University 5 (1982).
Second, it is worth noting that the Declaration concerned itself only with academic freedom for *academics*. *Lehrfreiheit* was the concern here, not *Lernfreiheit*.\(^73\) Thus, although the AAUP often addressed issues of student speech, its founding principles dealt only with research and speech by professors themselves.\(^74\)

Nor did the Declaration deal in express terms with institutional autonomy, or *Freiheit der Wissenschaft*. As Walter Metzger writes, the reason for this shift from the German model of academic freedom “went to the heart of the difference between the German academic freedom and their own.”\(^75\) Whereas German universities were state institutions, which required some model of autonomy to protect them against their masters outside the university gates, American universities were governed by lay bodies. It was those very governing bodies, composed of potentially intrusive non-experts, not the state, that posed the greatest perceived threat to free inquiry.\(^76\) Because the AAUP was unwilling to advocate the elimination of lay governing bodies, it adopted another approach altogether—crafting a set of principles designed to shelter academics from external or internal interference, from restrictions by the state or restrictions by governing bodies.\(^77\) In short, the Declaration “exalt[ed] the neutral university at the expense of the *autonomous* university.”\(^78\)

Finally, although the Declaration took the unusual step of protecting statements by academics outside their areas of expertise, a move prompted by the AAUP’s observation that academics were more likely to encounter reprisal for statements in public on general topics than for statements made in the classroom,\(^79\) it is important to observe that the committee “rejected any view that academic freedom implied an absolute right of free utterance for the individual faculty member.”\(^80\) The Declaration is emphatic that “there are no rights without corresponding duties.”\(^81\) Thus, “only those who carry on their work in the

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\(^73\) *See Am. Ass’n of Univ. Professors, supra* note 66, *reprinted in Freedom and Tenure, supra* note 66, at 393 (suggesting that “[i]t need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher[,] [not the student]”).

\(^74\) *See Metzger, Profession and Constitution, supra* note 46, at 1271–72.

\(^75\) *Id.* at 1276.

\(^76\) *See Byrne, supra* note 17, at 275–76.

\(^77\) *See Metzger, Profession and Constitution, supra* note 46, at 1277–79.

\(^78\) *Id.* at 1280.

\(^79\) *See id.* at 1274–76.

\(^80\) *Byrne, supra* note 17, at 277.

temper of the scientific inquirer may justly assert” any claim to academic freedom.82 Significantly, the Declaration assumed that departures from proper professional norms would be monitored and punished by colleagues within the same discipline, rather than lay governors. Nevertheless, from the outset, it was clear that although academics enjoyed a substantial degree of freedom from interference, that freedom was accompanied by limitations on their ability to speak, at least to the extent that their speech represented a departure from generally accepted standards of competence and professionalism.83

In 1940, the AAUP issued a new declaration, the 1940 Statement of Principles on Academic Freedom and Tenure (the “Statement”).84 Despite some important variations and differences, it remained true to the salient features of the Declaration.85 In particular, it renewed the assertion that academic freedom stemmed primarily from the need to safeguard “the free search for truth and its free exposition.”86 Thus, an academic’s freedom to pursue research was “fundamental to the advancement of truth.”87 Similarly, the Statement echoed the Declaration’s focus on preventing interference with academic freedom by the university itself, rather than outside forces, although it cautioned that professors should be duly aware of their obligations to their institutions and speak accordingly.88 And the Statement again warned that academic freedom “carries with it duties correlative with rights.”89

Thus, we can draw a number of conclusions about the nature of professional academic freedom in America, at least in its early stages. First, it was primarily concerned with academic freedom’s role in safeguarding the search for truth, not with any broader democratic or social functions served by higher education. Second, although it was influenced by a German model of higher education that itself recognized the importance of institutional autonomy, the American version of professional academic freedom was not as concerned with academic

82 Am. Ass’n of Univ. Professors, supra note 66, reprinted in Freedom and Tenure, supra note 66, at 401.
83 See Byrne, supra note 17, at 277–78.
84 See generally Am. Ass’n of Univ. Professors, 1940 Statement of Principles on Academic Freedom and Tenure (1940), reprinted in Freedom and Tenure, supra note 66, at 407.
85 See Metzger, 1940 Statement, supra note 46, at 3.
86 Am. Ass’n of Univ. Professors, supra note 84, reprinted in Freedom and Tenure, supra note 66, at 407.
87 Id., reprinted in Freedom and Tenure, supra note 66, at 407.
88 See id., reprinted in Freedom and Tenure, supra note 66, at 407–08.
89 Id., reprinted in Freedom and Tenure, supra note 66, at 407.
self-governance. Because American academics feared interference from internal forces rather than external forces, their version of academic freedom emphasized the neutrality of the academic institution rather than its insulation from outside influence. Third, it recognized that any academic bill of rights must be accompanied by a set of obligations, subject only to the limitation that these obligations were to be enforced by other academics rather than by lay governors. Academics were to adhere to the accepted standards of their field of study. Academic freedom was not a liberty; it was a conditional license.

For present purposes, let us focus on the first conclusion—that professional academic freedom was justified on truth-seeking grounds. Two aspects of this conclusion are of particular interest here. First, as Professor J. Peter Byrne has noted, this argument for academic freedom has long been a site of contestation. A variety of competing values have been advanced as additional, or even primary, values served by higher education. In particular, a number of scholars have argued for a “democratic value in higher education.”

Broadly speaking, the democratic justification for higher education “view[s] education as instrumental, conferring benefits on the general public, rather than as a good in itself or in its diffuse, long-term consequences.” Higher education thus is not valued, simply or even primarily, for its contribution to the search for truth through research and teaching. It is not simply a repository of experts. Nor does it strive for neutrality among various visions of the good. Rather, democratic education seeks to serve specific, non-neutral goals directly linked to society at large:

[It] is . . . committed to allocating educational authority in such a way as to provide its members with an education adequate to participating in democratic politics, to choosing among (a limited range of) good lives, and to sharing in the several sub-communities, such as families, that impart identity to the lives of its citizens.

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90 See Byrne, supra note 17, at 279.
91 Id. at 281. See generally Amy Gutmann, Democratic Education (1987); Clark Kerr, The Uses of the University (1963).
92 Byrne, supra note 17, at 281.
93 Gutmann, supra note 91, at 42 (stating that “a democratic state of education tries to teach . . . what might best be called democratic virtue: the ability to deliberate, and hence to participate in conscious social reproduction”). See generally Suzanna Sherry, Republican Citizenship in a Democratic Society, 66 Tex. L. Rev. 1229 (1988) (reviewing Gutmann, supra note 91).
Obviously, this is a starkly different vision of the values and functions of higher education, and it may coexist uneasily with the classical vision of the university and of academic freedom described above.\textsuperscript{94} Certainly the differing emphases of these two visions of higher education may result in different views about what are acceptable practices in an institution of higher education. Thus, a purely truth-oriented vision of the university \textit{could} lead to a strict principle of nondiscrimination, whether favorable or invidious, in university admissions.\textsuperscript{95} By contrast, to the extent an emphasis on the democratic values of higher education stresses the importance of universities in preparing and filling the ranks of future leaders, affirmative action in admissions would be “relevant to one of [the] legitimate social functions” of the university.\textsuperscript{96} Thus, democratic educational values may complement or diverge from truth-seeking justifications for higher education; the question will depend on whether the “ideal of the true” and the ideal of the “useful” lead to the same policy prescriptions.\textsuperscript{97}

I have focused on two particular visions of the value of universities, and thus, necessarily, of the purpose and value of academic freedom. Other competing values could have been discussed, although I think these two are the most relevant and illustrative.\textsuperscript{98} Given the existence of these competing approaches, it follows—and this is my second conclusion about the nature of professional academic freedom in America—that a court that draws on one of these values alone in defining and shaping \textit{constitutional} academic freedom is making a value-laden choice with potentially significant consequences. At the same time, a court that attempts to incorporate multiple justifications in defining academic freedom risks inconsistency, if not incoherence. Professional academic freedom is not a stable or uniform concept. It is a constantly shifting and deeply contested idea, grounded on very different views of what universities are meant to achieve and how they should operate. As if that tension were not enough, other writers have

\textsuperscript{94} Of course, it is also quite possible to construct democratic justifications for a broad defense of academic freedom. \textit{See}, \textit{e.g.}, \textit{Gutmann, supra} note 91, at 175–81.

\textsuperscript{95} I emphasize that such a vision \textit{could} do so because it need not lead to such a rule. It would not be hard to craft an argument—indeed, Justice Powell seemed to accept such an argument in \textit{Regents of the University of California v. Bakke}—that a diversity of views and experiences, including those stemming from racial and ethnic background, contributes to the university’s truth-seeking function.

\textsuperscript{96} \textit{Gutmann, supra} note 91, at 210.

\textsuperscript{97} Byrne, \textit{supra} note 17, at 283.

\textsuperscript{98} \textit{See id.} at 279–80 (discussing the so-called “humanistic” justification for higher education).
questioned whether an argument for academic freedom can be made on any stable and defensible grounds.\textsuperscript{99} It is thus unsurprising that, as we shall see, the courts have seesawed among various visions of what constitutional academic freedom means.

I thus conclude this Section with one central observation.\textsuperscript{100} Professional academic freedom, as opposed to constitutional academic freedom, is a contested and shifting concept, subject to significant disagreement about its purposes, its scope, and even whether it can be justified at all. In understanding the courts’ own shifting definition of academic freedom as a constitutional value, including its discussion of academic freedom in \textit{Grutter}, we must appreciate the challenge the courts have faced from the beginning: to arrive at a stable understanding of a value whose own immediate beneficiaries cannot settle on its meaning.\textsuperscript{101} To the extent the courts’ discussion of constitutional academic freedom seems inconsistent or incoherent, that fact has much to do with the unstable foundation on which they have built. Conversely, to the extent the courts can settle on a stable definition of constitutional academic freedom, it is unlikely to be entirely convincing if, as seems inevitable, it diverges from the shifting understanding of professional academic freedom.

\textbf{B. The Roots of Constitutional Academic Freedom}

1. The Pre-Regents of the University of California \textit{v. Bakke} Cases: The Birth Pangs of Constitutional Academic Freedom

With this unstable foundation laid, we may turn from professional academic freedom to constitutional academic freedom—that is, from the understanding of academic freedom that exists outside the courts to the constitutional understanding of academic freedom as a First Amendment value.


\textsuperscript{100} The other lesson of the description of professional academic freedom that I have offered here—that it carries with it duties as well as rights and may, in fact, constrain academic speakers more than ordinary speakers—is addressed again in Part III. See infra notes 472–575 and accompanying text.

As is the case for most First Amendment jurisprudence, academic freedom as a constitutional value is primarily a creature of the twentieth century. Although academic freedom made its first appearance as a potential First Amendment value in a dissent by Justice William Douglas in 1952, its true lineage can be traced to a case decided by the Supreme Court five years later, *Sweezy v. New Hampshire.* Pursuant to a state statute, Paul Sweezy was subpoenaed and questioned by the Attorney General of New Hampshire on a host of subjects, including lectures he had delivered at the University of New Hampshire. He refused to answer and was jailed for contempt.

The Court overturned the conviction on narrow grounds: the state legislature’s delegation of authority to the Attorney General was so vague that it was unclear what questions the legislature would have wanted that officer to pursue. Holding Paul Sweezy in contempt for failure to answer these questions thus violated his due process rights. Before reaching this conclusion, however, the Court detoured for a discussion of the First Amendment implications of the case. Writing for a plurality of the Court, Chief Justice Earl Warren bluntly asserted that the questions posed to Paul Sweezy constituted “an invasion of petitioner’s liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread.”

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of educa-

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102 That is not to say that it does not have earlier, deeper roots. For a discussion of those roots, see Finkin, *supra* note 46, at 830–40.
103 See *Adler v. Bd. of Educ.*, 342 U.S. 485, 509 (1952) (Douglas, J., dissenting) (criticizing the threat of loyalty proceedings under state law as rendering members of subversive organizations ineligible for employment as public school teachers because “[t]he very threat of such a procedure is certain to raise havoc with academic freedom”).
104 See generally 354 U.S. 234 (1957).
105 *Id.* at 236–45 (plurality opinion). For biographical information on Paul Sweezy, see Louis Uchitelle, *Paul Sweezy, 93, Marxist Publisher and Economist, Dies*, N.Y. TIMES, Mar. 2, 2004, at A25.
106 *Sweezy*, 354 U.S. at 244–45 (plurality opinion).
107 *Id.* at 251–55 (plurality opinion).
108 *Id.* at 250 (plurality opinion).
tion is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.\footnote{Id. (plurality opinion)}

Some themes sounded in this passage are worth noting. First, the Court’s novel assertion that academic freedom would join political expression as an area “in which government should be extremely reticent to tread”\footnote{Id. (plurality opinion)} clearly presages the Court’s modern approach, prominent in \textit{Grutter}, of deferring to higher educational institutions—for the Court makes clear that its concern is with the academic freedom of universities, not elementary or secondary schools.

It is equally clear, however, that this statement cannot be over-extended. Nothing in the plurality opinion in \textit{Sweezy} suggests that the Court thinks government ought to defer to university decision making as a general matter.\footnote{Sweezy, 354 U.S. at 235–55 (plurality opinion).} Its clear concern is with the regulation of \textit{speech} made in an academic context.\footnote{See id. at 249–50 (plurality opinion).} There is no hint at this point that government ought to steer clear of other aspects of university life. Nor does the Court indicate that it would be concerned with restrictions on speech initiated by a public university itself, rather than the state. Moreover, although the passage embraces “[t]eachers and students” alike, it leaves unaddressed the questions of whether a university is entitled to restrict or to penalize speech by teachers, whether a university may restrict speech by students, and whether teachers in turn may restrict student speech.\footnote{See id. at 250 (plurality opinion).}

Second, the Court’s conception of academic freedom is grounded first and foremost on the view that academic freedom is necessary to safeguard the search for truth. Academic freedom is necessary to ensure an environment in which “new discoveries,” whether in the hard sciences or in the social sciences, are possible.\footnote{Id. (plurality opinion)} To be sure, the Court looks beyond the college gates to the “vital role in a democracy that is
played by those who guide and train our youth.” But the Court here is not subscribing to the view that academic freedom is important to inculcate democratic values within the university. Rather, academic freedom is prized primarily because its contribution to truth-seeking will yield discoveries or insights that ultimately will benefit society at large. Chief Justice Warren’s opinion in *Sweezy* is thus far closer in spirit to the Declaration than it is to the vision of academic freedom articulated in *Bakke* and in *Grutter*.

Justice Felix Frankfurter, joined by Justice John Harlan, concurred in the result, but based the concurrence directly on First Amendment grounds. Like the plurality, Justice Frankfurter viewed universities as serving a truth-seeking function, not a democratic function. The public benefit of a university, in his view, was not to create better citizens, but to advance human knowledge. He stated, “In a university knowledge is its own end, not merely a means to an end.” If Justice Frankfurter thus sought to protect a university’s “atmosphere” of “speculation, experiment and creation,” it was for truth-seeking purposes, not in order to serve some larger vision of public dialogue or deliberative democracy.

Like the plurality, Justice Frankfurter argued that universities ought to be left undisturbed by the state. As Professor Byrne notes, Justice Frankfurter “would have held that university freedom for teaching and scholarship without interference from government is a positive right,” which may be abrogated only for “exigent and obviously compelling” reasons. But Justice Frankfurter gave more content to this right, setting out its boundaries more clearly than the plurality’s opinion had done. Quoting approvingly from a statement by a group of South African academics, he suggested that “four essential freedoms” govern the life of a properly functioning university: the freedom “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

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115 *Id.* (plurality opinion)

116 *See Sweezy*, 354 U.S. at 261–63 (Frankfurter, J., concurring in the result).

117 *Id.* at 262 (Frankfurter, J., concurring in the result) (quoting *Conference of Representatives of the Univ. of Cape Town & the Univ. of the Witwatersrand, The Open Universities in South Africa* 12 (1957) (presenting a statement of a conference of South African senior scholars)).

118 *Id.* at 263 (Frankfurter, J., concurring in the result).

119 Byrne, *supra* note 17, at 290.

120 *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring in the result).

121 *Id.* at 263 (Frankfurter, J., concurring in the result) (quotations omitted). For a discussion of the historical background of the South African scholars’ statement, see Richard
In those words—the freedom “to determine . . . who may be admitted to study”—lie the jurisprudential roots of Bakke and Grutter and their command of deference to university admissions programs. But if Justice Frankfurter’s Sweezy concurrence has provided fertile ground for future doctrinal developments, it is not because his opinion provides a meaningful definition of constitutional academic freedom or proper guidance on its application. To the contrary, Sweezy’s influence stems from the combination of its sweeping grandiloquent rhetoric and its lack of real guidance for future courts.\textsuperscript{122}

Justice Frankfurter’s concurrence in Sweezy is a curious artifact. The opinion appears to locate the First Amendment freedom it outlines in the protection of the autonomy of the university as a whole. It seeks to protect the university as a separate sphere. To be sure, it does so not strictly for its own sake, nor precisely for the sake of vigorous dialogue within the university, but for the sake of the individual activities—writing, research, teaching—that will thrive in the proper hot-house atmosphere of discussion and debate. But the freedom is nonetheless to apply to the university as a corporate body. Yet the University of New Hampshire had little to do with the facts of the case. Sweezy presents a struggle between the state and an individual academic, not a university. Despite its grand trappings, then, Sweezy offers little clarity about whether the First Amendment right to academic freedom should be thought of as an individual or an institutional right. Nor does it offer any prediction of how the courts will deal with intramural conflicts between an academic and the university itself.

Compounding this uncertainty is a further question: how strongly are we to read Justice Frankfurter’s reference to the “four freedoms” of a university? Two questions in particular follow from this inquiry. First, are they to be read as particular freedoms available under the First Amendment, or as general examples of the kinds of liberty that will be safeguarded if the state is precluded from investigating academic speech only? A proper reading of the opinion, with its reference to the “four freedoms” of a university, and the “fertile ambiguity” produced by “Frankfurter’s loose and essayistic writing”; cf. Paul Horwitz, Law’s Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law, 38 Osgoode Hall L.J. 101, 120–25 (2000) (advocating an “open-textured minimalist” approach to judicial opinion writing in constitutional cases during the early stages of the development of new constitutional doctrine, which pairs a minimalist approach to the holding with “eloquent and debate-encouraging language” in dicta, to spark dialogue while leaving room for future development).
to the presumptive freedom of “thought and action” in the academy from government intrusion, suggests that Justice Frankfurter intended the broader reading to apply. But even if the statement had come in the plurality opinion and not a mere concurrence, it again sweeps far outside the facts of the case before the Court.

The concurrence also provides minimal guidance on another question: what is the scope of these four freedoms? Are they absolute, or subject to internal or external limitations? Here, Sweezy provides some guidance, albeit minimal. The university is free to act within the sphere of the four freedoms to the extent its decisions are based “on academic grounds.” Thus, a determination such as an admission decision that is based on nonacademic grounds is entitled to no special protection under the rubric of constitutional academic freedom. That limitation, of course, begs the question as to what should be considered “academic grounds” for a decision, and on this point the opinion is silent. Nevertheless, that internal limitation underscores the importance to academic freedom doctrine of the Court’s understanding of the function of universities. As the discussion of Bakke and Grutter that follows suggests, much turns on whether the Court believes universities are a site for the search for truth, or whether they serve additional functions.

In one area, at least, Justice Frankfurter is sufficiently clear. Subsequent commentators have objected that a strong principle of constitutional academic freedom would grant constitutional rights to universities or academics not enjoyed by other First Amendment speakers. But the concurrence properly emphasizes that the freedoms accorded to the university do not confer a special status on the university for its own sake, but for the ultimate benefit of the public. Again, this suggests that Sweezy’s vision of academic freedom has little to do with a civic democracy view of education; the purpose of college is not simply to breed more thoughtful, sensitive citizens. Rather, it is to provide the public with the more immediate fruits of research, teaching, and scholarship—the advancement of knowledge. In any event, although the

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123 See Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (emphasis added).
124 Id. (Frankfurter, J., concurring in the result) (emphasis added).
125 See, e.g., Urofsky v. Gilmore, 216 F.3d 401, 411 n.13 (4th Cir. 2000) (en banc) (stating that “we note that the argument [that professors are entitled to academic freedom protections under the First Amendment] raises the specter of a constitutional right enjoyed by only a limited class of citizens”).
126 Sweezy, 354 U.S. at 262 (Frankfurter, J., concurring in the result).
categories of academic freedom listed by Justice Frankfurter—freedom to select a curriculum, to determine who may be admitted to study, and so forth—are specific to educational institutions, the opinion suggests that First Amendment academic freedom simply tracks the same core activities protected when individuals engage in political speech.\(^\text{127}\)

Whatever unanswered questions it may have left in its wake, \textit{Sweezy} was a landmark moment in the development of constitutional academic freedom. It marks the first occasion on which the Court identified academic freedom as a First Amendment right, although the plurality rested on other grounds. \textit{Sweezy} strongly suggests that academic freedom inheres in the institution as a whole. It is thus less an individual right that operates as a trump \textit{against} the state, and more an attempt to define university life as an area into which the state is presumptively forbidden to intrude. Still, any understanding of \textit{Sweezy}'s implications must take account of its context. The case itself did not involve institutional speech. Nor did it involve less speech-oriented matters such as university admissions. Most importantly, \textit{Sweezy} relies on a narrow conception of the purpose of a university, one that emphasizes the search for truth and not any alternative justifications for academic freedom.

This trend continued in the next major Supreme Court discussion of constitutional academic freedom, \textit{Keyishian v. Board of Regents of the University of the State of New York}.\(^\text{128}\) Like the earlier case of \textit{Adler v. Board of Education}, which involved the same law, \textit{Keyishian} was fundamentally a loyalty oath case.\(^\text{129}\) The case involved a challenge to a state law requiring employees of public educational institutions to certify that they were not Communists and to disclose any past affiliations to the Communist Party.\(^\text{130}\)

Unlike \textit{Sweezy}, \textit{Keyishian} was decided on First Amendment grounds.\(^\text{131}\) Like the earlier case, however, the grounds offered had little to do with academic freedom. The Court struck down the law as impermissibly vague. Thus, no special rights of academic freedom, institutional or individual, were required to address the case before it. Again, however, the Court could not resist adding a broader discussion of the institutional context in which the case arose. Justice William Brennan wrote the following:

\(^{127}\) See \textit{id.} at 266 (Frankfurter, J., concurring in the result).

\(^{128}\) See generally 385 U.S. 589 (1967).

\(^{129}\) See \textit{Keyishian}, 385 U.S. at 589; \textit{Adler}, 342 U.S. at 485.

\(^{130}\) \textit{Keyishian}, 385 U.S. at 591–94.

\(^{131}\) \textit{Id.} at 603–04.
Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the “marketplace of ideas.” The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth “out of a multitude of tongues, [rather] than through any kind of authoritative selection.”

In keeping with the narrow factual context in which it arose—state regulation of teachers’ political affiliations—and the narrow legal grounds on which it was decided, although Keyishian sounds many of the same themes as Sweezy, the discussion of academic freedom is equally unnecessary. It situates academic freedom squarely within the First Amendment and treats it as a right against the state, without addressing how or whether the public university itself may govern speech on campus. And it emphasizes that any special rights enjoyed by the university are “of transcendent value to all of us and not merely to the teachers concerned.”

What is significant here is the subtle shift in the Court’s justification for constitutional academic freedom. Although the passage quoted above appears to invoke the same truth-seeking value offered by the plurality and concurring opinions in Sweezy, there are, in fact, two justifications at work here. The Court is concerned not only with the knowledge that is the product of the search for truth, but with the civic value of the process of discussion itself. It is less concerned with the particular truths that may emerge “out of a multitude of tongues” than it is with the capacity of vigorous discussion to produce citizens who are accustomed to the “robust exchange of ideas.”

Keyishian’s reference to the classroom as “peculiarly the ‘marketplace of ideas’” is, on this reading, misleading. The marketplace of

132 Id. at 603 (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).
133 Id.
134 Id. (quoting Associated Press, 52 F. Supp. at 372).
135 Keyishian, 385 U.S. at 603.
136 Id. (quoting Associated Press, 52 F. Supp. at 372). For discussions of Keyishian that focus on the marketplace of ideas concept, see, for example, Rabban, Functional Analysis, supra note 46, at 228, 240; John A. Scanlan, Aliens in the Marketplace of Ideas: The Government,
ideas metaphor is generally understood to relate directly to the search for truth: “the best test for truth is the power of the thought to get itself accepted in the competition of the market.”\textsuperscript{137} \textit{Keyishian}, on the other hand, is less interested in the results of that competition than it is in the social value of training future leaders and other citizens in the habit of vigorous dialogue. If \textit{Keyishian} finds its roots elsewhere in First Amendment doctrine, then, they lie not in Justice Oliver Wendell Holmes’s \textit{Abrams v. United States} dissent but in Justice Louis Brandeis’s concurring opinion in \textit{Whitney v. California},\textsuperscript{138} which was similarly concerned with inculcating a free citizenry that is accustomed to public discussion and debate.\textsuperscript{139}

\textit{Keyishian} thus marks a significant shift in the Court’s understanding of academic freedom. Although the traditional justification for academic freedom both in the academy and in the Court’s jurisprudence had turned on the search for truth, the Court now suggested that academic freedom serves quite another virtue: the training and shaping of the nation’s citizens. That shift is important for at least two reasons. First, to the extent future applications of the constitutional principle of academic freedom may turn on the underlying purposes of academic freedom, it is important to understand what those purposes are. More broadly, though, constitutional academic freedom must be understood not just on its own terms, but in terms of its relationship to First Amendment doctrine. Any democratically based justifications raised in support of academic freedom might have equal application and important implications elsewhere in the First Amendment. Conversely, if democratic justifications for the First Amendment have found little traction elsewhere in the case law, the democratically oriented justification for academic freedom doctrine would stand all the more exposed for its inconsistency with the broader body of law.

\textit{Sweezy} and \textit{Keyishian} provided the richest descriptions of the Court’s understanding of the constitutional dimensions of academic freedom until \textit{Bakke}, albeit they left a variety of unanswered questions and were grounded on at least two distinct theoretical bases. Subse-

\textsuperscript{137} Abrams v. United States, 250 U.S. 616, 630 (1920) (Holmes, J., dissenting).
quent case law did little to give further shape to the doctrine. In one 1972 case, *Healy v. James*, the Court did offer some additional views about the scope of academic freedom. In holding that Central Connecticut State College had improperly denied the campus chapter of Students for a Democratic Society certification as a campus group, the Court necessarily suggested that academic freedom may in proper circumstances be a right held against the public university itself by members of the university community—in this case, students. To be sure, as in *Sweezy* and *Keyishian*, the Court could have reached the same ruling without referring to academic freedom. It could have held simply that the college had failed to act in a viewpoint-neutral fashion with respect to speech within what was basically a public forum. But the Court went further, situating the student group’s claim within “this Nation’s dedication to safeguarding academic freedom.”

*Healy* thus suggests that the “four freedoms” identified in Justice Frankfurter’s *Sweezy* concurrence—including, presumably, the freedom to determine who may be admitted to study—do not delineate spheres of absolute nonintrusion for university officials. They are not only subject to the requirement that the university act on “academic” grounds, but they also may potentially be subject to whatever competing academic freedom rights can be asserted by other members of the university community.

At the same time, *Healy* suggests that those limits work both ways. The Court made clear that student groups on campus would still be required to abide by generally applicable rules of conduct governing the university. Students for a Democratic Society could not “infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.” Again, that conclusion is an unexceptional exercise of time, place, and manner doctrine. Because the *Healy* Court invoked academic

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141 408 U.S. 169, 194 (1972).

142 *Id.* at 180–81.


144 *Healy*, 408 U.S. at 189.
freedom, however, we may read the limitation for something more. It suggests that academic freedom rights are subject to constraints specific to the unique circumstances of the university. After all, *Healy* involved certification of a student group, which allowed it to post notices on campus bulletin boards, to use campus facilities to hold meetings, and to take other such actions.\(^{145}\) The Court’s conclusion that Students for a Democratic Society could have been refused certification altogether if it was unwilling to abide by the university’s rules of conduct suggests that, when conflicts with the rules of civility that govern university speech are concerned, permissible restrictions on speech may be broader on campus than off campus.

2. *Bakke*: “. . . Who May Be Admitted to Study”

All of the cases discussed so far deal with paradigmatic speech acts, and in each case the Court could have reached the same results without any recourse to a novelty like academic freedom. *Bakke*\(^{146}\) is a different story altogether. For the first time, the Court invoked one of the “four freedoms” of *Sweezy* that has little to do directly with speech: the freedom “to determine . . . who may be admitted to study.”\(^{147}\) *Bakke* represents perhaps the Court’s most significant affirmation to that date that academic freedom was not simply an individual right, but contained a significant component of institutional autonomy for colleges and universities.\(^{148}\) If taken seriously as a First Amendment case, *Bakke* develops considerably the doctrine of constitutional academic freedom.\(^{149}\) Whether it ought to be taken seriously as a First Amendment case, as we shall see, is another matter.

The facts of the case are well known and need not long detain us. Allan Bakke brought suit challenging the admissions policies of the University of California at Davis’s medical school, which ensured admission to a specified number of minority applicants.\(^{150}\) A fractured Court held that the school’s admissions policy was illegal, but that the Constitution did not bar the consideration of race as one of a number of “plus” factors in an admissions decision.

In his pivotal opinion, Justice Powell rejected all the grounds advanced by the university in support of its admissions program, save

\(^{145}\) *Id.* at 176.

\(^{146}\) See generally 438 U.S. 265 (1978).

\(^{147}\) *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result).

\(^{148}\) See *Byrne*, *supra* note 17, at 313.

\(^{149}\) See, e.g., Yudof, *supra* note 30, at 854.

\(^{150}\) *Bakke*, 438 U.S. at 269–70 (opinion of Powell, J.).
one—"the attainment of a diverse student body."\footnote{151} That interest was linked directly to academic freedom, "a special concern of the First Amendment."\footnote{152} Under the "fourth" element of constitutional academic freedom enumerated in \textit{Sweezy}, a university must be free "to make its own judgments as to education[,] includ[ing] the selection of its student body."\footnote{153} The Court drew on \textit{Keyishian} to emphasize the importance of the "robust exchange of ideas" on campus.\footnote{154} That robust exchange of ideas "is widely believed to be promoted by a diverse student body."\footnote{155} The university’s judgment that racially diverse admissions would help create an atmosphere of robust discussion thus posed a "countervailing constitutional interest, that of the First Amendment,"\footnote{156} which constituted a compelling state interest.\footnote{157}

If Justice Powell’s opinion in \textit{Bakke} is viewed strictly for its First Amendment value, a number of aspects of the opinion merit discussion. First, the opinion offers further evidence that the Court’s view of academic freedom itself had changed over time, although its view was stated with something less than clarity. As we have seen, the Court to this point variously had described constitutional academic freedom as serving both the search for truth and the more democratic function of training leaders accustomed to engaging in the robust exchange of ideas. The only case suggesting that a university should enjoy autonomy in its admissions decisions, \textit{Sweezy}, clearly was grounded in the search for truth and no other value. Indeed, to the extent the \textit{Sweezy} concurrence tracks the Declaration in hewing to the search-for-truth justification, it was unlikely to offer much support for diversity-oriented admissions policies, let alone race-conscious admissions.\footnote{158}

But although Justice Powell relies on \textit{Sweezy} for the right to make admissions decisions, it is difficult to find any trace of its underlying truth-seeking justification in \textit{Bakke}. Instead, Justice Powell explains aca-

\footnote{151} Id. at 311 (opinion of Powell, J.).\footnote{152} Id. at 312 (opinion of Powell, J.).\footnote{153} Id. (opinion of Powell, J.).\footnote{154} Id. (opinion of Powell, J.) (quoting \textit{Keyishian}, 385 U.S. at 603).\footnote{155} \textit{Bakke}, 438 U.S. at 312 (opinion of Powell, J.).\footnote{156} Id. at 313 (opinion of Powell, J.).\footnote{157} Cf. Robert G. Dixon, Jr., \textit{Bakke: A Constitutional Analysis}, 67 Cal. L. Rev. 69, 75–76 (1979) (observing that Justice Powell’s reliance on diversity in \textit{Bakke} focused on “an interest of the institution . . . rather than an interest held by the represented minority group”) (emphasis omitted).\footnote{158} See Byrne, supra note 17, at 314 (“To the drafters of the AAUP’s 1915 Statement, benefitting a scholar because of his race would have been as repulsive in principle as penalizing him.”); Timothy L. Hall, \textit{Educational Diversity: Viewpoints and Proxies}, 59 Ohio St. L.J. 551, 578–79 (1998).
ademic freedom in terms closer to those used in *Keyishian*: universities must be free to seek a diverse student body because the nation’s future leaders ought to be exposed to a wide range of “ideas and mores.”

*Bakke* is also noteworthy for its indication that academic freedom means universities “must have wide discretion in making the sensitive judgments as to who should be admitted.” As Timothy Hall observes, it was on this ground that the university staked its argument in *Bakke*. But whatever autonomy the universities may have won in *Bakke*, it is far from unbounded. Institutional autonomy is still subject to the constraint of “constitutional limitations protecting individual rights.”

Moreover, by settling on and emphasizing diversity as a compelling state interest, Justice Powell specifies the grounds on which universities may engage in admissions decisions, rather than leaving those institutions free to make admissions decisions on any academic grounds they wish to select. If any opinion in *Bakke* truly represents the institutional autonomy strand of academic freedom, it is not Justice Powell’s, but Justice Harry Blackmun’s. Rather than focus on the particulars of the admissions program at issue, Justice Blackmun simply places his faith in the hands of the universities, arguing that “[t]he administration and management of educational institutions are beyond the competence of judges and . . . within the special competence of educators,” subject to constitutional limits.

In sum, *Bakke* represents a significant change in the Court’s treatment of academic freedom. Notwithstanding Justice Frankfurter’s opinion in *Sweezy*, academic freedom up until this point had been relevant only to disputes involving academic speech, whether by professors or students; the Court had never applied the principle to academic institutional decision making. Justice Powell’s treatment of diversity left unclear whether his approval of diversity as a compelling interest was based on the principle of deference to the autonomy of the university or on a more substantive, less deferential approval of the particular justification offered by the university for diversity in admissions.

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159 See *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).
160 *Id.* at 314 (opinion of Powell, J.).
161 Hall, *supra* note 158, at 581.
162 *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).
164 *Bakke*, 438 U.S. at 404 (Blackmun, J., concurring in the judgment in part and dissenting in part).
But it is at least evident that the Justice Powell opinion in *Bakke* had moved a considerable distance from the truth-seeking justification offered in support of academic freedom by the AAUP and the Supreme Court’s earlier decisions. Nevertheless, given the peculiar place of academic freedom in the case—its status as a “countervailing constitutional interest” rather than as a clearly defined ground for decision—*Bakke*’s import as a First Amendment case was far from clear.165


If, as I observed at the beginning of this Article, *Bakke* never made its way into the First Amendment canon, one reason is surely that few observers took Justice Powell’s reasoning on this point seriously, at least in its implications for academic freedom. Mark Yudof, for example, noted his suspicion that “the Powell approach to academic freedom . . . was for that day and trip only and that this face of academic freedom will quickly fade.”166

The evidence in favor of this view was mixed. On the one hand, the Court in subsequent decisions paid lip service to the principle of educational institutional autonomy set forth in *Bakke*. On at least two occasions, the Court turned back student due process challenges to university decisions dismissing them from academic programs.167 On both occasions, the Court stressed that courts owe great deference to “genuinely academic decision[s]” made by university faculties.168

The Court in these decisions, as Yudof notes, simply refused to interfere with an established decision-making procedure within the university. When those procedures were challenged, however, or when a university sought to carve out additional rights against the state on the basis of institutional autonomy, the Court rebuffed those attempts.169 Thus, in 1984, in *Minnesota State Board for Community Colleges v. Knight*, the Court rejected a challenge by community college instructors to a state statute requiring public employers to bargain on certain issues with the exclusive bargaining representative selected by their professional employees, holding that there was no “constitutional right of

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165 *Id.* at 313 (opinion of Powell, J.).  
166 Yudof, *supra* note 30, at 855–56; *see* Byrne, *supra* note 17, at 315.  
168 Ewing, 474 U.S. at 225; *Horowitz*, 435 U.S. at 90–91, 96 n.6.  
169 *See* Yudof, *supra* note 30, at 856–57.
faculty to participate in policy making in academic institutions.”

Thus, notwithstanding the Court’s repeated call for deference to academic decisions based on “the faculty’s professional judgment,” faculty were not constitutionally entitled to participate in the formulation of academic policy. And in refusing to grant a university any privilege against the disclosure of confidential peer review materials in job discrimination suits, the Court emphasized that its “so-called academic-freedom cases” all involved instances of content-specific speech regulation and nothing more. As Yudof notes, “[t]he post-Bakke decisions [thus] appear[ed] to reinforce the view that institutional academic freedom in the public sector is a make-weight.”

The Court’s decision in Grutter makes clear that Bakke was something more than a ticket good for one day and time only. In holding that the Law School had “a compelling interest in attaining a diverse student body,” based on principles of academic freedom grounded in the First Amendment, the Supreme Court gave a far more detailed explanation of the purpose and scope of educational institutional autonomy than the discussion offered by Justice Powell in Bakke. Justice O’Connor’s discussion of academic freedom in Grutter may be considered more carefully by looking in turn at a number of key elements.

a. Deference to Educational Institutions

The most significant hurdle facing the Law School in Grutter was the Court’s increasingly demanding use of strict scrutiny in reviewing all governmental classifications by race, whether for benign or invidious purposes. Although the Court purported to be applying strict scrutiny here, it is surely right to observe that its actual approach demonstrated “remarkable latitudinarianism.” The key to understanding that ap-

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171 See id. at 288.
173 Yudof, supra note 30, at 857. But see Bruce C. Hafen, Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures, 48 OHIO ST. L.J. 663, 716 (1987) (arguing that the Court’s reliance on institutional academic freedom in Ewing demonstrates that Justice Powell’s discussion of educational institutional autonomy in Bakke was not merely a “theoretical stretch made necessary by the peculiar demands of affirmative action as a national policy”).
174 Grutter, 539 U.S. at 328.
proach lies in the Court’s posture of deference toward academic institutions. The Court places its approach within its purported “tradition of giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.” Thus, Justice O’Connor suggests, strict scrutiny of the Law School’s admissions policies must “take[e] into account complex educational judgments in an area that lies primarily within the expertise of the university,” albeit within constitutional limits.

This deference is extraordinary for a number of reasons. First, it represents a strong reaffirmation that the Court stands by its prior statements singling out universities as institutions uniquely worthy of substantial deference. Certainly the Law School was accorded deference far beyond that granted to any other institution whose affirmative action policies had come before the Court since Bakke.

Moreover, notwithstanding the Court’s rhetoric, it is unlikely that the deference the Court showed toward the Law School can be based simply on the fact that universities make “complex educational judgments.” Every institution makes complex judgments. As Peter Schuck notes, those institutions whose programs had failed strict scrutiny between Bakke and Grutter—local governments, government agencies, and others—are not situated so differently from academic institutions. They all operate with some greater level of expertise and experience with respect to their own affairs than a court would be likely to possess. They presumably structure their policies with the particular circumstances of their institution in mind. And they are subject to a host of “political, ideological, competitive, social, legal, and institutional pressures,” both internal and external. The Court’s hands-off treatment of the Law School’s program must have been based on its regard for the special social role of educational institutions, and not merely on its respect for the expert judgment of educators.

Finally, if one takes the Court’s opinion seriously, it is clear that deference to the Law School’s educational judgment performed real work in Grutter. In the face of the Court’s stringent approach in recent cases to the requirement that racial distinctions be “narrowly tailored to achieve [the] compelling state interest,” it is hard to believe that

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177 Grutter, 539 U.S. at 328.
178 Id.
179 Id. at 328.
180 Schuck, supra note 176.
181 Id.
182 Grutter, 539 U.S. at 378 (Rehnquist, C.J., dissenting).
the Court would have left the Law School so free a hand to shape its admissions policies had it not proceeded from a posture of deference to university decision making. So, if one assumes the Court meant what it said and did not refer simply to the need to defer to educational institutions as a makeweight in support of its Fourteenth Amendment conclusions, deference made a significant difference in Grutter.

The Court’s approach is all the more remarkable because it is not clear that the level of deference displayed in Grutter is justified by the case law. Although the Court cites its decisions in Regents of the University of Michigan v. Ewing and Board of Curators v. Horowitz in addition to Bakke, and both cases speak in strong terms about the importance of respecting the discretion of university faculties, neither opinion comes close to suggesting the kind of deference applied here. Those cases merely held that even if students were entitled to due process protection when public universities made decisions affecting their enrollment, the procedures in place at those schools were sufficient to satisfy those rights. Neither case suggested that the Court would pay universities the level of deference that they were given by the Grutter majority.

Conversely, when universities argued on institutional autonomy grounds for a limited carve-out from the Equal Employment Opportunity Commission’s disclosure requirements for peer review materials, the Court did not hesitate to shut down the argument, asserting the right to determine for itself what constitutes legitimate or illegitimate academic decision making. It is a curious form of deference to deny a university the right to maintain the confidentiality of peer review materials while permitting it to exercise its own best judgment in crafting admissions policies that may skirt the boundaries of the Fourteenth Amendment.

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183 See, e.g., Michelle Adams, *Searching for Strict Scrutiny in Grutter v. Bollinger*, 78 Tul. L. Rev. 1941, 1943 (2004) (noting that Grutter’s strict scrutiny approach is “undeniably relaxed”); Ware, supra note 20, at 2111 (“The academic deference principle, and its influence on the majority’s strict scrutiny analysis, was critical to the outcome in Grutter. The majority’s interpretation of strict scrutiny in university admissions was far more relaxed and flexible than it has been in other cases.”); Schuck, supra note 176 (arguing that “Justice O’Connor’s strict scrutiny has all the strictness of an indulgent mother who gives her affable son the keys to the family car without questioning him about his drinking”).

184 See, e.g., Ewing, 474 U.S. at 225 n.11.

185 See Univ. of Pa., 493 U.S. at 198–99.
b. Academic Freedom and Institutional Autonomy

Justice O’Connor’s opinion in *Grutter* links the Court’s deferential treatment of the Law School to the broader constitutional value of academic freedom. “[U]niversities,” the Court makes clear, “occupy a special niche in our constitutional tradition.” Specifically, the Court affirms Justice Powell’s statement in *Bakke* that universities enjoy a constitutional “dimension” of “educational autonomy,” including the right to make their own decisions regarding whom to admit to study. The Court did not note, as it has in the past, the shifting and uneasy nature of the question whether academic freedom inheres in the individual, the institution, or both.

What is not clear from *Grutter* is whether any exercise of institutional autonomy by a university, or at least one involving “academic decisions,” operates within a sphere of government noninterference. The Court seconded Justice Powell’s invocation of the university’s right to “make its own judgments as to . . . the selection of its student body.” But that point is tied closely to the Court’s discussion of the particular merits of diversity in education, which I discuss immediately below. Would a university’s invocation of academic freedom insulate from attack some other set of admissions criteria not tied to diversity, if those criteria raised constitutional questions? *Grutter* does not answer that question. The implications of this unresolved issue are treated at length later in this Article.

c. Academic Freedom and Student Diversity

The core of *Grutter*’s First Amendment discussion is its treatment of the Law School’s proffered compelling interest: “obtaining the educational benefits that flow from a diverse student body.” On this point, the Court provided an illuminating discussion with profound potential implications for constitutional academic freedom. Drawing

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186 *Grutter*, 539 U.S. at 329.
187 Id.
188 See *Ewing*, 474 U.S. at 226 n.12 (“Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the university itself . . . .”) (citations omitted); see also *Piarowski v. Ill. Cmty. Coll.* 515, 759 F.2d 625, 629 (7th Cir. 1985). For criticism of the Supreme Court’s reliance in *Grutter* on institutional autonomy, see generally *Hiers*, supra note 20.
189 *Grutter*, 539 U.S. at 328.
190 Id. at 329 (internal quotation marks and citations omitted).
191 Id. at 317 (internal quotation marks and citation omitted).
on Justice Powell’s citation of Keyishian in Bakke, the Court accepted that a diverse student body will contribute to the “robust exchange of ideas,” and held that the Law School’s search for a critical mass of minority students would serve that end.\footnote{192}{Id. at 329.}

Significantly, the Court’s holding that the Law School had a compelling interest in the educational benefits of diversity was “informed by [its] view that attaining a diverse student body is at the heart of the Law School’s proper institutional mission.”\footnote{193}{Id.} This statement can be read in a number of ways. Perhaps the Court simply was acknowledging that the Law School’s institutional autonomy gave it the freedom to set its own educational goals, which would qualify as a compelling interest. That reading is supported by the prelude to the Court’s discussion of educational diversity, which sounds precisely those notes. Similarly, perhaps the Court meant to suggest that any set of admissions policies—including but not limited to diversity-oriented policies—that qualified under some unarticulated definition as the result of an “academic decision” would be entitled to the same degree of deference.

In truth, there seems to be something more going on here. Although this section of the Court’s opinion focuses on the First Amendment, and although the scope of this Article is limited to that issue, obviously the Court’s treatment of academic freedom is significantly underwritten by the Fourteenth Amendment context in which the case arose. Thus, a third natural reading of the Court’s opinion in \textit{Grutter} suggests that, far from deferring to the general expertise of academic officials, the Court here was actively endorsing the educational benefits of diversity. If so, of course, that is precisely the kind of “complex educational judgment[ ]” that the Court had just declared itself incompetent to evaluate.\footnote{194}{\textit{Grutter}, 539 U.S. at 328.}

Certainly that reading of the Court’s treatment of the Law School’s diversity argument is supported by the depth and breadth of its discussion of the benefits of racial and ethnic diversity in education. Far from quietly relying on the Law School’s own determination on that issue, the Court provided extensive discussion of the educational benefits of student exposure to classmates of different backgrounds: it “promotes cross-racial understanding, helps to break down
racial stereotypes, and enables [students] to better understand persons of different races.”\(^{195}\)

Significantly, the Court’s tribute to the benefits of student diversity looked beyond the immediate pedagogical benefit of learning in a diverse environment, to focus on the external benefits of student diversity—its value in preparing students as citizens, workers, and leaders.\(^{196}\) The Court stressed the democratic value of diversity in education, its capacity to prepare students “for work and citizenship.”\(^{197}\) Diversity in this view serves a dual purpose: to prepare students for citizenship by exposing them to diverse views, and to ensure that a diversity of views are heard in the polity by taking measures to provide the benefits of higher education to members of diverse racial and ethnic groups.\(^{198}\) And the Court added that in the context of elite legal education, diversity helps members of different races achieve eventual leadership and so ensures that those leaders have “legitimacy in the eyes of the citizenry.”\(^{199}\)

Having canvassed the Court’s prior case law on academic freedom, it should be evident on this account that *Grutter* is not merely a restatement of the Court’s prior views. There is little here that the authors of the *Sweezy* majority or concurrence would recognize as following from their handiwork. In particular, there is no trace in *Grutter* of the truth-seeking rationale for constitutional academic freedom that was the centerpiece of both opinions in *Sweezy*, and that was the core of the AAUP’s Declaration.

Nor does *Grutter* rest on the reasoning in *Keyishian*, or even the reasoning in *Bakke*. True, *Grutter* shares with the earlier cases a shift from a truth-seeking to a democratic rationale for academic freedom. But *Keyishian* and *Bakke* ultimately remained safely within the college gates, because the Court in both opinions argued that a proper democratic education would give students exposure to the vigorous clash of ideas. Thus, Justice Powell, quoting *Keyishian*, focused on the contribution made by a diverse student body to an “atmosphere of speculation, experiment and creation” in the academy.\(^{200}\) *Grutter*

\(^{195}\) *Id.* at 330 (alteration in original) (quotations and citations omitted).

\(^{196}\) *See id.* at 330–33.

\(^{197}\) *Id.* at 331 (emphasis added).

\(^{198}\) *See id.* at 331–33.

\(^{199}\) *Grutter*, 539 U.S. at 332.

\(^{200}\) *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quotation omitted).
shares that concern, but adds something more. Here, the concern is not merely with the quality of education, with its capacity to prepare students for work and citizenship; the Court is concerned that education be representative, irrespective of the immediate educational benefits supplied by a diverse student body.

To be sure, that reasoning follows as much (or more) from the Court’s Fourteenth Amendment premises as its First Amendment premises. But the two cannot be easily disaggregated. presents a detailed vision of the social role of education, particularly elite higher education. Although that vision necessarily sounds in terms of equal protection, it is ultimately still a statement about the “proper institutional mission” of the university, and thus about the basis for constitutional academic freedom.

I do not mean at this juncture to criticize that vision. Indeed, whether or not is a sound application of the specific principles of constitutional academic freedom, it arguably is consistent not only with our constitutional ideals, but also with a longstanding stream of thought about the broader democratic purposes of the university. But ’s vision of academic freedom is still indisputably one that would be unrecognizable to the framers of the Declaration and to the drafters of the early academic freedom cases.

In sum, then, may represent a significant moment in the development of the law of academic freedom. Again, as with , whether it does or not will depend on whether the Court takes its own words seriously or treats the case as a sport for First Amendment purposes. But as a First Amendment case, raises a number of issues worthy of serious attention and reflection. First, it buttresses the view that educational institutions are entitled, on First Amendment grounds, to substantial autonomy in their decision making. Second, it reaffirms that “complex educational judgments” will be given substan-

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201 See , 539 U.S. at 330 (discussing diversity’s contribution to lively classroom discussion).
202 See id. at 330–32.
203 See , Diversity, the University, and the World Outside, 103 Colum. L. Rev. 1610, 1619 (2003) (“Justice O’Connor structures her argument so that preparation for the world beyond graduation has the constitutional protection of being a subset of academic freedom.”).
205 See , supra note 158, at 578–79 (making a similar point with respect to ).
206 See , supra note 30, at 855–56 (discussing the fate of as an academic freedom case).
tial deference by the courts—indeed, enough deference to overcome strict scrutiny under the Equal Protection Clause.\(^{207}\) Third, although it is difficult to discern which elements of the Court’s discussion of educational diversity speak to its First Amendment understanding and which speak to issues of equal protection, *Grutter* also may represent a further move away from a truth-seeking rationale for constitutional academic freedom, and toward one that focuses instead on the internal and external democratic goals served by higher education.

II. Taking *Grutter* Seriously

This Part aims to do something the Court and commentators likely will not do. It proposes to take *Grutter v. Bollinger* seriously as a First Amendment decision. If read for all it is worth, *Grutter* has a number of wide-ranging and significant First Amendment implications.

For these purposes, *Grutter* may be read in one of two ways. First, it could be read for its enthusiastic support for the “constitutional dimension, grounded in the First Amendment, of institutional autonomy.”\(^{208}\) That reading assumes that the particular educational goals put forward by a university are less important to the courts than the fact that the goals are propounded by educators making “complex educational judgments.”\(^{209}\) On this view, provided a university policy is based on genuine academic reasons, it is entitled to act substantially free of government interference. It may act only “within constitutionally prescribed limits,” but as *Grutter* itself suggests, it certainly may push those limits and in fact will be given considerable latitude to do so.\(^{210}\) This institutional autonomy reading of *Grutter* offers support for positions—often conflicting positions—taken by partisans on both sides of a host of First Amendment, constitutional, and educational policy debates.

The second reading of *Grutter* focuses not on institutional autonomy, but on the Court’s democratically oriented justification for academic freedom, and thus for the Law School’s admissions policies in that case. It asks what First Amendment implications follow from a conception of academic freedom centered on the democratic func-

\(^{207}\) *Grutter*, 539 U.S. at 328.


\(^{209}\) See id. at 328; see also *Katyal*, supra note 19, at 557 (“Universities should have a zone of freedom in which to conduct their academic affairs because they are better at making choices about educational matters than are generalist courts.”).

\(^{210}\) 539 U.S. at 328; see also *Katyal*, supra note 19, at 558 (warning that universities should resist the temptation “to use their autonomy wantonly to carry out policies that cross the constitutional line”).
tion of higher education—its role in preparing students to serve as citizens and in serving as an entry point for a more representative set of elite professionals, citizens, and leaders. This approach to Grutter carries a different set of implications for particular First Amendment disputes. More importantly, however, this reading of Grutter suggests that significant fault lines exist between the Court’s approach in this case and its approach in other areas of First Amendment doctrine.

A. Institutional Autonomy and Its Implications

Begin with the assumption that Grutter stands for the proposition that courts will defer to a substantial degree, though within loosely defined constitutional limits, to an institution of higher education’s academic judgments about whether certain programs or measures will serve its educational interests. What measures might a university justify under this standard?

1. Hate Speech on Campus

An obvious candidate for reexamination under Grutter’s strongly deferential approach to university officials is the question of the constitutionality of campus speech codes. The late 1980s and early 1990s saw a flurry of efforts by universities to regulate hostile speech targeted at individuals on campus by virtue of their race, sex, ethnicity, and so forth. The University of Michigan, for example, adopted a policy on discrimination and discriminatory harassment that created grounds for disciplining anyone who engaged in “[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status,” provided the behavior met certain other conditions. Among the specified circumstances in which this sort of speech would be grounds for discipline were cases in which the speech “has the purpose or reasonably foreseeable effect of interfering with an individual’s academic efforts, employment, participation in University spon-

211 See Grutter, 539 U.S. at 331–32.
212 See id. at 328 ("The Law School’s educational judgment that such diversity is essential to its educational mission is one to which we defer. . . . within constitutionally prescribed limits.").
213 The materials discussing this topic are voluminous. For a history of these developments, see generally Timothy C. Sheil, Campus Hate Speech on Trial (1998).
sored extra-curricular activities or personal safety.” 215 Although these measures sparked enormously heated debates, they were largely abandoned or allowed to fade into obscurity after several courts found such codes unconstitutional. 216

Those cases relied largely upon general First Amendment doctrine, rejecting or giving short shrift to any argument that the courts should defer to the judgment of the universities that had promulgated the codes. Thus, in 1989, in Doe v. University of Michigan, the district court struck down the University of Michigan policy described above on vagueness and overbreadth grounds. 217

Academic freedom did no significant work in the case. To the contrary, the court suggested that the general First Amendment principles it cited, such as the importance of content neutrality, “acquire a special significance in the university setting, where the free and unfettered interplay of competing views is essential to the institution’s educational mission.” 218 But academic freedom provided no thumb on the scales here. The decision would surely have been the same regardless of whether or not the court had acknowledged the university setting of the case. Indeed, the judge who decided this case later suggested that the decision largely to omit any discussion of academic freedom was quite deliberate, and he distinguished, oddly, between the constitutional academic freedom issues raised by the case and the First Amendment issues that it raised. 219 A similar code promulgated by the University of Wisconsin met the same fate in a 1991 district court case, without any mention at all of academic freedom. 220

By comparison, in 1995, in Dambrot v. Central Michigan University, the U.S. Court of Appeals for the Sixth Circuit acknowledged that academic freedom concerns might arise in reviewing a university’s discriminatory harassment policy, but held that the speech in question—racially offensive locker room talk by a college basketball coach—

215 Id.
217 See Doe, 721 F. Supp. at 852.
218 Id. at 863.
219 See Avern Cohn, A Federal Trial Judge Looks at Academic Freedom, in Unfettered Expression: Freedom in American Intellectual Life 117, 131 (Peggie J. Hollingsworth ed., 2000) (“[I]n my written decision I used the words academic freedom only twice and then obliquely. My concerns were directed to the First Amendment implication of the code in action.”).
“served to advance no academic message” and therefore did not “[e]nter the [m]arketplace of [i]deas [o]r the [r]ealm of [a]cademic [f]reedom.” Dambrot thus admitted the relevance of academic freedom to its First Amendment inquiry, while narrowing the scope of academic freedom to embrace only classroom speech. Like other courts faced with academic freedom claims, the Sixth Circuit resolved the issue by using First Amendment doctrine that is generally applicable to other public employees.

The speech code cases thus are marked by two distinguishing factors. First, they proceed on the view that standard First Amendment analysis—are the codes content-neutral or content-based, and is the university, or some parts of it, a public forum?—may be applied in the context of university speech as it would be applied elsewhere. Second, and relatedly, they pay lip service to academic freedom but are unwilling to let claims based on academic freedom shift the balance. If hate speech is susceptible to regulation on campus, the university must perforce address the same speech in the same way as any other public body, and it may restrict only speech that otherwise properly would be subject to regulation by any other public institution.

In the heyday of the speech code debate, a number of academics entered the lists in favor of a more permissive approach to the regulation of discriminatory speech on campus. Those advocates argued in part that the law had failed to take adequate account of the harms wreaked by discriminatory speech on its targets—failed, in Professor Mari Matsuda’s words, to consider the victim’s story. But they argued as well that campus speech codes could be justified on pedagogical grounds. Thus, Professor Matsuda argued that students on campus, young and often far from home for the first time, are espe-

221 55 F.3d 1177, 1188, 1190 (6th Cir. 1995).
222 See id. at 1185–86 (discussing application of Connick v. Myers, 461 U.S. 138 (1983), and similar cases); see also Urofsky v. Gilmore, 216 F.3d 401, 415 (4th Cir. 2000) (en banc) (adopting same approach); Rebecca Gose Lynch, Pawns of the State or Priests of Democracy? Analyzing Professors’ Academic Freedom Rights Within the State’s Managerial Realm, 91 CAL. L. REV. 1061, 1074–98 (2003); Chang, supra note 140, at 926–28.
225 See generally Mari J. Matsuda, Public Response to Racist Speech: Considering the Victim’s Story, in Matsuda et al., supra note 224, at 17.
cially vulnerable to racist speech, and that universities therefore carry a special obligation not to tolerate such conduct.226

More centrally to this Article, it has been argued by some proponents of campus speech codes that campus speech codes are appropriate not only because of the vulnerability of students but also because they represent the settled judgment of the university that particular kinds of speech do not contribute to its educational mission. A university may reasonably determine that the kind of speech covered by a discrimination policy or other code affecting campus speech is simply not of the intellectual quality demanded in an environment of scholarly inquiry—just as it would not hesitate to conclude that a professor teaching creationism in a biology class may be subject to discipline or dismissal, or that a student pursuing an argument in favor of Holocaust revisionism may receive a failing grade in a history class. When the university concludes, in light of all the circumstances, that “the proscribed speech hurts, more than it promotes, high-quality intellectual debate in a university community,” it may properly take action to restrict that speech.227

Other scholars have taken a slightly more nuanced position, arguing that given the special educational mission of a university, and its duty to protect and encourage the most vulnerable members of the campus community, administrators must be given more discretion to regulate racist speech than might be available to other regulators, but within carefully circumscribed limits. In Professor Kent Greenawalt’s terms, universities might be allowed to restrict speech if they adopted regulations that are both “narrow” in scope and “noncategorical” in nature, treating all vicious remarks similarly, rather than discriminating among such remarks on the basis of categories such as race.228 At the margins, however, as Professor Greenawalt’s formulation suggests, it is not clear that these careful approaches are altered significantly by

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226 See id. at 44–45. Chi Steve Kwok has argued that some advocates of affirmative action in university admissions and campus speech codes, such as Professor Matsuda, adopt startlingly divergent assumptions about the vulnerability of students depending on which policy they are addressing. See generally Chi Steve Kwok, A Study in Contradiction: A Look at the Conflicting Assumptions Underlying Standard Arguments for Speech Codes and the Diversity Rationale, 4 U. Pa. J. Const. L. 493 (2002).


considerations of academic freedom. Although they begin by recognizing the special role of the university, they often end with recommendations about the proper scope of campus speech codes that simply track existing categories of First Amendment jurisprudence: narrowness as against vagueness and non-categorical approaches as against content- or viewpoint-specific regulation.229

Ultimately, then, the campus speech code debate is fought on different grounds in academic circles and in the courts. The academic debate has turned less on the applicable doctrine than it has on the question of the mission of the university.230 Is it the unfettered search for truth?231 If so, it may be difficult (although not impossible) to justify speech codes. Is it the free and robust exchange of ideas, not simply for purposes of truth-seeking but for the democratic education inherent in “allow[ing] students to interact as citizens do in the wider polity?”232 Then, arguments may be made on both sides: speech codes must be prohibited because they obstruct the free exchange of ideas, or they must be permitted because racist speech itself impedes some students’ ability and willingness to participate in the broader debate.233 This debate has been largely beside the point for the courts that have actually decided speech code cases; what has mattered there is simply whether the codes can withstand the strict scrutiny aimed at speech regulation by standard First Amendment doctrine. The universities’ attempts to bring a deeper sense of context to the courts’ deliberations have been unavailing.

The reading of Grutter I have emphasized above—a reading that places in the foreground the Court’s substantial deference, on First Amendment grounds, to the university’s right to make “complex educational judgments” in shaping policies to serve its educational mission—would significantly shift the balance of power with respect to speech codes at public universities from the courts back to the

229 See Greenawalt, supra note 228, at 76–77. In fairness, Professor Greenawalt is addressing how universities might proceed given the courts’ application of conventional First Amendment analysis in these cases; he is not writing on a blank slate.

230 For an example of various contending visions regarding academic freedom and its consequences for campus speech codes, see Cohn, supra note 219, at 123–34.


233 See, e.g., Charles R. Lawrence, If He Hollers Let Him Go: Regulating Racist Speech on Campus, 1990 Duke L.J. 431, 452.
This approach respects the fact that there is, finally, no one “educational mission.” Different universities may properly emphasize different aspects of the academic mission. One school may emphasize pure research and truth-seeking, or believe that learning ought to occur in an uncheck environment of vigorous and even out-of-bounds debate. Another may focus on teaching over research, and come near adopting an in loco parentis relationship toward its students. Another may believe in the exchange of ideas among a diverse (and ethnically diverse in particular) range of individuals, but believe that this kind of exchange is most likely to flourish if it is subject to a carefully bounded set of civility norms. Surely all of these fall well within what a university may properly view as its educational mission. Indeed, a campus is a large and varied place, and a university or its component faculties may believe that different missions are at the forefront of different sectors of university life.

On all these matters, according to the deference reading of Grutter, the courts must remain agnostic. A university may set its own course, and having done so, the courts must respect its considered determination that some set of rules or policies is vital to the fulfillment of that mission. According to this view, courts err when they apply standard First Amendment analysis, without more, to the case of a campus speech code. Those distinctions that a university may choose to draw between different kinds of speech, or different types of offensive speech, are not mere content distinctions; they are also a product of the university’s “complex educational judgments” and should be respected.

234 Grutter, 539 U.S. at 328.
235 See Greenawalt, supra note 228, at 74.
236 I therefore think that criticisms of the University of Michigan and other, similarly situated schools along the lines of those offered by Brian Fitzpatrick—that it is hypocritical to laud diversity in admissions while discouraging diversity in speech—are only superficially attractive. See Brian T. Fitzpatrick, The Diversity Lie, 27 HARV. J.L. & PUB. POL’Y 385, 392–93 (2003); cf. Robert F. Nagel, Diversity and the Practice of Interest Assessment, 53 DUKE L.J. 1515, 1521 (2004) (noting “the anomaly that the diversity movement . . . should have come into full flower during approximately the same period when many universities have undertaken strenuous efforts to sanitize discourse”). It seems entirely plausible that a school may think the two policies are not inconsistent, but complementary. That certainly does not render either policy wise as a matter of educational policy or constitutional law, but it does render the general criticism unpersuasive without additional support.
237 Grutter, 539 U.S. at 328; cf. W. Bradley Wendel, A Moderate Defense of Hate Speech Regulations on University Campuses, 41 HARV. J. ON LEGIS. 407, 408 (2004) (advancing a defense of campus hate speech regulation in particular circumstances where the university is operating within the sphere of its expertise and according to its mission).
Thus, the gift of Grutter’s deference to educational mission is the same with respect to speech codes as it is with respect to admissions policies: the gift of discretion. A university may conclude quite reasonably that a campus speech code is unwarranted or that it conflicts with its educational mission. But if it believes that its vision of its educational mission would be better served by imposing restrictions on campus speech, it ought to have wide latitude to do so. In each case, the determination rests with the school. If a university enforces a speech code upon careful professional judgment about its own desired ends, “the state is powerless to interfere.”238

The few courts that have examined campus speech codes have thus arguably fallen into error by assuming that academic freedom concerns do not alter the need to perform the traditional First Amendment analysis that would be performed in other speech contexts. Under Grutter’s First Amendment, their task would be quite different. First, they must look for evidence that the university’s restrictions on speech were justified by reference to its educational mission. Second, they must ask whether the restrictions were the product of a genuinely “academic” decision-making process. Finally, given a finding that the university met the first and second conditions, the courts should accord wide latitude to the nature and scope of the measures adopted by the university. In that inquiry, the courts must assume the university’s good faith absent contrary evidence.239

In short, the elaborate architecture of First Amendment jurisprudence—its inquiries about whether a public forum is present and what kind of forum, and its effort to smoke out content and viewpoint distinctions—must take a back seat to a deferential, context-specific inquiry into whether a university’s speech code relates to its educational mission. Under this test, it is quite conceivable that the courts would uphold restrictions on campus speech.

238 J. Peter Byrne, Racial Insults and Free Speech Within the University, 79 Geo. L.J. 399, 425 (1991). Professor Byrne limits his recommendation to cases in which the university “acts to safeguard liberal education, which is understood both as the disinterested pursuit of truth according to disciplinary criteria and the elaboration and instruction in culture.” Id. That analysis assumes that prohibitions of racist speech on campus are justified only when they serve the particular functions of a university, which Professor Byrne is concerned to identify. Because this Section assumes that the Grutter Court privileged deference to academic institutions generally over any particular vision of the university, it need not accept that aspect of Professor Byrne’s argument. It does, however, play a more significant role in the next Section of this Article. See infra notes 397–437 and accompanying text.

239 Grutter, 539 U.S. at 329.
Interestingly, in his concurrence in 2000 in *Board of Regents of the University of Wisconsin System v. Southworth*, Justice David Souter (joined by Justices John Paul Stevens and Stephen Breyer) recognized that a strong institutional autonomy approach to university policies affecting student speech might carry precisely this implication. As he recognized, an institutional autonomy approach like that suggested by Justice Frankfurter in *Sweezy v. New Hampshire* “might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission.” For that very reason, Justice Souter was at pains to emphasize the limited nature of the Court’s prior academic freedom jurisprudence and the fact that *Southworth* interposed student First Amendment rights as against the university’s First Amendment right to institutional autonomy. “[I]t is enough to say,” he concluded, “that protecting a university’s discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees.”

However limited his conclusions about the status of institutional autonomy as a First Amendment right of universities may have been, though, Justice Souter at least acknowledged that this approach indeed may support a university’s right to restrict student speech on campus. That is the approach taken by the majority in *Grutter*—a majority that included Justice Souter.

Ultimately, I take no position on whether such codes are wise. The question here is simply whether they are permissible. Under *Grutter’s* First Amendment, as long as the wisdom of campus speech restrictions is left in the university’s hands, the court need not conduct the same searching inquiry into constitutionality. Thus, *Grutter*’s First Amendment may well support the imposition of speech codes on campus.

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240 529 U.S. 217, 239 n.5 (2000) (Souter, J., concurring in the judgment) (“Indeed, acceptance of the most general statement of academic freedom (as in the South African manifesto quoted by Justice Frankfurter [in his *Sweezy* concurrence]) might be thought even to sanction student speech codes in public universities.”).

241 Id. at 237 (Souter, J., concurring in the judgment).

242 Id. at 239 (Souter, J., concurring in the judgment).

243 See Greenawalt, supra note 228, at 72–73 (noting that the constitutionality and the wisdom of university speech regulations are two different questions).
2. Content Distinctions on Campus, with Special Attention to Religious Speech

Universities have become a prime ground of contention in the Court’s ongoing effort to determine what constitutes permissible or impermissible regulation of religious speech and activity in the public sphere. In recent years, some of the Court’s most important pronouncements on the boundaries of acceptable government support for or regulation of religion under the Establishment Clause have taken place in the context of the university.\(^{244}\) Here, too, *Grutter* may suggest a different approach.

Debates over the inclusion of religious speech in campus life have centered on a simple conflict. On the one hand, it is argued, public institutions must comply with the absolute prohibition of certain kinds of state support for religion indicated by the language of the Establishment Clause and the separationist approach of the Warren-era Supreme Court. On the other hand, the Court and various advocates before it have turned increasingly to a speech-oriented model in evaluating public religious conduct.\(^{245}\)

This conflict was illustrated in the Supreme Court decision of *Widmar v. Vincent* in 1982. There, a student religious group challenged a decision of the University of Missouri at Kansas City prohibiting it from meeting on university grounds “for purposes of religious worship or religious teaching.”\(^{246}\) The university argued the restriction was necessary to comply with the Establishment Clause.\(^{247}\) The Court was unanimous in agreeing that the university was not required to restrict religious speech on campus, but it was fractured on the question of whether the university could restrict the speech.

For the majority, Justice Powell—the author of the pivotal opinion in *Bakke*, it should be noted—assumed the proper course of analysis was through public forum doctrine. Because the university had created a forum for the activities of varied student groups, it was not entitled to discriminate among those groups based on the content of their speech.\(^{248}\) On this point, the Court’s analysis was rather thin; any

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\(^{246}\) *Widmar*, 454 U.S. at 265–66 (quoting Board of Curators, Reg. No. 4.0314.0107 (1972)).

\(^{247}\) See *id.* at 275.

\(^{248}\) See *id.* at 267–70.
consideration of whether the university truly had engaged in content discrimination, or whether the case actually involved some form of viewpoint discrimination, would receive more careful consideration in *Rosenberger v. Rector & Visitors of the University of Virginia*.

The *Widmar* Court did acknowledge that a university is not, in all respects, the same as a traditional public forum, and the Court suggested that its decision did not question a university’s “authority to impose reasonable regulations compatible with [its educational] mission upon the use of campus and facilities.” At the same time, it asserted that persons entitled to be on campus, including students, enjoy the usual array of First Amendment rights.

In rejecting any special right of the university to exclude the religious speech at issue, moreover, Justice Powell turned in part to the Court’s own prior academic freedom jurisprudence. Because the university “is peculiarly the marketplace of ideas,” he suggested, it was under a particular obligation not to discriminate among the speakers in that “marketplace.” Of course, that phrase had found its way into the academic freedom jurisprudence in *Keyishian*. In *Bakke*, Justice Powell had quoted that case (carefully omitting the sentence containing that phrase) for the proposition that a university may select for diversity when choosing its students. The marketplace of ideas metaphor thus supported the university’s discretion in *Bakke*. Here, the same phrase served to narrow that discretion. Thus, despite its mention of academic freedom and its suggestion that universities might enjoy some breathing room in the grant of access to university facilities, *Widmar* again proceeded on a standard First Amendment analysis basis that rendered any constitutional principle of academic freedom irrelevant.

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249 See id. at 284 n.2 (White, J., dissenting).
250 See 515 U.S. at 819.
251 *Widmar*, 454 U.S. at 268 n.5. The *Widmar* Court provided the following explanation:

> Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or “to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.”

*Id.* at 276 (citations omitted) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)).
252 See id. at 268–69.
253 *Id.* at 267 n.5 (quotation and citation omitted).
The Court took a similar approach in *Rosenberger*. There, again, the case turned on the workings of public forum doctrine and the requirements of content and viewpoint neutrality, not on the University of Virginia’s unique status as a university. Thus, in asserting that “[t]he first danger to liberty lies in granting the state the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them,” the Court seemed to assume that any constitutional test that would generally apply to state action applied in precisely the same way to a public educational institution.

Indeed, to the extent that the university’s status as an educational institution weighed in the balance, it was weighed against its discretion to regulate viewpoints on campus. As in *Widmar*, the Court treated the university’s status as a locus of “thought and experiment that is at the center of our intellectual and philosophic tradition” as a constraint on its discretion, rather than a basis for according it autonomous status under the law. As for *Widmar*’s statement that a university might be entitled to greater leeway in “mak[ing] academic judgments as to how best to allocate scarce resources,” the Court effectively cut back sharply on this apparent grant of discretion, labeling it no more than a lame recognition that a university may “determine[ ] the content of the education it provides.”

Three relevant conclusions may be drawn from these cases. First, where conflicts arise between student speech on campus and the university’s own efforts to direct or to limit that speech, the Court is inclined to turn to standard First Amendment tests in resolving those conflicts. Second, as a corollary to the first conclusion, claims of constitutional academic freedom will buy universities little additional discretion. Third, to the extent academic freedom is involved in these cases, the majority of the Court has treated it as an additional obligation to follow rules of content- and viewpoint-neutrality, rather than as a grant of discretion to universities to shape and channel the content of on-campus speech more freely.

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255 See *Rosenberger*, 515 U.S. at 835; see also *Southworth*, 529 U.S. at 229.
256 *Rosenberger*, 515 U.S. at 835.
257 *Widmar*, 454 U.S. at 276.
258 *Rosenberger*, 515 U.S. at 833.
259 See *Southworth*, 529 U.S. at 233 (indicating that the proper protection of students’ First Amendment interests requires the application of a viewpoint neutrality rule where a university allocates funding support to student groups).
Grutter’s First Amendment might approach these cases quite differently. Perhaps because they believe these conflicts are best dealt with under the rubric of the Establishment Clause, or perhaps because of their reasonable belief that the courts ultimately will treat these cases according to established First Amendment jurisprudence, universities have not argued that they are entitled to regulate religious speech on campus in service of their educational mission. No doubt many universities quite properly believe that because their educational mission includes the provision of access to a wide variety of forms of student speech in order to encourage a vibrant pluralism of religious and other views on campus, such an argument would actually contradict their own idea of a university. Accordingly, they may believe that if there is any basis for treating religious speech differently, it must come from the Establishment Clause.

But a Grutter-based argument in favor of restricting religious speech on campus is hardly inconceivable. Even leaving aside strong-form arguments in favor of a strictly secular campus, a plausible weak-form argument could be made in favor of some careful restrictions on campus religious speech. For example, a university might argue that campus speech should be directed toward the creation of spaces in which students can engage in productive dialogue and debate. Many religious organizations and activities may provide opportunities for that kind of dialogue; indeed, even some forms of religious proselytization may provide that kind of productive exchange of ideas. But religious worship is not, at least in some traditions, an opportunity for dialogue. It is, rather, a communal experience that assumes a group of like-minded individuals and may (again, in some traditions only) exclude non-believers. Even if this is too harsh a view, a university may simply make the considered judgment that worship services, however meaningful and valuable, are far from the core educational mission of a modern public university.

I would hesitate a long time before suggesting that such an argument would succeed, even under Grutter’s vision of substantial deference to a university’s academic judgments. But it must at least be clear that a court applying Grutter’s deferential approach would differ considerably in its view of the same case from one applying traditional First Amendment standards. First Amendment scrutiny of speech allocation

260 Cf. id. at 233 (“The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.”).
decisions taking place in a public forum is highly exacting, and begins from the assumption that all speech that is not distinguishable on time, place, and manner grounds is equally valuable and equally entitled to share in the use of the commons. By contrast, a court starting from the position of Grutter’s deference to an educational institution assumes that the most important factor is the university’s own evaluation of the value of particular forms of speech within the college gates.

Under this approach, provided that a university can make a colorable claim that its policy is the result of a considered academic judgment, the court must treat that judgment with something less than the exacting scrutiny usually demanded under the First Amendment. Something of the flavor of this approach is evident in Justice Stevens’s concurrence in Widmar. There, he suggested that “the use of the terms ‘compelling state interest’ and ‘public forum’ to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.”

He thus would have held that a university may limit access to speech within the college gates to a greater extent than could the administrator of other public forums, provided it can supply a valid reason for the limitation.

Because the only reason put forward by the University of Missouri in that case was its “fear of violating the Establishment Clause,” Justice Stevens concurred in the Court’s judgment. But his approach, which refuses to “encumber[ ]” universities “with ambiguous phrases like ‘compelling state interest,’” would plainly give greater scope to universities to move beyond an Establishment Clause rationale and advance other, more academically based reasons for imposing restrictions on certain forms of religious speech, and it would subject those reasons to a far more forgiving level of scrutiny.

Thus, if read seriously, Grutter’s emphasis on the importance of deferring to the academic judgments of universities would compel a different approach to the question of religious speech on campus. Because universities’ restrictions on religious speech are commonly grounded on nonacademic arguments such as a concern about violating the Establishment Clause, it is not clear that the results of such disputes would differ significantly. But this approach would still be significant if only for its assumptions that universities are not obliged to treat all forms of speech the same, and that they are not subject to the

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261 Widmar, 454 U.S. at 277–78 (Stevens, J., concurring).

262 See id. at 280 (Stevens, J., concurring).

263 Id. (Stevens, J., concurring).

264 Id. at 279 (Stevens, J., concurring).
same kinds of scrutiny that may apply to other administrators of what may be characterized as public forums. If a university could advance a plausible academic argument in favor of any restrictions on particular forms of religious speech, Grutter’s First Amendment would place a good deal of weight on that argument.

3. The Solomon Amendment

Under the bylaws of the American Association of Law Schools (the “AALS”), every member school is bound to a policy of equal opportunity in employment, including equal treatment without regard to sexual orientation. Schools are expected to limit the use of their facilities in recruitment or placement assistance to those employers who are willing to abide by these principles of equal opportunity. One potential employer is the U.S. military, which discriminates against gays and lesbians. Because of its policies, the military has been the subject of various protests, limitations, and outright restrictions on its ability to recruit law students on campus.

Congress responded to this state of affairs in 1994 by passing the so-called Solomon Amendment. Under the Solomon Amendment, a university or its “subelement,” such as a law school, may not prohibit or prevent the government from recruiting students on campus, or

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266 See AALS, Bylaws, supra note 265, § 6.19.


restrict the government’s access to student information for recruiting purposes. Failure to comply with this provision carries with it significant funding consequences for both the law school and the university. A law school’s non-compliance may result in the government withdrawing all Defense Department funding from the university as a whole, and a significant portion of non-defense government funding from the law school itself.

Since the passage of the Solomon Amendment, law schools have attempted by a variety of means to reconcile their nondiscrimination policies with its terms. In recent years, however, the government has become increasingly strict in its interpretation of the Solomon Amendment and increasingly active in enforcing it. As a result, many law schools effectively suspended their nondiscrimination policies with respect to military recruitment.

Recently, a number of different groups of plaintiffs brought various lawsuits challenging the government’s enforcement of the Solomon Amendment. The complaints brought by these plaintiffs, who include a variety of law schools, law professors, law students, and student and professional groups, raise a number of statutory and constitutional claims, including First Amendment, due process, and equal pro-

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271 See FAIR I, 291 F. Supp. 2d at 277–78 (discussing the current state of the Solomon Amendment and its implementing regulations). An amendment to the Solomon Amendment reinforces this legal regime by stating clearly that military recruiters must be granted the same access to students that other employers receive and by adding to the list of agencies that may withhold funding for noncompliant schools. See Pub. L. 108-375, § 552(b)(1), 118 Stat. 1811, 1911–12 (2004) (codified at 10 U.S.C. § 983(b)(1)).
tection objections to the enforcement of the Solomon Amendment. Many of these arguments sound in standard First Amendment terms—the Solomon Amendment constitutes a form of viewpoint or content discrimination, is void for vagueness, violates the plaintiffs’ First Amendment association rights, and so forth.\textsuperscript{275} Not surprisingly, all of the plaintiffs have also argued that the Solomon Amendment violates their academic freedom.\textsuperscript{276} For the most part, these arguments are barely fleshed out in the complaints and appear to be mere supplements to the other arguments.\textsuperscript{277}

One set of plaintiffs, however, has advanced an academic freedom argument that clearly perceives the influence that \textit{Grutter’s} First Amendment discussion may have in the Solomon Amendment litigation. The Forum for Academic and Institutional Rights (“FAIR”), a recently formed, largely anonymous “association of law schools and other academic institutions,” has suggested that “\textit{Grutter} supports the idea that universities should be free to define their own concepts of discrimination . . . and that law schools have a powerful interest in placement policies that avoid invidious discrimination.”\textsuperscript{278} Its complaint is replete with language about law schools’ educational missions, the “pedagogical value” of the school’s policy regarding on-campus recruiters, which “pronounce[es] values that students do not necessarily learn from casebooks and lectures,” and the schools’ interest in “nurture[ring] the sort of environment for free and open discourse that is the hallmark of the academy.”\textsuperscript{279}

Unlike the plaintiffs in the other


\textsuperscript{276} See, e.g., Complaint ¶ 33, \textit{Burt} (No. Civ.A.3-03-CV-1777 (JCH)); Complaint ¶ 37–39, \textit{Burbank} (No. Civ.A.03-5497); Complaint ¶ 44, \textit{FAIR I} (No. Civ.A.03-4433 (JCL)).

\textsuperscript{277} The student plaintiffs in \textit{Student Members of SAME v. Rumsfeld}, who are members of student groups at Yale Law School, do not mention academic freedom in express terms in their complaint at all. They do, however, raise the argument at least tangentially in their opposition to the government’s motion to dismiss. \textit{See} Plaintiffs’ Memorandum of Law in Opposition to Defendant’s Motion to Dismiss at 10–11, Student Members of SAME v. Rumsfeld, 321 F. Supp. 2d 388 (D. Conn. 2004) (No. Civ.A.3-03-CV1867 (JCH)) (citing \textit{Grutter}, 539 U.S. at 329, and Shelton v. Tucker, 364 U.S. 479, 485–87 (1960), in support of the proposition that the plaintiffs’ asserted right to receive information under the First Amendment is especially crucial in the university context), available at http://www.law.georgetown.edu/solomon/Documents/reply_to_MTD2.pdf.

\textsuperscript{278} \textsc{Forum for Academic & Institutional Rights, Questions & Answers About the Solomon Amendment Litigation} 5, 11, available at http://www.law.georgetown.edu/solomon/documents/FAQQandA.doc (last visited Apr. 15, 2005); \textit{see id.} at 8 (“Our claim is that law schools are entitled to define their institutional values, at least insofar as those selfdefinitions do not violate rights specifically protected by the constitution.”).

\textsuperscript{279} Complaint ¶¶ 23–25, \textit{FAIR I} (No. Civ.A.03-4433 (JCL)).
Solomon Amendment lawsuits, FAIR and its fellow plaintiffs have said that academic freedom comprises “the principal basis of the[ir] legal challenge.”

The district court ultimately rejected that position, at least at the preliminary injunction stage. In *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld* (FAIR), Judge John Liºand of the District of New Jersey denied plaintiffs’ motion for a preliminary injunction enjoining enforcement of the Solomon Amendment, holding that plaintiffs had standing to bring their claims (a point discussed below), but had failed to show a likelihood of success on their constitutional claims. Judge Liºand acknowledged that *Grutter* required courts to defer to academic decisions made by universities, but suggested that the fact that “such institutions occupy ‘a special niche in our constitutional tradition’ implies that they remain part of, and not sovereign to, that constitutional tradition.” Here, the court made clear, any academic freedom interests asserted by the plaintiffs failed in the balance against the asserted interests of the government itself.

More interesting was another aspect of the court’s decision: its conclusion that “[t]he concept of academic freedom seems to be inseparable from the related speech and associational rights that attach to any expressive association or entity.” In other words, “the right to academic freedom is not cognizable without a foundational free speech or associational right.” The court effectively concluded that because academic freedom is merely a “First Amendment interest,” and because the Solomon Amendment did not interfere directly with any speech act on the part of individual speakers, such as professors, any academic freedom claim in the case would have to arise from and be

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280 *Forum for Academic & Institutional Rights, supra* note 278, at 1. That is not to say that the other plaintiffs have ignored academic freedom generally or *Grutter* specifically. Their arguments, too, are replete with references to both the general principle of academic freedom and *Grutter*. But the FAIR case represents perhaps the most fully fleshed-out version of the argument from *Grutter* and academic freedom. Curiously, the plaintiffs in *Burt v. Rumsfeld*, a challenge brought to the application of the Solomon Amendment by a group of professors at Yale Law School, appear to have argued that their right to autonomy as academics also qualifies as a Fifth Amendment substantive due process right. See 354 F. Supp. 2d 156, 187–89 (D. Conn. 2005) (rejecting this argument).


282 *Id.*

283 *Id.* at 303.

284 *Id.* at 302.
parasitic on some independent First Amendment violation. Because the court found no such violations here, any academic freedom claim necessarily would fail.

Recently, a divided panel of the U.S. Court of Appeals for the Third Circuit reversed the district court’s decision. The panel held that the Solomon Amendment violated the plaintiffs’ First Amendment rights in two ways, both of which therefore violated the doctrine of unconstitutional conditions.

First, drawing on a fairly aggressive reading of the Supreme Court’s decision in Boy Scouts of America v. Dale, the court held that the plaintiff law schools are expressive associations, with “clear educational philosophies, missions and goals.” One such mission is the establishment and advocacy of policies of nondiscrimination, which are to be inculcated in students “by expression and example.” Because the imposition of the Solomon Amendment undermined this mission, and because the government had failed to show it was sufficiently narrowly tailored to achieve its own compelling interest in recruiting military lawyers, the Solomon Amendment violated the First Amendment. Second, the court held that the Solomon Amendment was a form of compelled speech. By requiring law schools to assist military recruiters in their recruitment efforts, the Solomon Amendment required law schools to “propagate, accommodate, and subsidize” the military’s recruitment program, and thus to advance a message of discrimination that ran counter to the schools’ own policies and beliefs. Because, again, the military had failed to show that it could not recruit effectively by other, less restrictive means, the provision could not survive strict scrutiny.

There is no doubt that the Solomon Amendment, both on its terms and in the manner in which the government has enforced it in the past three or four years, is Draconian in its effects. There are also

285 See id. at 302–03 (“If the Solomon Amendment violates Plaintiffs’ right to academic freedom, it is because it also intrudes on their rights to free speech and expressive association.”).
286 See FAIR I, 291 F. Supp. 2d at 314.
287 See FAIR II, 390 F.3d at 229–46.
289 FAIR II, 390 F.3d at 231 (quoting Circle Sch. v. Pappert, 381 F.3d 172, 182 (3d Cir. 2004)).
290 Id. at 232.
291 See id. at 233–35.
292 Id. at 242; see id. at 237–38.
293 See id. at 242.
substantial reasons to criticize the underlying policy of discrimination in the armed forces for which the Solomon Amendment serves as a supporting instrument. It is therefore not surprising that many legal scholars have welcomed the Third Circuit ruling as a strong victory in the law schools’ institutional struggle against discrimination. The federal government sought Supreme Court review of the Third Circuit’s opinion and, given the importance of the issues at stake, the High Court will hear the case next Term. Moreover, at least one district court has followed the Third Circuit in enjoining the application of the Solomon Amendment, in this case with respect to recruitment activities at Yale Law School. Thus, a brief examination of the FAIR litigation may be useful and timely. For present purposes, however, my discussion of the litigation is somewhat limited in scope. I do not want to deal substantially with the arguments that ultimately formed the basis of the Third Circuit’s opinion, although I comment on one aspect of that reasoning. Rather, I want to suggest that the Solomon Amendment litigation raises several interesting points about the institutional autonomy reading of Grutter that I have developed here.

First, although the point is somewhat submerged in the Third Circuit’s reasoning, it is strongly arguable that the course of the FAIR litigation was influenced significantly by Grutter’s principle of substantial deference to decision making by higher educational institutions. Compare the different treatment accorded to the law schools’ arguments by the district court and the Third Circuit. Although the district court accurately quoted Grutter as speaking in terms of “a degree of deference,” in reality it gave short shrift to the real degree of deference accorded there. By contrast, although the Third Circuit barely referred to Grutter, it did acknowledge that law schools “are entitled to at least as much deference” in setting out the nature and purpose of their existence as expressive associations “as the Boy Scouts,” given Grutter’s recognition that “universities and law schools


297 See FAIR I, 291 F. Supp. 2d at 302 (quoting Grutter, 539 U.S. at 328).
occupy a special niche in our constitutional tradition.’”

Although it was speaking in terms of what it labeled “Dale deference”—that is, the Supreme Court’s instruction in Dale that the courts must defer substantially to an association’s own view of what would impair its ability to operate—its decision to defer to the plaintiffs’ own statements about their expressive purposes drew both on Dale and on “[t]he Supreme Court’s academic freedom jurisprudence.”

Moreover, this was deference with teeth. As Judge Ruggero Aldisert noted in his dissenting opinion in the Third Circuit, courts usually defer substantially to the government in constitutional claims involving the military. “Judicial deference . . . is at its apogee when reviewing congressional decision making . . . in the realm of military affairs.” Yet the majority of the panel made short shrift of the government’s arguments in the strict scrutiny section of its analysis. It held that the government “has ample resources to recruit through alternative means,” such as placing recruitment ads on television, without any apparent deference to the presumed judgment of Congress and the military that no other means of recruitment were as effective. Thus, this was not simply Dale deference; the court did not simply defer to the law schools’ assessment of their goals as an expres-

298 FAIR II, 390 F.3d at 233 n.13 (quoting Grutter, 539 U.S. at 329).
299 Dale, 530 U.S. at 653; FAIR II, 390 F.3d at 233–34 & n.13. Notably, the Burt court stated the following in a footnote:

While not a factor in its decision, the court notes that the deference the Dale Court accorded expressive associations would appear to be particularly appropriate in the university setting, in light of the Supreme Court’s ‘tradition of giving a degree of deference. . .’ to universities because they ‘occupy a special niche in our constitutional tradition.’
354 F. Supp. 2d at 186 n.29 (alteration in original) (quoting Grutter, 539 U.S. at 328–29) (citations omitted).
300 FAIR II, 390 F.3d at 254 (Aldisert, J., dissenting); see also Goldman v. Weinberger, 475 U.S. 503, 509–10 (1986) (rejecting Free Exercise claim brought by plaintiff whose religious headgear fell outside military dress regulations, at a time when incidental burdens on religious exercise still were subject to strict scrutiny); Rostker v. Goldberg, 453 U.S. 57, 64–65 (1981) (noting the great deference given to Congress in military matters).
302 Compare FAIR II, 390 F.3d at 235, with Goldman, 475 U.S. at 509 (rejecting the argument that military dress regulation had not been supported by record evidence because “the desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment”), and United States v. Albertini, 472 U.S. 675, 689 (1985) (indicating that the validity of military regulations “does not turn on a judge’s agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests”).
sive association, while applying the usual level of scrutiny in cases involving clashes with military policy when it came time to balance the law schools’ goals against the competing government interest. Instead, its deference to the law schools spilled over into the interest-balancing portion of its constitutional analysis, weighing heavily in the law schools’ favor despite a substantial tradition of deference to military policy. As I have argued, that spillover effect is also highly evident in the *Grutter* Court’s constitutional analysis, and helps explain its departure from conventional strict scrutiny.

It is not hard to conclude, then, that although the Third Circuit’s decision was not grounded expressly on *Grutter*, its approach nevertheless was underwritten substantially by the Supreme Court’s decision in that case. Without the thumb on the scales of the law schools that *Grutter* provides, it is difficult to see the Third Circuit’s opinion in *FAIR* as perfectly consistent with the Supreme Court’s prior decisions in military cases.

Still, if we are to take *Grutter*’s educational autonomy reading seriously, this may be the right outcome. Given the Supreme Court’s treatment of the Law School’s program in that case, *Grutter* can only be read fairly as requiring the courts to accord substantial deference to university decisions. As Peter Schuck has quite properly noted, the Court’s “latitudinarian” treatment of the Law School’s admissions policy is truly striking, particularly when contrasted with the Court’s normal brand of Fourteenth Amendment strict scrutiny. That treatment is best read as suggesting that university decisions are insulated substantially under the First Amendment from the normal processes of judicial review.

Nor is it a sufficient rejoinder to suggest, as the district court did, that universities “remain part of, and not sovereign to,” the Constitution and its limitations. If *Grutter*’s gentle treatment of the Law School’s program means anything, it surely means that “constitutionally prescribed limits” are themselves fluid and context-dependent. They are, in Professor Robert C. Post’s terms, the product of a continuous negotiation between internal constitutional law and external cultural norms. Thus, as I have argued, *Grutter* suggests that within the bounds of institutional autonomy provided by the First Amend-

304 *FAIR I*, 291 F. Supp. 2d at 302.
305 *Grutter*, 539 U.S. at 328.
ment, universities enjoy substantial freedom to experiment with policies that serve their educational missions. Within those boundaries, they are free at least to flirt with, and even to bend, traditional constitutional limits.\textsuperscript{307} Indeed, the product of those experiments itself will go a long way toward defining the boundaries of appropriate constitutional conduct.

In short, it was not enough for the district court in \textit{FAIR} simply to state that universities are “not impervious to competing societal interests.”\textsuperscript{308} The point of \textit{Grutter}'s First Amendment is that universities have substantial freedom to negotiate between those interests, and the balance they strike should generally be respected as the product of “complex educational judgments in an area that lies primarily within the expertise of the university.”\textsuperscript{309} Thus, the Third Circuit’s decision in \textit{FAIR} may be more persuasive if it is read not simply as a case about expressive association or compelled speech, but as a case about \textit{Grutter} deference to educational autonomy.

I do not mean to suggest conclusively that the court was therefore wrong in denying \textit{FAIR}'s motion for a preliminary injunction, or that the Third Circuit was right in directing that an injunction issue against the government. Nor do I intend to advance a strong argument as to whether \textit{FAIR} ought to prevail at trial. Although I am admittedly sympathetic to the plaintiffs’ aims, it is possible that, even with the thumb on the scales of the plaintiffs provided by \textit{Grutter}'s command of educational autonomy, the government’s claims might still prevail, at least as against an argument for \textit{Grutter} deference. A court applying academic freedom doctrine might properly conclude that \textit{FAIR}'s lawsuit looked less like the internal admissions policy at issue in \textit{Grutter}, and more like the unsuccessful privilege claim in \textit{University of Pennsylvania v. EEOC}—a positive claim for something more than “the protect[ion] [of] the normal decision-making processes of educational institutions.”\textsuperscript{310} Certainly the unique context of the case, in which \textit{FAIR} challenged the law schools’ obligation to abide by the terms of their public funding, offers a complicating factor that was not present in \textit{Grutter}. Even on this point, however, the Supreme Court has suggested in dicta that universities may occupy a more privileged position than other actors when they accept government fund-

\textsuperscript{307} For expansion on this point, see \textit{infra} notes 472–575 and accompanying text.
\textsuperscript{308} \textit{FAIR I}, 291 F. Supp. 2d at 302.
\textsuperscript{309} \textit{Grutter}, 539 U.S. at 328.
\textsuperscript{310} Yudof, \textit{supra} note 30, at 856.
ing that carries conditions that affect academic freedom. It is also unclear whether the Supreme Court should treat on-campus recruiting rules as a matter of “academic” policy. If they are not, those rules would not be entitled to constitutional deference under Grutter.

Nevertheless, the reading of Grutter advanced in this Section does provide significant support for the argument that university and/or law school plaintiffs in litigation against the Solomon Amendment ought to be granted substantial deference to structure their academic policies—including their decisions about on-campus access to employment recruiters—in order to suit their educational missions. Whether that institutional autonomy ought to overcome the substantial interests of the government in maintaining access to potential recruits is another question. Surely, however, if institutional autonomy is enough to support university admissions policies that might otherwise fail the Court’s application of strict scrutiny, as in Grutter, it ought to weigh heavily in the balance against the government’s asserted interests in the Solomon Amendment litigation.

Another interesting question raised by the decision in FAIR is whether the Third Circuit based its decision on the expressive association and compelled speech arguments rather than the educational autonomy argument because it felt it had to do so. The district court,

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311 Thus, in Rust v. Sullivan, the Court did suggest that government funding could not overcome all First Amendment claims on the part of the recipient of funds. 500 U.S. 173, 200 (1991). In particular, it noted the following:

[The university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.]

Id. That dicta, however, only suggests that specific vagueness and overbreadth arguments, which were made and rejected by the district court in FAIR I, might prevail in a government funding context. It does not suggest that a free-standing claim of academic freedom necessarily would prevail in any contest with the government over the terms of public funding for universities. For a valuable discussion of the dicta in Rust, see Randall P. Bezanson & William G. Buss, The Many Faces of Government Speech, 86 Iowa L. Rev. 1377, 1457–62 (2001).

312 See Grutter, 539 U.S. at 328 (noting the Court’s tradition of “deference to a university’s academic decisions”) (emphasis added). As a legal matter, I would find unpersuasive such an effort to place decisions about recruiting outside the province of academic policy. I think the FAIR plaintiffs, and the Third Circuit, overstate the connection between a law school’s general academic mission and the fairly discrete activity of on-campus recruiting. Indeed, having taught through two recruitment seasons at two different law schools, I can barely recall having run across, let alone talked to, any on-campus recruiters. But, under the reading of Grutter that I have offered here, surely a law school’s assertion that recruiting is a part of its academic mission ought to be entitled to substantial deference.
after all, concluded that academic freedom claims must be grounded on “foundational free speech or associational right[s]” to be sustain-
able.\footnote{FAIR I, 291 F. Supp. 2d at 303.} Perhaps the Third Circuit, too, concluded that academic freedom claims of the kind pressed by the plaintiffs in FAIR are parasitic—that one cannot bring a free-standing claim of academic freedom under the First Amendment, although academic freedom itself may lend weight to arguments based on other First Amendment claims.

If so, I argue that the Third Circuit was wrong on this point, and that the district court, which ruled expressly on this point, also erred. Unless the university’s right to select those who shall be admitted to study, which has been recognized since Justice Frankfurter’s concurrence in Sweezy, is conceived of as a species of associational right, Bakke and Grutter themselves involved no foundational speech or association claims. Nor does it fully capture what was going on in those cases to conceive of admissions decisions as a form of associational right. Although the academic freedom arguments in those cases arose as defenses rather than as claims for relief, Grutter’s vehement discussion of the vital First Amendment role of universities does not suggest that academic freedom is a shield only and not a sword. Rather, Grutter’s First Amendment recognizes that universities play a special role in the First Amendment firmament, and must be granted discretion to design and to implement a broad range of educational policies, whether conceived as direct speech acts or as decisions that shape the structure and composition of universities as a whole.

Thus, Grutter’s command of deference to educational institutions is more than a mere atmospheric addition to the quiver of arguments in the FAIR litigation. It has some substantive weight of its own, although how much weight it has is still an open question. As the FAIR litigation advances to the Supreme Court, amici such as the AALS, if not the plaintiffs themselves, ought to make some effort to develop further the question of whether academic freedom can itself serve as a free-standing First Amendment claim.\footnote{Cf. Byrne, supra note 20, at 141 (arguing that academic institutions must do a better job of filing amicus briefs that address the issue of institutional academic freedom).}

I have as yet barely touched on a third issue raised in the FAIR litigation and in the other pending assaults on the Solomon Amendment. The district court in FAIR suggested that all of the plaintiffs in this case—FAIR, “an association of law schools and law faculties”;\footnote{FAIR I, 291 F. Supp. 2d at 275.} the Society of American Law Teachers; two law professors; three law stu-
dents; and two law student groups—had standing to pursue their claims against the government.\footnote{See id. at 285–96.} The court based its conclusion on the view that the individual plaintiffs and associations enjoyed First Amendment rights as “beneficiaries, senders, and recipients of the message of non-discrimination sent by their schools’ non-discrimination policies.” \footnote{Id. at 294.} The Third Circuit easily upheld the standing of FAIR itself, without addressing the standing of the other plaintiffs.\footnote{See FAIR II, 390 F.3d at 228 n.7.}

That conclusion suggests, consistent with the Court’s pre-\textit{Grutter} academic freedom jurisprudence, that members of the university community enjoy a substantial degree of First Amendment freedom on campus, notwithstanding the institutional setting.\footnote{See, e.g., Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 506 (1969) (stating that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).} \textit{Grutter} itself, however, sounds in institutional terms. The freedom described there is not an individual right of professors to enjoy the communicative benefits of a diverse student body, but the discretion of an educational \textit{institution} to set educational policies and to make academic decisions—to fulfill a “proper institutional mission.” \footnote{\textit{Grutter}, 539 U.S. at 329 (emphasis added).}

Thus, one fair reading of \textit{Grutter} suggests that academic freedom is a fundamental \textit{institutional} right, not one enjoyed by a university’s faculty or students. At the very least, it suggests that educational autonomy itself is an institutional right, not an individual right, and therefore may be invoked only by the institution itself.\footnote{Id.; cf. \textit{Urofsky}, 216 F.3d at 412 (“Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.”). The conclusion in \textit{Urofsky} might be more apt in cases like \textit{Grutter} and the Solomon Amendment litigation, which involve educational policies set by the institution as a whole, than in \textit{Urofsky} itself, which involved state-imposed limitations on information-gathering activities by professors themselves. \textit{Urofsky}, 216 F.3d at 404. For commentary on the standing issues raised by \textit{Urofsky}, see Kate Williams, Note, \textit{Loss of Academic Freedom on the Internet: The Fourth Circuit’s Decision in Urofsky v. Gilmore}, 21 REV. LITIG. 493, 507 (2002). See generally Alvin J. Schilling & R. Craig Wood, \textit{The Internet and Academic Freedom: The Implications of Urofsky v. Gilmore: Standing as a Constitutional Concern: A Required Threshold Issue}, 179 \textit{WEST’S EDUC. L. REP.} 9 (2003).} That conclusion is fortified in a case like the Solomon Amendment litigation. For whatever the position of the law schools themselves with respect to the
Solomon Amendment, it is far from clear that the individuals and groups within those institutions agree on the propriety or impropriety of on-campus military recruitment. If we permit individual students or faculty to assert institutional autonomy claims in place of the institution itself, we might face a situation in which some students and professors attempt to alter the educational policy of their institutions without apparent regard to the official policies of the institution itself, let alone the views of any professors or students who want the military to recruit on campus.  

Because the plaintiffs in FAIR apparently included at least one law school, and the faculty of another, the academic freedom claims in FAIR could still proceed even if they could only be invoked by educational institutions. But this reading of Grutter does raise questions about the status of many of the other plaintiffs in the Solomon Amendment litigation—both the FAIR litigation itself and the other cases still pending before other district courts. Those plaintiffs include a variety of parties other than the law schools themselves, let alone the parent universities of which the law schools are only sub-units. The membership of FAIR itself includes not only law schools acting collectively as corporate bodies, but also law school faculty members, acting as a body but not necessarily with the imprimatur of the institution to which they belong. And, of course, there are still other plaintiffs in the other Solomon Amendment cases: the Society

322 For example, a number of law student groups comprised of service members, reservists, veterans, and non-veterans filed an amicus brief in the Third Circuit in the FAIR litigation, arguing that the exclusion of the military from on-campus recruiting would "undercut their ability to participate meaningfully in the classrooms and halls of American law schools." Brief of Amici Curiae UCLaw Veterans Society et al. in Support of Appellees at 26, Forum for Academic & Institutional Rights, Inc. v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (FAIR II) (No. 03-4433), available at http://www.law.georgetown.edu/solomon/Documents/AmicusUCLAWVets24Feb04.pdf.

323 See FAIR I, 291 F. Supp. 2d at 289 (noting that the second amended complaint identified the Golden Gate University School of Law and the faculty of Whittier Law School as members of FAIR, and that two more law schools had informed the court by letter that they were also members of the association). The decision says nothing about the nature of those law schools' commitment—whether they represented the decision of the faculty as a whole or of the law school itself, whether that decision was authorized in turn by the governing body of the university, and so forth. Since the district court issued its opinion, FAIR has announced that "30 law schools and law faculties" have joined the organization. See Forum for Academic & Institutional Rights, Join FAIR, at http://www.law.georgetown.edu/solomon/JoinFair.htm (last visited Apr. 15, 2005) (providing Solomon Amendment response and protest information).

of American Law Teachers, individual professors and students, and student groups.

These plaintiffs may have standing to raise a variety of First Amendment claims in litigating against the Solomon Amendment. But it is arguable that they simply lack standing to pursue any institutionally based claims of academic freedom, or to demand the kind of deference that Grutter commands when such claims are made.\footnote{See Urofsky, 216 F.3d at 412.} Although this point was not at issue in FAIR itself, given both the proper standing of the law school members of FAIR and the independent grounds on which FAIR was decided, it might be of great importance in future cases grounded primarily on academic freedom. If the importance of the point is not apparent in FAIR itself, it is much clearer in the other recent challenges brought against the Solomon Amendment. The Burt v. Rumsfeld lawsuit was brought by forty-four members of the Yale Law School faculty and the Student Members of SAME v. Rumsfeld litigation was brought by Yale Law School students, yet the law school itself was not a party to either case.\footnote{See Burt, 322 F. Supp. 2d at 196; Student Members of SAME v. Rumsfeld, 321 F. Supp. 2d 388, 390 (D. Conn. 2004). The court’s decision granting standing to the Yale Law School faculty members who served as plaintiffs in Burt turned on the fact that the plaintiffs included a voting majority of the law school faculty, who thus were treated as “equivalent to [Yale Law School]” for standing purposes. See Burt, 322 F. Supp. 2d at 199. At the same time, the court ventured that the university “appear[ed] to have no First Amendment rights in jeopardy” in the case. Id. at 200 n.2. Obviously, given my reading of Grutter as according educational institutions a right to deference as institutions, I believe the latter conclusion is simply wrong.} The plaintiffs in the Burbank v. Rumsfeld litigation are faculty and students at the University of Pennsylvania Law School, not the law school itself.\footnote{See Complaint ¶¶ 8–9, Burbank (No. Civ.A.03-5497).} Thus, as at least one court has recognized, whatever claims they are entitled to bring, they may not be entitled to rely on the educational autonomy reading of Grutter that I have advanced here.\footnote{See Student Members of SAME, 321 F. Supp. 2d at 393–94 (rejecting student groups’ expressive association claim on the basis that the relevant “association” here was Yale Law School, whose policies “are set by the faculty and can change at any time,” and not the student groups themselves).} This reading of Grutter suggests that any academic freedom claims in those particular cases—at least, any academic freedom claims grounded on institutional autonomy rather than on some individual’s right to speak or receive information—must be dismissed.

A fourth point that has occasioned some interest in the legal academy itself is the role of the AALS, which filed an amicus brief in
the FAIR litigation but declined to join the suit as a plaintiff. Although the point is surely not dispositive, there is an irony lurking behind the academic freedom arguments that have been advanced by the law school and faculty members of FAIR. As I have noted, membership in the AALS commits law schools to a policy of equal opportunity in employment, including equal treatment without regard to sexual orientation. Thus, whether or not individual law schools oppose the Solomon Amendment, the benefits of membership in the AALS may subject a law school to soft or hard pressure to conform its policies on military recruitment to the position favored by the AALS. Law schools that oppose the Solomon Amendment and that want to speak out against it, but that also welcome military recruiters despite their discriminatory policies, may thus be caught between the undoubtedly more grave coercive pressure of the Solomon Amendment and the unofficial but equally real pressure brought to bear by the AALS.

This raises the awkward question whether law schools that are simply reacting to the AALS’s demands rather than formulating non-discrimination policies of their own can truly be said to be entitled to the sort of deference to expert educational judgments that Grutter, on the reading presented here, demands. If they are acting in response to the top-down instructions of the AALS, have they really made a “complex educational judgment in an area that lies primarily within the expertise of the university” when they refuse to comply with the Solomon Amendment?

Similarly, if we rely on Dale as the Third Circuit did, is an expressive association entitled to Dale deference if its policies are not the result of its own considered goals as an expressive association, but rather are the product of pressures from outside that association?

Again, I emphasize that I do not think this point is dispositive. However attractive, or customary, it may be for law schools to seek


330 Cf. Katyal, supra note 19, at 558 (concluding that “universities must engage in a greater degree of self-governance . . . before educational autonomy can insulate their practices from judicial review”).

331 See Grutter, 539 U.S. at 328; see also Memorandum from Mark V. Tushnet to the Deans of Member and Fee-Paid Schools and Members of the House of Representatives (Sept. 10, 2003) [hereinafter Tushnet Memorandum] (“Putting it bluntly . . . how can the Association assert that its member schools have made academic freedom judgments when the policies at issue were adopted because of pressure from the Association, not because of member schools’ own reflection on their missions?”), http://www.aals.org/03-33.html (last visited Apr. 15, 2005). Professor Tushnet was the president of the AALS when he wrote the memorandum.
membership in the AALS, they are not required to do so. Choosing to continue as a member of the AALS, and thus to abide by its nondiscrimination policy, is itself a considered educational and expressive judgment. Whether they are influenced by the AALS or independently arrive at their policy, law schools are in no different a position for purposes of the Grutter deference argument. Still, given the disapproval in some quarters that met the AALS’s refusal to join the FAIR lawsuit as a party, the issue—as Professor Tushnet put it, not a “technical problem,” but “only an awkwardness”—is worth noting. As with the standing issue, it may not be of crucial importance in the Solomon Amendment litigation, but it may raise questions in future cases about the circumstances in which an educational institution can properly lay claim to the protective mantle of deference to its considered judgment on matters of educational policy. Perhaps the AALS was right to hesitate to join the lawsuit.

Finally, the Third Circuit’s decision in FAIR raises important questions about the consequences of an educational autonomy reading of Grutter. As we have seen, this reading of Grutter suggests that if universities can use Grutter to expand the range of voices engaging in campus speech, they might be equally entitled to limit campus speech. By relying principally on the Supreme Court’s decision in

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332 Tushnet Memorandum, supra note 331.

333 See supra notes 213–264 and accompanying text; see also infra notes 336–345 and accompanying text. This issue is also apparent in the FAIR litigation. Notwithstanding FAIR’s commitment to “free and open discourse,” Complaint ¶ 24, FAIR I (No. Civ.A.03-4433 (JCL)) the plaintiffs’ arguments in the FAIR litigation also would appear to support the imposition of speech restrictions on law school campuses. Indeed, the complaint revealingly illustrates the conflict between a view of academic freedom that believes on-campus discourse should be free and unfettered and one that emphasizes the need to restrict on-campus speech to ensure civility and prevent the silencing of disfavored groups. See id. ¶ 20 (“Diversity serves no purpose if students and faculty feel inhibited from engaging in discourse. Thus, law schools have promoted, demanded, and strictly enforced, not merely diversity, but also tolerance and respect.”).

Chai Feldblum and Michael Boucai’s handbook offering ways for law schools to “ameliorate” their compliance with the Solomon Amendment strikes a similarly ironic note. See generally Feldblum & Boucai, supra note 272. On the one hand, the authors allow that “one should expect a range of views on the part of faculty, students and staff regarding the acceptability of homosexuality,” let alone the Solomon Amendment itself. Id. at 8. On the other hand, they make clear that in their view, discussion of these issues in the context of “amelioration” activities such as teach-ins should be anything but free and open, on the basis that the mere fact that military recruiters are present on campus is sufficient to represent the view that “the service of openly gay individuals is destructive to the military.” Id. at 11. Accordingly, they would permit, if not quietly encourage, ignoring supporters of the Solomon Amendment even within teach-ins and other educational programming. See id. (stating that “a law school can legitimately choose not to include any panelists supporting
Dale (albeit, I have suggested, in a way that is underwritten by the profound deference exhibited by the Court in Grutter), the Third Circuit suggests that its ruling may have similar implications. If a university’s status as an expressive association enables it to overcome even the substantial governmental interest in providing a well-staffed military, an interest that normally sweeps aside all contrary arguments in the courts, then what happens when a university cites FAIR for illiberal purposes? What of a university that wishes to exclude members of certain races, or to impose discriminatory policies without suffering consequences such as the deprivation of favorable tax status? There is no logical reason why the arguments raised in Grutter, Dale, and FAIR could not apply in such a case.

To be sure, the government has a compelling interest in nondiscrimination. But that argument did not defeat the Boy Scouts of America in Dale. Nor did the traditionally compelling interest in military policy immunize the Solomon Amendment from attack in FAIR. Thus, FAIR, like Grutter, may yet serve as the basis for decisions that may disturb those who have applauded the decision the most loudly. For those who support Grutter’s policy of deference to educational institutions for its own sake, this may not be unduly disturbing. But for more fair-weather friends of this reading of Grutter, it ought to raise the question whether grounding the attacks on the Solomon Amendment on Grutter—or on Dale, for that matter—was the wisest course of action.

In sum, the institutional autonomy-based reading of Grutter offers real ammunition for law schools that wish to challenge the enforcement of the Solomon Amendment. Law schools’ policies of nondiscrimination and their efforts to enforce those policies in a variety of settings (arguably including on-campus recruitment) represent considered academic judgments that are entitled to substantial deference, notwithstanding any contrary government interests in maintaining an

the military’s policy in the [educational] program”); id. at 12 (“Law schools . . . need not feel they must expend excessive energy to find [individuals who support the Solomon Amendment or military policy with respect to gays and lesbians] in order to have a ‘balanced’ program.”); id. at 13–16 (advocating various means of supporting groups and activities on one side of the debate only). The handbook evinces little recognition that some students or faculty might oppose the government’s policy on gays in the military and support on-campus military recruiting. See, e.g., Garnett, supra note 296, at 9 (noting arguments to the same effect); Diane H. Mazur, Is “Don’t Ask, Don’t Tell” Unconstitutional After Lawrence? What It Will Take to Overturn the Policy, 15 U. Fla. J.L. & Pub. Pol’y 423, 441 (2004) (arguing that excluding military recruiters from law schools only serves to widen a problematic gap between military and civilian society).

335 See FAIR II, 390 F.3d at 245 & n.27.
on-campus presence for military recruitment. But the argument for institutional autonomy in the Solomon Amendment context also raises some significant questions. Thus, if those academic judgments concerning recruiting are properly within the discretion of the law schools as academic institutions, then any institutional autonomy-based arguments against the Solomon Amendment must be invoked by the institutions themselves, not individual professors or students or their representatives. Accordingly, Grutter’s First Amendment demands a searching look at the fitness of many of the parties to the Solomon Amendment lawsuits, even as it also suggests that those lawsuits may have added merit as a result of Grutter. In addition, it raises troubling questions about when an educational judgment can truly be said to be the product of an institution’s own decision-making process and not simply a result of outside pressure.

4. The Academic Bill of Rights

Assume that the justifications for academic freedom discussed above are correct—that academic freedom is justified because of its contribution to the search for truth or because of its contribution to a truly democratic education and, by extension, a truly democratic polity. Further assume that these are the values that undergird the Court’s decision in Grutter. What, then, could be wrong with legislation that enshrines these values in the law? What could be wrong with legislation that purports to support academic freedom as I have described it? That question is raised by recent efforts, in Congress and in the individual states, to champion legislation called the Academic Bill of Rights. Drafted by conservative commentator David Horowitz and backed by his and other groups, the document states, in part, that decisions concerning the hiring, firing, tenure, or promotion of faculty; students’ grades; curriculum decisions; and other aspects of university life should not be made “on the basis of . . . political or religious beliefs.” The Academic Bill of Rights is grounded on views that most readers of this Article likely support: that the university serves “the pursuit of truth,” that “pluralism, diversity, opportunity, critical intelligence, openness and fairness” are “the cornerstones of American society,” and that academic freedom serves to “secure the intellectual

336 See supra notes 63–97 and accompanying text.
independence of faculty and students and to protect the principle of
intellectual diversity.”338

In short, if taken at face value, the Academic Bill of Rights ought
to be largely uncontroversial to those who adopt conventional views of
academic freedom. It should be no more objectionable than, for ex-
ample, a law that declares that universities must guarantee and sup-
port a diversity of views on campus.

Whether the Academic Bill of Rights should be read literally is
quite a different question. Horowitz and his supporters are mostly po-
litical conservatives, and because their evident concern is the percep-
tion that the university has been colonized and made the almost ex-
clusive preserve of political liberals, the Academic Bill of Rights could
be viewed simply as a covert device to force the hiring of greater
numbers of conservative academics and nothing more.339 If, however,
as Horowitz and his supporters contend, conservatives not only are
underrepresented on campus, but are underrepresented as a result of
active and deliberate choices stemming from political bias, what is
wrong with redressing this imbalance?

Although Horowitz disclaims any desire to see the Academic Bill
of Rights enacted as binding law,340 it has been the subject of a num-er of legislative developments. A version of the Academic Bill of
Rights has been introduced as a nonbinding resolution in the House
of Representatives,341 and a similarly nonbinding version was passed
by the Georgia Senate.342 A binding version of the Academic Bill of
Rights which focused on student rights rather than faculty issues was
withdrawn from the Colorado legislature, but only after a number of
Colorado university officials reached a memorandum of understand-
ing endorsing the views provided in the bill.343

338 Id.
339 See Stanley Fish, “Intellectual Diversity”: The Trojan Horse of a Dark Design, CHRON.
to use the language that the left has deployed so effectively on behalf of its own agendas”);
340 See Fish, supra note 339, at B13; Zhao, supra note 339, at B9.
343 See Zhao, supra note 339, at B9; Memorandum of Understanding Endorsed by
Elizabeth Hoffman, President of the University of Colorado, Larry Penley, President of
Colorado State University, Raymond Kieft, Interim President of Metropolitan State College
of Denver, Kay Norton, President of the University of Northern Colorado, and Shawn
Mitchell, State Representative House District 33 (n.d.), http://www.studentsforacademic
freedom.org/reports/comemorandumofunderstanding.htm (last visited Apr. 15, 2005).
Again, these bills are nonbinding or, as in the Colorado case, inoperative with respect to faculty hiring and other fundamental university decisions. But what if a binding version of the Academic Bill of Rights was passed? The Academic Bill of Rights purports to stand on the same principles that the Court relied on in *Grutter*—a belief in the importance of academic freedom and intellectual diversity. What would *Grutter*’s First Amendment have to say about such legislation?

The answer is, I think, clear but not without irony. Looking to the institutional autonomy reading of *Grutter*, an academic institution whose educational mission is itself substantive—a university whose mission involves a conclusion about “political or religious beliefs”—is entitled to substantial deference in framing and advancing policies that support those substantive views. A religious university whose educational mission is to advance Southern Baptist views may refuse to hire or to promote academics whose views counter or depart from those beliefs. A secular university’s economics department that concludes that Marxism is a dry well may eliminate courses advancing Marxist theory, just as surely as a science department may conclude that its truth-seeking mission would hardly be advanced by providing lectures advancing a Ptolemaic view of astronomy. A university that believes its educational mission requires it to advance liberal views on racial diversity may oppose the inclusion of more voices championing conservative views on racial diversity. To be sure, a university would have to advance credible evidence that its substantive views were indeed a part of its educational mission, but if it could, *Grutter*’s First Amendment would invalidate any attempt to subject it to the strictures of the Academic Bill of Rights.

As I noted, however, this is not without irony. For the Academic Bill of Rights is, on its face, entirely consistent with the rationales for academic freedom—truth-seeking, intellectual diversity, and the like—that the Supreme Court has typically treated as supporting a constitutional right to academic freedom. These are also the same values that undergird the institutional autonomy reading of *Grutter*. Yet, if I am correct, the rule of deference to decisions made by academic institutions that emerges from these values would foreclose the enforcement of an Academic Bill of Rights. By contrast, it is at least arguable that these values cut against prohibitions on hate speech or

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344 See Fish, *supra* note 339, at B13 (“It’s hard to see how anyone who believes (as I do) that academic work is distinctive in its aims and goals and that its distinctiveness must be protected from political pressures (either external or internal) could find anything to disagree with here.”).
religious speech on campus. Yet, as I have suggested, the institutional autonomy reading of \textit{Grutter} compels the conclusion that a university \textit{may} impose these restrictions, as long as they are part and parcel of its academic mission.

We might draw two conclusions from this seemingly contradictory state of affairs. The first is that the institutional autonomy reading of \textit{Grutter} is a prophylactic rule that has slipped its moorings. Like many prophylactic rules, it draws a wide boundary around the values it seeks to protect, even when that boundary no longer corresponds to the values in question. Thus, although the institutional autonomy reading of \textit{Grutter} is based on the value of truth-seeking and other standard rationales for academic freedom, it serves those values only indirectly, by giving universities wide latitude to set their own academic policies. In so doing, as the contrast between the campus hate speech and Academic Bill of Rights examples suggests, this version of \textit{Grutter}'s First Amendment gives universities latitude even when their academic policies would disserve the very rationales offered in support of academic freedom. Such a rule still could be justified, however, if we believe that universities may adopt a diversity of approaches to educational policy and academic freedom. Additionally, it could be justified if we believe that we are better off entrusting decisions on educational policy to educational institutions without reservation rather than allowing courts or legislators to make case-by-case determinations.

The second possible conclusion points to a deeper concern, which I touched on earlier—that the academic freedom values the Academic Bill of Rights seeks to protect are themselves incoherent, inaccurate, or non-existent. If Horowitz’s defense of intellectual diversity as a core value of academic freedom fails under \textit{Grutter}'s institutional autonomy principle, perhaps that is because universities do not all agree that intellectual diversity is an important value.\footnote{Cf. id. (arguing that neither intellectual diversity nor “[c]itizen building” are academic activities).} Or perhaps they agree on the end but not the means. This again suggests, as I have argued above, that courts—and supporters of the Academic Bill of Rights—cannot rely safely on a fixed justification for or definition of academic freedom.

I will canvass those issues more fully below. For now, it is simply important to note that even as the institutional autonomy reading of \textit{Grutter} may support efforts by universities to impose policies that do not treat all ideas or speakers alike, it may also bar legislators and
regulators from imposing otherwise unobjectionable norms of intellectual diversity or equal treatment on universities from above.

5. Race-Based Scholarships

*Grutter*’s deferential First Amendment-based treatment of the university’s right to determine who shall be admitted to study, and the forgiving nature of its treatment of the narrow tailoring part of its Fourteenth Amendment inquiry, suggests that courts, colleges, and state and federal education officials now may revisit another heated issue affecting university admissions—the constitutionality of race-based scholarships.  

The leading case on this issue, *Podberesky v. Kirwan*, addressed the University of Maryland’s Banneker scholarship program, a merit-based scholarship program available only to African-Americans. The University of Maryland maintained a separate scholarship program available to all students, but that program’s merit standards were more stringent. Daniel Podberesky, a Hispanic student who met the Banneker scholarship requirements but not the requirements of the generally available scholarship program, challenged the University of Maryland’s maintenance of a separate program.

The U.S. Court of Appeals for the Fourth Circuit decided *Podberesky* as if *Bakke*’s diversity interest did not exist, relying instead on the Supreme Court’s stringent scrutiny of remedial racially conscious measures in *City of Richmond v. J.A. Croson Co.* Thus, it looked—searchingly and critically—for evidence that the scholarship program

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347 38 F.3d 147 (4th Cir. 1994).

348 Id. at 152.

was justified as a response to “the present effects of past discrimination.” The University of Maryland was unable to meet this high hurdle; whatever racial tensions still existed at the university were not sufficiently linked to past discrimination to justify the program. In any event, the program—which gave scholarships to all qualifying African-American students, and not just those African-American students from the state of Maryland—was not narrowly tailored to remedy the past discrimination at issue.

Given the uncertain status of Bakke at the time Podberesky was decided, it is perhaps unsurprising that the Fourth Circuit thought to apply Croson rather than to examine the diversity rationale in evaluating the scholarship program. Moreover, it is not clear whether the University of Maryland advanced diversity as a rationale for its program. It is thus understandable that commentators following Podberesky assumed a diversity-based argument for race-based scholarships might be unsustainable.

Grutter suggests that race-based scholarships may stand on surer footing than the Podberesky panel assumed. This argument does not require as much detail as those offered above, because it is little more than a rehearsal of the Court’s reasoning in Grutter. Quite simply, Grutter holds that universities may legitimately tailor their admissions programs to meet the educational goal of maintaining a diverse student body. That interest is grounded in the First Amendment, and measures taken by the university to ensure that diversity, short of “outright racial balancing,” will be viewed with some substantial degree of deference, despite the ostensibly “strict” level of constitutional scrutiny applied by the Court under the Fourteenth Amendment.

350 Podberesky, 38 F.3d at 153.
351 Id. at 154–57.
352 Id. at 158–59.
353 The University of Maryland’s failure to raise the diversity rationale may have to do with the historical context in which it arose. The constitutionality of race-based scholarship programs was a disputed issue at this point, and at the time of the litigation, the University of Maryland may have believed the argument was not available. See, e.g., Weir, supra note 346, at 975–76 (noting that the Department of Education had issued a statement in 1990 declaring that race-based scholarships were unconstitutional and violated Title VI of the Civil Rights Act of 1964, and only in 1994 issued revised policy guidelines suggesting that race-based financial aid was available to create a diverse student body).
354 See, e.g., Thro, supra note 346, at 632.
355 That is not, however, necessarily what some educational institutions, which have to plan outside the sanctuary of the law reviews, have concluded. See Golden, supra note 346, at A1.
356 Grutter, 539 U.S. at 330.
That reasoning applies equally to the case of race-based scholarships. If a university has a compelling interest in a diverse student body, and may mold its admissions requirements toward that end, surely it has an equal interest in ensuring that it also can “attract and retain” those students who serve the educational mission of maintaining student diversity.\textsuperscript{357} This is particularly true to the extent that such scholarships enable the school to attract and to retain a critical mass of minority students.\textsuperscript{358} \textit{Grutter} thus suggests that universities ought to be able to rely confidently on their educational interest in student diversity in maintaining race-based scholarship programs.\textsuperscript{359}

6. Single-Sex Schools, Historically Black Colleges and Universities, and Other Exclusive Educational Institutions

A final controversial issue to which \textit{Grutter’s} First Amendment ultimately may speak is the constitutionality of publicly funded single-sex or race-based educational institutions. As with the regulation of religious speech, I do not argue that \textit{Grutter} necessarily demands a sea change in the law’s current treatment of those institutions. It may, however, give ammunition to those who wish to argue in favor of a different approach.

In both cases involving publicly funded single-sex education that have reached the Supreme Court, the Court has struck down those institutions’ admissions policies as a form of gender discrimination. In the first case, \textit{Mississippi University for Women v. Hogan},\textsuperscript{360} the Court sustained a challenge by a male applicant to a state-supported single-sex

\textsuperscript{357} Weir, \textit{supra} note 346, at 987.

\textsuperscript{358} Admittedly, this argument does not settle the question of whether a university may maintain race-based scholarships with lower requirements than those scholarships made available to students who do not belong to the relevant minority groups. \textit{See Podberesky}, 38 F.3d at 152; Kennedy, \textit{supra} note 346, at 770. The answer may depend on whether one believes that the admissions program employed by the University of Michigan Law School (the “Law School”) was as “flexible [and] nonmechanical” as the Supreme Court suggested it was in \textit{Grutter}, or whether it actually placed a thumb on the scales that weighed admission decisions heavily in favor of minority applicants, 539 U.S. at 334. To the extent that a minority-based scholarship maintains a fixed lower eligibility requirement than the eligibility requirement for generally available scholarships, it may come closer to the admissions program outlawed by the Court in \textit{Gratz v. Bollinger}, 539 U.S. 244 (2003). A university that maintained a larger pool of scholarship funds for minority students without applying a lowered eligibility standard for access to those funds, however, could argue credibly that its actions fell outside the scope of \textit{Gratz}.


\textsuperscript{360} 458 U.S. 718 (1982).
nursing school. The state of Mississippi attempted to justify the school’s admissions policy on the ground that it “compensates for discrimination against women.” 361 The Court, however, found that the school’s discriminatory policy reflected “a desire to provide white women in Mississippi access to state-supported higher learning,” not a desire to compensate them for any discrimination that they previously faced. 362 Moreover, because the Court found that women at the time earned most of the baccalaureate nursing degrees granted in both the United States and the state of Mississippi itself, it was difficult to show that the program was necessary to compensate women for discrimination in the field. 363 Nor could the school justify its policy on the grounds of any pedagogical benefits enjoyed by women in a single-sex environment. The record did not indicate that admitting men to nursing classes affected teaching style, student performance, or classroom discussion. 364 In any event, because men were allowed to audit classes at the school, those pedagogical arguments would have belied in the context of the case. 365

Similarly, in United States v. Virginia (VMI), the Court rejected the State of Virginia’s arguments in favor of its state-supported “incomparable military college, Virginia Military Institute (VMI),” which was open only to men. 366 The state advanced pedagogically based arguments that VMI’s single-sex educational environment offered “important educational benefits” that would be hampered if women were permitted to attend the academy. 367 Further, it claimed that the school contributed to a diversity of educational approaches in the state’s array of publicly funded institutions of higher learning. 368

The Court, however, concluded that the program had not been established for the purpose of advancing diversity in the state’s educational programs. 369 It also held that to the extent that the school’s “adversative” method of training did constitute a unique approach to learning, the State of Virginia could not justify excluding women from the benefits that unique institution offered. 370 Indeed, because

361 Id. at 727.
362 Id. at 727 n.13.
363 See id. at 729.
364 See id. at 731.
365 Hogan, 458 U.S. at 730.
367 Id. at 535.
368 Id. at 539–40.
369 Id.
370 Id. at 540.
the women’s military academy established by the state to compensate for the continued sex segregation of VMI did not offer a similar adversative style of training, it was a mere “pale shadow of VMI,” and could not salvage the continued maintenance of separate facilities.

For present purposes, it is important to note that neither Hogan nor VMI absolutely foreclose single-sex education. Indeed, as Justice O’Connor observed in Hogan, “[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened.” And in VMI, the Court repeatedly emphasized the “unique” opportunity offered by VMI’s long history, resources, reputation, and unusual style of instruction, adding that the Court did not “question the State’s prerogative evenhandedly to support diverse educational opportunities.” It is possible that Virginia’s system of sex-segregated military academies could have passed muster if a court had found that such academies had been opened simultaneously and enjoyed similar resources, and perhaps had also found that there was some pedagogically sound reason for the maintenance of gender segregation in the educational system.

Advocates for single-sex education for women, in fact, have advanced a host of pedagogical arguments in favor of such programs. According to the (admittedly mixed) research, female students benefit strongly from single-sex education. They are more likely to engage in classroom discussion, to receive attention from their instructors, to excel in math and science, and to pursue professional interests in those fields. They are also less likely to suffer the indignities of peer harassment, and ultimately more likely to enjoy a better self-image and

371 VMI, 518 U.S. at 553 (quotation and citation omitted).
373 458 U.S. at 728.
374 VMI, 518 U.S. at 534 n.7.
to seek broader opportunities, including jobs in fields that traditionally have been closed to or less attractive to women, than girls or women who attend co-educational institutions.\textsuperscript{376} Put in \textit{Grutter}'s terms, single-sex education for women may “promote[] learning outcomes.”\textsuperscript{377}

All of these considerations gain added strength when considered under the deferential approach to educational mission that \textit{Grutter} represents. To the extent that universities enjoy insulation, on First Amendment grounds, when making “complex educational judgments,” and to the extent that a non-diverse student body enables a school to achieve its educational mission, \textit{Grutter} suggests that these institutions should be able to claim substantial deference for their decision to admit a narrower, rather than a broader, range of students to the student body. In short, read for its emphasis on deference, \textit{Grutter} suggests that what is good for the goose is good for the gander: if diversity-based admissions can be justified as a sound means of achieving a school’s educational mission despite the strict scrutiny of the Fourteenth Amendment, sex-segregated admissions policies ought to be able to command the same degree of deference from the courts.

What of racially exclusive colleges and universities—specifically, historically black colleges and universities?\textsuperscript{378} This concern sounds loudly in Justice Clarence Thomas’s dissent in \textit{Grutter}, building on concerns he has voiced elsewhere concerning the preservation of historically black colleges and universities.\textsuperscript{379} As Justice Thomas observed, \textit{Grutter} in fact may help preserve these institutions.\textsuperscript{380} If it does, however, it will do so on grounds that might well support broader efforts at experimentation with racially segregated educational systems.

The history of segregation in the American educational system, including its system of state-supported higher education, certainly


\textsuperscript{377} 539 U.S. at 330.

\textsuperscript{378} See Alfreda A. Sellers Diamond, \textit{Serving the Educational Interests of African-American Students at Brown Plus Fifty: The Historically Black College or University and Affirmative Action Programs}, 78 TUL. L. REV. 1877, 1881–92 (2004) (discussing the history and value of these institutions). As Professor Diamond notes, historically black colleges and universities, in fact, are defined statutorily, as those institutes of higher education “established prior to 1964, whose principal mission was, and is, the education of Black Americans.” \textit{Id.} at 1881 (quoting Higher Education Act, 20 U.S.C. § 1061(2) (2000)).


\textsuperscript{380} See \textit{Grutter}, 539 U.S. at 365 (Thomas, J., dissenting).
suggests that any pedagogical benefits claimed for historically discriminatory institutions would face the same problems that the Mississippi nursing school faced in *Hogan*. The law is clear that states may not maintain a system of racially identifiable, effectively segregated institutions.\(^{381}\) Although historically black colleges and universities in the United States maintain high enrollments of African-Americans, they may not simply exclude white or other non-black students, though the number of such students is generally small.\(^{382}\)

A number of legal and educational scholars have argued in recent years that the promise of *Brown v. Board of Education* has proved chimerical, and that black students would be well served by primary or higher education in a supportive, nurturing, racially exclusive environment.\(^{383}\) Nevertheless, as these scholars recognize, many publicly supported historically black educational institutions may be in constitutional peril under the Court’s current equal protection jurisprudence because these institutions have been fatally tainted by their long association with segregationist premises, even if they have long since outgrown the occasion for their birth.\(^{384}\)

As Justice Thomas quite reasonably argued in his dissent, *Grutter’s* First Amendment-grounded posture of deference to educational institutions’ proffered academic justifications for admissions policies lends ammunition to the maintenance of these historically black institutions. Indeed, it might do so even if those institutions admitted few or no non-black students. If the majority in *Grutter* was entitled to treat with deference the Law School’s claim that a diversity-based admissions policy would benefit its educational mission, so too a historically black college should be entitled to deference if it argues that “racial homogene-

\(^{381}\) See generally *Fordice*, 505 U.S. at 717.

\(^{382}\) See *Grutter*, 539 U.S. at 364–66 (Thomas, J., dissenting).


\(^{384}\) See, e.g., Adams, *supra* note 383, at 483 (“Despite the view of Justice Thomas and many others [concerning] the present day value of HBCUs, the current state of the law threatens the continuing existence of these institutions in prior de jure racially segregated states . . . .”); Strasser, *supra* note 383, at 64–67.
ity will yield educational benefits.” 385 Although universities are still required to act “within constitutionally prescribed limits,” 386 Grutter at least suggests that a university that advanced sound pedagogical reasons for its racially exclusionary policies might be entitled to some significant leeway. This would be true at least as long as the school was not a mere vestige of de jure segregation, did not impact its students adversely, and “persist[ed] with[] sound educational justification.” 387

As with single-sex education, such justifications are available, plausible, and plentiful. Historically black universities may argue, based on their history and continuing role in the African-American community, that they provide a unique educational environment with its own particular set of values. 388 Professor Wendy Brown-Scott summarizes some of the common attributes of historically black universities as follows:

The features of many HBIs [historically black institutions] which distinguish the academic experience include open enrollment, emphasis on public and community service, the inculcation of moral and ethical values, the promotion of democracy, citizenship, and leadership skills but also critical analysis as a catalyst for social change, demonstrated concern for the physical health and well-being of the student body and the communities from which they come, preparation for specific careers through liberal arts education, and African and African-American studies curricula. 389

These unique attributes have contributed to significant “learning outcomes”: greater intellectual development, positive social and psychological effects, greater ease in interpersonal relations, and greater cultural awareness. 390 Nor can any pedagogical evaluation of these schools ignore the fact that, to the community which they primarily serve, they are honored as vital and important contributors to the

385 Grutter, 539 U.S. at 365 (Thomas, J., dissenting).
386 Id. at 328.
387 Fordice, 505 U.S. at 746 (Thomas, J., concurring).
389 Brown-Scott, supra note 383, at 10–11.
well-being of the African-American community and are not seen as mere vestiges of segregation.391

All of these pedagogical arguments in favor of predominantly black schools surely are entitled to the same degree of deference as the arguments for diversity presented in *Grutter*. If read for all that it is worth, then, *Grutter* would appear to support the maintenance of these universities against an equal protection challenge. Whatever relief that may provide to supporters of historically black universities, however, it must be acknowledged as a matter of logic that those arguments could be raised in favor of a variety of experiments with racially exclusive higher education. Would the Court support the establishment and public funding of an all-white university, provided it could advance sound academic reasons in favor of such an institution? A university deliberately and expressly serving Hispanic students, or members of some other group, and excluding others? Even if that outcome seems unlikely for a variety of reasons, it is still the case that the argument is supported by the constitutional logic of *Grutter*.392

Certainly Justice Thomas is not the only one to recognize this implication of the Court’s approach. Long before *Grutter*, Charles Lawrence expressed his discomfort with a diversity rationale for affirmative action in higher education admissions, observing that Justice Powell’s reasoning in *Bakke*, with its emphasis on deference to the views of the educational establishment, “could as easily justify an all white school as one that is racially diverse.”393 Strong supporters of *Grutter* acknowledged the same discomfort not long after the ruling was handed down.394

391 See, e.g., Diamond, supra note 378, at 1883–84 (discussing the reasons her students cite for attending the Southern University Law Center, a historically black institution, and noting that many students cite the role of such institutions “as a reminder of educational legacy or cultural connectedness”); John A. Moore, Note, *Are State-Supported Historically Black Colleges and Universities Justifiable After Fordice?—A Higher Education Dilemma*, 27 Fla. St. U. L. Rev. 547, 547 (2000).

392 See Dixon, supra note 157, at 78 (“It would seem to follow [from *Bakke*’s focus on diversity as a permissible but not compelled educational value] that academic freedom would permit some colleges to seek homogeneity if they had a rational basis for doing so.”); Katyal, supra note 19, at 564 (“If the university is free to discriminate against whites, the argument goes, why isn’t it free to do the same to African-Americans?”); id. at 564 n.22 (citing examples of this argument).


394 Goodwin Liu, Remarks at the American Constitution Society Conference, Session E: Segregation, Integration and Affirmative Action After *Bollinger* 33–34 (Aug. 2, 2003) (noting that the “academic freedom argument . . . would seem to swing both ways” and could support arguments for segregated universities if they could be justified on educa-
Grutter certainly does not absolutely compel the conclusion that courts must accept a regime of single-sex or racially segregated higher education. Hogan, United States v. Fordice, and other cases suggest most institutions would be hard pressed to prove that any racially exclusive admissions policies were motivated by purely pedagogical purposes. Nevertheless, the “tension” acknowledged by the supporters of Grutter’s acceptance of the diversity rationale is not a mere phantom. Grutter’s logic compels the conclusion that a wide range of educational missions may be entitled to deference on constitutional academic freedom grounds, even if they skirt different boundaries of the Fourteenth Amendment than did the Law School’s admissions policy in Grutter itself.

7. Conclusion

As this discussion has endeavored to show, the logical implications of the institutional autonomy reading of Grutter’s First Amendment are wide-ranging and significant. They counsel a different approach, and potentially different outcomes, with respect to a variety of controversial First Amendment issues. Under Grutter’s First Amendment, universities may have much greater discretion than currently is presupposed to shape the speech activities of their institutions, including the imposition of speech codes and the preclusion of at least some forms of religious speech. They may also provide universities with additional ammunition to contest the government’s withdrawal of funding where, as with military recruiting on law school campuses, the government activity conflicts with their educational mission.

Moreover, as in Grutter itself, the implications of Grutter’s First Amendment carry beyond cases directly implicating speech itself. The “countervailing [First Amendment] interest”395 of educational institutional autonomy that is identified in Bakke and reinforced in Grutter may alter the landscape of other areas of constitutional jurisprudence as well. Thus, universities, bolstered by Grutter’s First Amendment, may

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395 Bakke, 438 U.S. at 313 (opinion of Powell, J.).
win greater freedom to employ a variety of race-conscious policies, including the use of race-specific scholarships and other funding mechanisms. Indeed, they may be able to argue in favor of single-sex or single-race admissions policies. As I have suggested above, because the arguments in favor of single-sex or single-race admissions policies would be grounded in pedagogical rather than remedial justifications, all-white or all-male institutions might find as much shelter under *Grutter* as all-female institutions or historically black colleges and universities.

A few points deserve emphasis here. First, I do not intend to suggest that any of the varied outcomes that I have discussed above are likely to follow from *Grutter*. Indeed, I would venture to predict that although some version of the arguments that I have outlined will be advanced in the courts in future cases, many will fail. At the very least, given the significant reshaping of settled precedent that some of these outcomes represent, these arguments are unlikely to fare well in the lower courts, although some of them ultimately might find vindication in the Supreme Court. The point of this discussion has not been to predict real-world litigation outcomes, but to ask which outcomes follow from *Grutter’s* First Amendment discussion as a matter of logical implication.

The importance of this first reading of *Grutter’s* First Amendment, however, does not rest on its ultimate success in the courts. Indeed, that is one of the key points of this Article. Notwithstanding the Court’s bold First Amendment rhetoric in *Grutter*, it is quite possible that it will turn out to be a “sport” in First Amendment case law, as *Bakke* arguably was before it. Nonetheless, *Grutter* and *Bakke* still demand greater consideration within the world of First Amendment scholarship. If *Grutter’s* First Amendment eventually does have greater influence beyond the narrow confines of race-conscious admissions policies, the importance of carefully studying this aspect of *Grutter* will be obvious. Regardless, *Grutter* will raise serious questions for First Amendment scholars even if it does turn out to be a sport. For example, what are the First Amendment principles announced in *Grutter*? Do they have greater application beyond the facts of that case? Do they merit greater application? And if the Court refuses to apply those principles elsewhere, why? In short, no matter what happens in the courts, *Grutter* deserves serious consideration as a First Amendment case.

Finally, it should be evident that the outcomes discussed in this Section point in no particular direction. A university might stress

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396 See Byrne, *supra* note 17, at 315; Yudof, *supra* note 30, at 855–56.
Grutter in arguing for campus speech restrictions, or in asserting its right to permit a wide degree of potentially offensive speech. It might assert that its educational mission demands more religious speech on campus or less religious speech. It might argue in favor of the educational benefits of a homogeneous student body, while leaving room for the argument that Grutter supports an all-white or all-male school as much as a traditionally African-American school. Indeed, under this reading of Grutter, the latter position might be stronger than the former, if the all-white school raised legitimate pedagogical arguments in its defense and the African-American school was tainted in the eyes of the courts by its origins in de jure segregation.

On this reading, then, Grutter’s First Amendment is not about substantive values, but about deference. Provided a university can supply a plausible academic justification of a policy, that policy may be accorded substantial deference notwithstanding its potential conflict with First Amendment jurisprudence or with other constitutional provisions. This reading of Grutter therefore is bound to please some constituencies and to displease others, depending on the particular educational policy at stake.

To the extent that one wishes to police the legal community for consistency, Grutter’s First Amendment thus provides a nice testing point: are those who showered the decision in praise equally willing to live with a set of educational outcomes they find unwise or distasteful? For example, would the plaintiffs who have employed Grutter’s emphasis on institutional autonomy to oppose the discriminatory policy of the Solomon Amendment be equally content to see that emphasis used to support an educational institution’s ability to discriminate in favor of a different set of students or potential employers? Conversely, will those who criticized Grutter nevertheless adopt its First Amendment arguments to support their own set of educational policies?

There is, however, another possibility. As I emphasized at the beginning of this Section, Grutter’s First Amendment is susceptible to more than one reading. Instead of reading it as adopting a deferential posture toward university policy making regardless of the specific educational policies and values at stake, we might read Grutter as having made a substantive commitment to specific educational values—and, by extension, to specific political values. It is to this possible reading of Grutter’s First Amendment that I now turn.
B. Grutter’s First Amendment as Substantive Commitment

The focus on the institutional autonomy reading of Grutter has yielded a surprising and wide-ranging set of potential implications for First Amendment doctrine and other aspects of constitutional law. It is based, however, on a particular reading of Grutter. So far, I have assumed that Grutter adopts a value-neutral conception of academic freedom. Provided that a university is making “academic decisions” with respect to policies that serve its “proper institutional mission,” it is entitled to substantial deference. What constitutes a “proper educational mission,” on this reading, is substantially up to the university. A university may decide that its educational mission demands a diverse student body, or it may conclude that it has a pedagogical interest in maintaining a gender- or race-exclusive student body. It may decide that its mission demands the imposition of stringent and viewpoint-specific codes of civility in student speech, or that its mission demands wide open debate and precludes the imposition of speech codes.

In each case, the discretion lies with the educational institution. Courts are not qualified to judge the “complex educational judgments” that go into the formation of a university mission, and must assume that the university has reached its judgments about its proper educational mission, and the policies necessary to support it, in good faith. This reading of Grutter, which is substantially based on the Court’s own language, thus preserves universities as “spheres of independence and neutrality” into which the government may not intrude.

It is not, however, the only available reading of Grutter. Another reading of the opinion is decidedly not value-neutral. Rather, it reads Grutter as having made a substantive commitment to a particular vision of the proper educational mission of universities, law schools, and other institutions of higher education.

On this reading, Grutter offers a substantive vision of the university as fulfilling an important democratic function. This vision does not simply accept the Law School’s arguments for a diverse student body because they are the product of autonomous decision making by an institution within its sphere of expertise. Instead, it asserts that diversity in

397 Grutter, 539 U.S. at 329.
398 Id. at 328
399 See id. at 329.
higher education—and particularly within elite bodies such as the Law School—provides broader goods that are part of our political and constitutional framework.⁴⁰¹ Diversity in higher education is not just an \textit{intrinsic} good that brings positive “learning outcomes”⁴⁰² to the educational process itself. Rather, it is an important \textit{extrinsic} good.⁴⁰³ Diverse student bodies “better prepare[ ] students for an increasingly diverse workforce and society, and better prepare[ ] them as professionals.”⁴⁰⁴ They produce a diverse leadership corps that is better able to deal with the realities of a “global marketplace.”⁴⁰⁵

More importantly, a diverse student body ensures that equal educational opportunity is available to all in order to provide for “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation.”⁴⁰⁶ Additionally, diversity in \textit{elite} educational institutions undergirds democratic legitimacy: it “cultivate[s] a set of leaders with legitimacy in the eyes of the citizenry” by ensuring that “the path to diversity [is] visibly open to talented and qualified individuals of every race and ethnicity.”⁴⁰⁷ Thus, under the substantive reading of \textit{Grutter}, the Court pledged allegiance to a specific substantive constitutional vision of the nature of higher education, one which emphasizes its continuity with a broader democratic vision of full and equal participation “in the civic life of our Nation.”⁴⁰⁸

A number of early examinations of \textit{Grutter} have focused on this reading of the case. Professor Post, for example, sees in \textit{Grutter} a vision of education “as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership.”⁴⁰⁹ Universities, according to this view, are not mere warehouses for researchers. They are, instead, both models of democratic dialogue⁴¹⁰ and training grounds for a well-trained and representative body of citizens. Profes-
sor Lani Guinier, in a statement that spotlights the two readings of *Grutter* that I have stressed thus far, also argues that *Grutter* makes a positive statement about “the fundamental role of public education in a democracy,” by “link[ing] the educational mission of public institutions not only to the autonomy that the First Amendment gives universities to fashion their educational goals, but also to the broad democratic goal of providing upward mobility to a diverse cadre of future leaders.”*411* *Grutter*, in her view, is the starting point for a public discussion about the “democratic purpose of public education.”*412*

As I have suggested above, this vision of the democratic purpose of higher education is not precisely the same as the description of the purposes of education offered in support of student body diversity by Justice Powell in *Bakke*. *413* The focus of that case was on benefits that are intrinsic to the educational process. *Bakke* was concerned with the exposure of students to diverse ideas and values *within* the university itself, in order to foster an atmosphere of “speculation, experiment and creation.”*414* Although that environment might have an impact on the nation’s future,*415* Justice Powell looked only to the educational environment itself. His diversity argument contemplated “only that the [nation’s future] leaders, who might all be white, should be attuned to a diversity of ideas and mores.”*416*

*Grutter*, by contrast, is expressly outward-looking; it is concerned not simply with the intrinsic value of diversity on campus but with the *extrinsic* value of education, particularly with regard to leadership and citizenship. Moreover, unlike *Bakke*, which is concerned only with the benefits that some putative set of future citizens and leaders might reap from a diverse student body, *Grutter* is concerned with the composition of that caste of citizens and leaders. It suggests that the legitimacy of higher education, and of the leaders it produces, rests on

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*411* Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 175 (2003); see id. at 223 (noting the connection between “institutions’ educational and public missions”).


*413* Cf. Post, supra note 306, at 60.

*414* 438 U.S. at 312 (opinion of Powell, J.).

*415* See id. at 312–13 (opinion of Powell, J.).

*416* Greenberg, supra note 203, at 1618.
its representativeness and inclusiveness. \textit{Grutter} thus presents a significantly different picture of the nature and purpose of higher education than that offered in \textit{Bakke}.\textsuperscript{417}

What might we make of this substantive vision of \textit{Grutter}'s First Amendment—a vision of academic freedom as serving a particular democratic vision of higher education, as providing both training for democracy and a miniature model of diversity \textit{in} democracy? Most obviously, this reading of \textit{Grutter} may imply a different approach to the various free speech and other constitutional issues discussed above than the approach suggested by an institutional autonomy reading of \textit{Grutter}. An educational institution defending a particular policy, such as a set of restrictions on campus speech or the establishment of a single-sex university, would be faced with a different justificatory task under this reading. Rather than emphasize the connection between its policy and its educational mission, it would be obliged to show a connection between the educational mission itself and broader democratic values outside the immediate context of the university.

It is easy to conceive of such arguments regarding some, if not all, of the issues discussed above. It would be no great stretch, for example, to assert that “‘education . . . is the very foundation of good citizenship,’”\textsuperscript{418} and that racial epithets and other instances of campus speech targeted at particular segments of the university community erect a barrier to the full participation of some groups in institutions of higher learning. Consequently, it could be argued, racially offensive speech on campus ultimately impedes some groups’ full enjoyment of and participation in democratic citizenship. Thus, campus speech restrictions could be as plausibly justified under the democratic reading of \textit{Grutter} as they could under the institutional autonomy reading.

\textsuperscript{417} The changing nature of the Court’s vision of educational diversity is acknowledged in Jeffrey S. Lehman, \textit{The Evolving Language of Diversity and Integration in Discussions of Affirmative Action from Bakke to Grutter}, in PATRICIA GURIN ET AL., \textit{Defending Diversity: Affirmative Action at the University of Michigan} 61, 61–96 (2004). Lehman, who was involved in the \textit{Grutter} litigation as Dean of the Law School, discusses the difficulties involved in speaking consistently of diversity over the course of the litigation, in court and in public. I suspect, however, that Lehman places too much weight on the evolving nature of diversity discourse in general, and too little on the conflict between the Law School’s actual purposes and its need to find a set of educational and rhetorical goals that would fit safely within the safe harbor of the juridical category of “diversity” imposed by Justice Powell in \textit{Bakke}. See, e.g., SANFORD LEVINSON, \textit{WRESTLING WITH DIVERSITY} 16 (2003) (noting that “diversity” became a “‘mantra’ . . . of those defending the use of racial or ethnic preferences” in university admissions after \textit{Bakke}, “not least, it should be obvious, because such celebrations seem licensed and, indeed, encouraged by the Supreme Court”).

\textsuperscript{418} \textit{Grutter}, 539 U.S. at 331 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).
Other issues might compel different outcomes, however. I have suggested, for example, that under the institutional autonomy reading of *Grutter*, a sincere pedagogical justification of single-sex or single-race university education might justify such admissions policies against any claims of discrimination. It is not clear that equally compelling reasons could be mustered in favor of gender- or race-exclusive admissions policies under the democratic reading of *Grutter*. To be sure, one could argue that if educational outcomes for women or African-Americans are improved under a system of sex- or race-exclusive higher education, then those programs ultimately will increase the ability of traditionally disadvantaged groups to participate fully in democratic society, both as leaders and as citizens. Nevertheless, if *Grutter* conceptualizes universities as both a conduit to and a model of democratic participation—in Professor Post’s words, if the Court sees universities as “for[a] for participation in civic life”\(^{419}\)—then single-sex or single-race institutions may be seen as falling short of this inclusive participatory ideal.

I will not develop these alternative arguments at length. Suffice it to say that it is not clear that the same set of policy implications for other First Amendment or constitutional issues would follow under the democratic reading of *Grutter* as under the institutional autonomy reading of *Grutter*. The more interesting questions about this reading of *Grutter’s* First Amendment, however, reside beyond the realm of litigation strategy. The democratic reading of *Grutter’s* vision of academic freedom is interesting because it raises larger questions: questions of fit and consistency with the larger body of First Amendment doctrine, and questions about the Court’s willingness to embrace a specific, contestable conception of the purpose of the university.

One way to see this problem of consistency is to compare the democratic reading of *Grutter’s* First Amendment—the reading of the case as embodying a substantive ideal of participatory democracy, and as a signal that public institutions ought to take steps to enhance full and equal participation in that democracy—with one current stream of First Amendment thought. Several prominent First Amendment theorists, drawing on the work of Alexander Meiklejohn,\(^ {420}\) have argued that the First Amendment should be understood not as supporting an individu-

\(^{419}\) Post, *supra* note 306, at 61.

alistic vision of speech as self-actualization, but as serving a substantive vision of democracy as self-government. In Professor Owen Fiss’s words, “[t]he purpose of free speech is . . . the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live.” In Professor Cass Sunstein’s terms, this approach represents a turn from free speech as an unregulated marketplace of ideas to a system dedicated to deliberative democracy.

Under this theory, a purely context-insensitive, rule-oriented approach to First Amendment issues may properly be amended or abandoned when that approach interferes with the larger goal of democratic self-government. In order that “public debate might be enriched and our capacity for collective self-determination enhanced,” the state “may sometimes find it necessary to restrict the speech of some elements in our society in order to enhance the relative voice of others.”

This democratic approach to free speech thus may demand a set of departures from current free speech doctrine. Under this model of free speech and its relation to self-government, the state may properly enact greater restrictions on the spread of pornography, to ensure that “everyone ha[s] an equal chance to speak and to be heard.” It may allocate subsidies in content-specific ways to “further the sovereignty of the people by provoking and stirring public debate.” It may restrict hate speech where that speech “helps contribute to the creation of a caste system.” The state also may intervene in the sphere of election-related speech to “promote democratic processes.” In short, government may employ a number of regulatory

421 See, e.g., Sunstein, supra note 228, at xvii (describing his project as the “effort to root freedom of speech in a conception of popular sovereignty”).


423 See Sunstein, supra note 228, at 17–23, 50–51 (elaborating on this point).

424 Fiss, supra note 422, at 19.

425 Id. at 30; see Sunstein, supra note 228, at 37 (reasoning that the constitutional questions posed in First Amendment cases should be: “[d]o the rules promote greater attention to public issues” and “[d]o they ensure greater diversity of view?”).

426 Fiss, supra note 422, at 87.

427 Id. at 107.

428 Sunstein, supra note 228, at 193. This capsule description misses much of the nuanced flavor of Professor Sunstein’s position, which would not demand sweeping departures from current doctrine. Nevertheless, it is accurate enough for these purposes to note that Professor Sunstein’s deliberative democracy account of free speech would compel both a different approach to problems of hate speech regulation (among other issues) and a somewhat different result.

429 Id. at 85; see id. at 93–120.
approaches to speech in order to enhance our system of selfgovernment and deliberative democracy.

This approach to First Amendment problems has been criticized elsewhere, and any lengthy treatment of this question is beyond the proper scope of this Article.\textsuperscript{430} For present purposes, I want to make two observations. First, this democratic self-government approach to the First Amendment may be seen as closely linked to the democratic conception of education and academic freedom offered by the second reading of \textit{Grutter} that I have described. In both cases, the driving force behind the First Amendment (or its subsidiary, academic freedom) is a particular vision of free speech as serving a sphere of democratic selfgovernment in which legitimacy depends on the full and equal participation of all groups. Additionally, in both cases, that vision of democracy may demand intervention by the state (or its subsidiary, the public university) to ensure access to the democratic forum for all.

Second, both the general democratic approach to the First Amendment and the democratic reading of academic freedom in \textit{Grutter} are arguably in tension with the courts' usual approach to the First Amendment. Certainly the leading advocates for a democratic approach to free speech recognize that their views are not consistent with the larger body of First Amendment jurisprudence.\textsuperscript{431} Although the democratic theorists of the First Amendment stress the need to shape First Amendment doctrine to meet specific concerns about equality and diversity of debate in the public sphere, even if that requires state intervention, the courts typically approach free speech issues through a lens of state neutrality that is suspicious of any state intervention in the arena of public debate.\textsuperscript{432} The resulting laissezfaire attitude toward speech often ends up supporting existing distributions of power and media access, a state of affairs that First Amendment scholars concerned with enhancing public debate find


\textsuperscript{431} See, e.g., Sunstein, supra note 228, at 16 (“[A] reconnection of the First Amendment with democratic aspirations would require an ambitious reinterpretation of the principle of free expression.”).

\textsuperscript{432} See Fiss, supra note 422, at 5.
deeply troubling.\textsuperscript{433} It is thus clear that these theorists argue for a significant reshaping of First Amendment theory and doctrine.\textsuperscript{434}

Similarly, the democratic reading of \textit{Grutter} suggests a different approach to First Amendment issues, at least in the arena of academic freedom, than the Supreme Court usually takes. It does not rely on a view of the university as a marketplace of ideas. Nor, despite the Court’s language, does it directly rely on a conception of the university community as serving the “robust exchange of ideas.”\textsuperscript{435} Instead, the democratic reading of \textit{Grutter} depicts the university as both a small-scale model of and a gateway for a democracy in which “[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential.”\textsuperscript{436} To that end, the university may intervene in an ostensibly neutral admissions process to ensure diversity in the body of students participating in university life and, ultimately, citizenship and leadership.

This reading of \textit{Grutter} thus invites questions about whether the Court’s vision of the First Amendment in this case is consistent with its approach to free speech issues elsewhere in its jurisprudence. If it is not, at least two responses are possible. One may take this inconsistency as further evidence that \textit{Grutter}’s First Amendment is good for one case and one case only, a conclusion that necessarily undermines some of the force of the opinion. Alternatively, one may see \textit{Grutter}’s First Amendment as an invitation to revisit the Court’s general approach to the First Amendment. I take up one aspect of that invitation below.\textsuperscript{437} The only untenable approach is indifference. By taking a markedly different approach to the First Amendment, \textit{Grutter} demands either serious consideration of the merits of the opinion, or serious reconsideration of the merits of the Court’s general approach to the First Amendment.

\textbf{C. Is \textit{Grutter}’s First Amendment Consistent with the Court’s First Amendment Jurisprudence?}

In the two previous Sections, I have offered two potential readings of \textit{Grutter} as a First Amendment case. One focuses on institutional def-

\textsuperscript{433} See Sunstein, \textit{supra} note 228, at 50.

\textsuperscript{434} See, \textit{e.g.}, \textit{id.} at 252.

\textsuperscript{435} \textit{Grutter}, 539 U.S. at 329 (quoting \textit{Bakke}, 438 U.S. at 313 (opinion of Powell, J.) (quoting Keyishian v. Bd. of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967)) (internal quotation marks omitted)).

\textsuperscript{436} \textit{Id.} at 332.

\textsuperscript{437} See \textit{infra} notes 487–575 and accompanying text.
ference; the other offers a more substantive, democratically oriented vision of the First Amendment. As I have suggested, if these readings are inconsistent with the broad run of First Amendment opinions issued by the Supreme Court, two possibilities present themselves: either\textit{Grutter} can be treated as a sport for First Amendment purposes, or the Court itself ought to reexamine its First Amendment case law.

One might ask at this point, is \textit{Grutter}, on either of the alternative readings offered above, really inconsistent with the Court’s First Amendment jurisprudence? One way to approach this question is to compare the First Amendment analysis undertaken in other cases by the Justices who joined the majority in \textit{Grutter}, as well as that taken by the dissenting Justices in \textit{Grutter}. What emerges from this discussion is something of a mixed record, which may in itself be revealing.

Focusing first on the majority Justices, the two Justices who seem most consistent in their approach with respect to both \textit{Grutter} and other First Amendment cases are Justices Breyer and Stevens. In both his extrajudicial writing and his writing on the Court, Justice Breyer has emphasized an approach to the First Amendment that “[f]ocus[es] on participatory self-government.”\footnote{Stephen Breyer, \textit{Our Democratic Constitution}, 77 N.Y.U. L. Rev. 245, 254 (2002).} Like Professors Sunstein and Fiss, Justice Breyer argues for an approach that looks back to “the Constitution’s more general objectives,”\footnote{Id. at 256.} and considers whether a particular speech regulation serves “the ability of some to engage in as much communication as they wish and . . . the public’s confidence and consequent ability to communicate.”\footnote{Id. at 253 (referring specifically to communication in the electoral process).} Justice Breyer is thus suspicious of First Amendment rules that treat all speech as equal, and all speech restrictions as equally deserving of suspicion.\footnote{See, e.g., id. at 253, 255.} He finds that approach inconsistent with the more general objective of ensuring “democratic government,”\footnote{Id. at 255.} which may counsel permitting speech regulations in some cases despite their conflict with general rules of content neutrality. This context-specific, democratically oriented approach is evident in Justice Breyer’s writing on such issues as campaign finance regulations and commercial speech.\footnote{See, e.g., United States v. United Foods, Inc., 533 U.S. 405, 424–25 (2001) (Breyer, J., dissenting); Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 399–405 (2000) (Breyer, J., concurring). See generally Jerome A. Barron, \textit{The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer’s New Balancing Approach}, 31 U. Mich. J.L. Reform 817 (1998).}
Similarly, Justice Stevens has voiced his suspicion of general First Amendment rules such as the prohibition on content-based regulation, suggesting that they may “obfuscate[] the specific facts at issue and interests at stake in a given case.”\textsuperscript{444} He advocates an approach to First Amendment cases that exhibits “a sensitivity to fact and context that allows for advancement of the principles underlying the protection of free speech.”\textsuperscript{445} This approach is evident in his First Amendment jurisprudence,\textsuperscript{446} and, as I have suggested above, it is consistent with his treatment of academic freedom jurisprudence.\textsuperscript{447}

So Justices Breyer and Stevens may be seen as taking positions in \textit{Grutter} that are broadly consistent with the drift of their general views on the First Amendment. What of the other Justices who joined the majority in \textit{Grutter}? Here, I think, the record is more mixed. To be sure, at least some of the other Justices have on occasion taken a more pragmatic, narrow, institutionally oriented view of First Amendment problems, rather than a broad, institution-indifferent, rule-based approach. For example, Professor Frederick Schauer has argued that Justice O’Connor’s opinion in \textit{National Endowment for the Arts v. Finley},\textsuperscript{448} although nominally relying on conventional doctrinal rules of First Amendment analysis, in fact depended on the unique nature of the arts-funding function performed by the National Endowment for the Arts.\textsuperscript{449} Closer to the subject at hand, as we have seen, Justice Souter’s concurring opinion in \textit{Southworth} rejected the imposition of a “cast-iron viewpoint neutrality requirement” on the University of Wisconsin, and argued that “protecting a university’s discretion to shape its educational mission may prove to be an important consideration” when judging the propriety of student fees under the First Amendment.\textsuperscript{450}

Still, these occasional eruptions of dissatisfaction with traditional doctrinal analysis are not the same thing as a generally consistent and

\textsuperscript{445} Id. at 1305.
\textsuperscript{448} See generally 524 U.S. 569 (1998).
\textsuperscript{449} See Schauer, supra note 32, at 96–97.
\textsuperscript{450} 529 U.S. at 239 (Souter, J., concurring in the judgment). Consistent with the analysis provided above, Justice David Souter was joined by Justices Stephen Breyer and John Paul Stevens. \textit{See id.; see also} Barron, \textit{supra} note 443, at 855–56 (arguing that Justice Souter’s approach to electronic media cases is “medium-specific and pragmatic,” and skeptical about “the utility of categorical analysis in resolving the First Amendment issues raised by the new electronic media”).
different approach to the First Amendment, whether it resembles the institution-specific or democratic readings of *Grutter* or some other vision of the First Amendment. Instead, most of the Justices who joined *Grutter* have, for the most part, willingly followed traditional categorical First Amendment rules in a substantial number of cases. Even Justice Stevens, who I have suggested does have a fairly consistent case-specific approach to the First Amendment, has at times displayed an unwillingness to depart from traditional First Amendment rules.451

A review of the dissenting Justices in *Grutter* results in a similarly mixed result. In important respects, the Justices who dissented in that case regularly have hewed close to categorical First Amendment rules, rejecting any sort of institution-specific or substantive democratic reading of the First Amendment.452 Thus, Justice Thomas has refused to draw institutional or fact-bound distinctions in a variety of other First Amendment contexts, including commercial speech453 and broadcast media regulation.454 That rejection of institution- or medium-specific distinctions in the First Amendment is of a piece with his skepticism in *Grutter* about the “constitutionalization of ‘academic freedom,’”455 and his rejection of the idea that the First Amendment could provide special constitutional privileges to a public university.456

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451 See, e.g., Ark. Educ. Television Comm’n v. Forbes, 523 U.S. 669, 683–95 (1998) (Stevens, J., dissenting). Justice Stevens rejected any suggestion that a different First Amendment approach should apply where a state institution acts as a broadcaster, instead treating the state public television station the same as any other state actor subject to the usual First Amendment restraints on its exercise of discretion. See Schauer, supra note 32, at 90. Again consistent with my suggestion that most of the Justices in the *Grutter* majority are neither especially loyal nor especially hostile to traditional forms of First Amendment analysis, Justice Stevens was joined by Justices Souter and Ruth Bader Ginsburg. See *Forbes*, 523 U.S. at 683. Justice Souter also rejected Justice O’Connor’s institution-specific approach in *Finley*, treating the National Endowment for the Arts as no differently situated for purposes of First Amendment analysis than any other government actor. See 524 U.S. at 601 (Souter, J., dissenting); Schauer, *supra* note 32, at 96.


453 See, e.g., Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 575 (2001) (Thomas, J., concurring) (“I doubt whether it is even possible to draw a coherent distinction between commercial and noncommercial speech.”).


455 *Grutter*, 539 U.S. at 362 (Thomas, J., dissenting).

456 See *id.* at 362–64.
In this sense, it might appear at first blush that the dissenters in *Grutter*, to the extent that the case turned on First Amendment values, acted with greater loyalty and consistency across a range of First Amendment cases than did the *Grutter* majority. That observation might offer some comfort (albeit decidedly cold comfort) to the dissenting Justices’ more politically or jurisprudentially conservative allies in the legal academy.

On another view, however, the dissenting Justices in *Grutter* are equally guilty of inconsistency with the First Amendment values that they have advanced elsewhere. For this insight, we may turn to some of these Justices’ own academic supporters. In recent writing, Professor John O. McGinnis, among other scholars, has attempted to characterize the Rehnquist Court as moving toward “an encompassing jurisprudence” based on the “decentralization and private ordering of social norms.”457 One vehicle for this process of decentralization is an increased “solicitude for civil associations.”458 In a host of cases, including *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston,*459 *Dale,*460 and *California Democratic Party v. Jones,*461 the Rehnquist Court has offered a far stronger level of protection for freedom of association than that provided by the Warren or Burger Courts.462 That freedom necessarily includes the power of associations to “exclude individuals whose mere presence is antithetical to their expressive norms.”463

If this is an accurate description of the Rehnquist Court’s movement in the area of freedom of expression, let alone an umbrella description of a jurisprudence cutting across various constitutional provisions, as Professor McGinnis would have it, it is hard to square with the dissents in *Grutter*. Surely the first reading of *Grutter* that I have canvassed here—the deferential reading—is far more consistent with the Tocquevillian approach Professor McGinnis describes than the dissenters’ approach in *Grutter*. It permits educational institutions to organize their “membership” as they see fit and to shape social norms


through a diversity-based approach to university admissions standards. It does not mandate that they do so, and recognizes that many universities will not take this approach to the admissions process. Some may adopt class-based admissions standards, and some simply may open the gates wide. Those institutions that wish to admit students on the basis of some diversity-oriented vision of the university, however, are free to do so, consistent with their status as autonomous social institutions. By contrast, the dissenters in *Grutter* would shut down entirely any attempt, by public universities at least, to shape the student community according to a perceived need for diversity.

Thus, if any faction on the Court was following a Tocquevillian vision in *Grutter*, it was the majority and not the dissent. To the extent Professor McGinnis can be read as including *Grutter*'s dissenting Justices among those who have championed the jurisprudence he describes, therefore, they stand fairly accused of inconsistency in *Grutter*.  

To be sure, there are some reasonable objections to this account. First and foremost, Professor McGinnis recognizes that even a Court that is more attentive to freedom of association might still “be less willing to permit associations to exclude [certain] identifiable groups,” such as racial minorities, “on First Amendment grounds.” But Professor McGinnis himself is at least ambivalent about this prospect. He appears to suggest that some greater scope of freedom might be available to institutions such as universities, including freedom to shape admissions decisions along racial grounds, if the school advanced the argument that its “expression of . . . values” would be harmed by state intervention with respect to its admissions choices. That is precisely the objection raised by the Law School in *Grutter*.  

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464 Professor McGinnis is careful not to ascribe his description of the Rehnquist Court’s jurisprudence to any individual Justices. See id. at 489 n.10. Still, the opinions that he treats as illustrative of the Court’s increased attention to mediating institutions were authored entirely by Justices—William Rehnquist, Antonin Scalia, and Anthony Kennedy—who dissented in *Grutter*. See id. at 531–43 (discussing Dale, 530 U.S. 640 (Rehnquist, C.J.); Cal. Democratic Party v. Jones, 530 U.S. 567 (2000) (Scalia, J.); Southworth, 530 U.S. 217 (Kennedy, J.).) See id. at 537 n.264 (discussing Runyon v. McCrary, 427 U.S. 160 (1976)).

465 Id. at 536.

466 See id. at 537 n.263.

467 Id. at 537 n.264.

468 I should add that in exploring the tension between the Tocquevillian approach discussed by Professor McGinnis and the dissent in *Grutter*, I am in no way suggesting any inconsistency on Professor McGinnis’s part. Similarly, as his comment on the FAIR litigation suggests, Richard Garnett is well aware of the connection between his work on expressive
It might also be argued that whatever additional protections Professor McGinnis’s Tocquevillian Court has accorded to civic associations, that focus has been on private institutions rather than public institutions. I do not think this argument can be reconciled fully with Professor McGinnis’s broader constitutional vision, however. That vision treats the Court’s protection of private civic associations as only one component of a broader vision of autonomous and decentralized institutions both private and public. “states, secular and religious associations, and juries” among them.\(^469\) If the Court’s vision instructs us to “focus on associations themselves, and on the content and function of their expression,”\(^470\) perhaps the associative role of public universities should weigh more heavily in the balance than their tenuous connection to state action.\(^471\)

In sum, the verdict on *Grutter*’s consistency with the Court’s First Amendment jurisprudence is, perhaps surprisingly, at least mixed. Surely the democratic reading of *Grutter*’s First Amendment offered above presents a fairly imperfect fit with the larger body of First Amendment case law. Even here, however, it is at least consistent with some of the First Amendment writings of Justice Breyer and Justice Stevens. Similarly, the deferential reading of *Grutter*, though again not wholly in line with the Court’s generally categorical and institution-indifferent approach to the First Amendment, is consistent with some of the Justices’ prior academic freedom opinions. It may also present a fit with a broader tendency on the Rehnquist Court to favor the autonomy of civic associations.

The fit is decidedly an awkward one, to be sure, and it is ultimately hard to resist the conclusion that no Justice writing in *Grutter* took seriously its First Amendment implications. The strongest likelihood is that the Court used the First Amendment both to buttress its conclusions in *Grutter* and to limit the reach of this affirmative action decision to educational institutions. Nonetheless, the Court’s decision to frame the case in First Amendment terms leaves those who would seek to find (or to impose) a coherent shape on the Court’s First Amendment jurisprudence with the obligation to reexamine that jurisprudence with *Grutter* in mind. Moreover, the very fact that some

associations and the sorts of issues raised by the first reading of *Grutter* offered in this Article. See generally Garnett, supra note 296.

\(^{469}\) McGinnis, supra note 27, at 495.

\(^{470}\) Garnett, supra note 457, at 1844, 1853.

\(^{471}\) For further discussion of the relationship between *Grutter*’s First Amendment and the public-private distinction, see infra notes 554–575 and accompanying text.
coherent tale can be told suggests something. It suggests that the Court, or some of its individual members, is struggling to find some new vision of the First Amendment—one that looses the self-imposed bonds of a series of generally applicable rules, and instead trusts to institutions themselves to shape their own, more context-sensitive rules. That story of Grutter’s First Amendment is told in Part III.

III. Taking First Amendment Institutions Seriously

A. Introduction

Thus far, I have offered two different First Amendment readings of Grutter v. Bollinger: one emphasizing the importance of educational institutional autonomy, regardless of the content of the academic policies of the institution in question, and one that champions the university in advancing a particular substantive vision of democracy. Each, as we have seen, has its potential and its problems. The institutional autonomy reading of Grutter lets “a thousand flowers bloom,” encouraging universities to experiment with different visions of education and academic freedom, but it also permits them to shape academic policies that some will find profoundly objectionable or inconsistent with the core values of academic freedom, university education, or the Constitution itself. The substantive, democratic reading of Grutter advances a vision of democratic education that again will find many adherents in the academy. This is especially true within the ranks of civic republicans and other scholars who have articulated a substantive vision of the role of the Constitution in encouraging participatory democracy. At the same time, it is hard to see this latter approach as consistent with the broader body of First Amendment jurisprudence, and it does not present a perfect fit with visions of academic freedom prevalent outside the courts.

I have refrained from direct discussion of a third reading of Grutter’s First Amendment—what we might call an institutional First Amendment reading of Grutter—until now, although it bears a close kinship with the institutional autonomy reading of Grutter and may be gleaned by implication from the discussion that has preceded this Part.\footnote{See, e.g., Schauer, supra note 28 (titling his article Towards an Institutional First Amendment). The phrase actually originates with Bruce C. Hafen. See generally Bruce C. Hafen, Comment, Hazelwood School District and the Role of First Amendment Institutions, 1988 Duke L.J. 685.} It will become clear that, although this vision of Grutter raises
the most troubling questions and must be much more fully fleshed out, I also believe it is the most promising reading of Grutter, one which portends a sea change in First Amendment jurisprudence.

Before turning to that reading of Grutter, it is important to consider the current state of First Amendment jurisprudence. As Professor Schauer has observed, for the most part, the Supreme Court has been “institutional[ly] agnostic[ ]” in its treatment of First Amendment issues. Its general approach has been one of generality and principle rather than specificity, narrowness, and policy on the ground. The Court has viewed the First Amendment through a lens of “juridical categories,” in which all speakers and all factual situations, no matter how varied, are compressed into a series of narrow legal questions. For example, what general category of speech is implicated here: incitement, commercial speech, pornography? What kind of legal rule is implicated: content-neutral, viewpoint-specific, or time, place, and manner restriction? Is the speaker public or private? These questions sometimes overlap with questions of factual context, but their contours are hardly the same and the nature of the inquiry undertaken by the courts is entirely different. The nature of the speaker, its role in society, the kinds of social or professional norms that govern a particular kind of speech act even absent the specter of legal proceedings—all these facts have been less important than the conceptual cubbyhole into which the dispute must be placed once it reaches the Court. In Justice Holmes’s terms, the Court has thought about words, not things.

This preference for rules over facts, this relative insensitivity to the nature of the institutions before the courts, is evident throughout the congeries of rules and principles that govern the law of the First Amendment. A few examples will suffice to illuminate this point. Consider the role of the press in First Amendment law. As a general rule, albeit with some exceptions, the Court has rendered the Press

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473 Schauer, supra note 32, at 120.
474 See id. at 119–20.
476 See Oliver Wendell Holmes, Jr., Law in Science and Science in Law, 12 Harv. L. Rev. 443, 460 (1899).
Clause of the First Amendment a virtual nullity, refusing to grant special privileges to the press or to treat media institutions differently than it would any other speaker under the First Amendment.\textsuperscript{478} Religious institutions have come in for similarly categorical, rule-oriented treatment. Thus, a narrow majority of the Court has refused to grant special accommodations under the Free Exercise Clause to religious groups when they challenge neutral laws of general applicability,\textsuperscript{479} disdaining any approach that would require judges to “weigh the social importance of all laws against the centrality of all religious beliefs.”\textsuperscript{480} As many critics have recognized, the Court’s treatment of religion has traveled from a substantive concern with the distinctive role of religious groups and practices to a less protective, but more generally applicable, fact-insensitive focus on formal neutrality.\textsuperscript{481}

That institution-indifferent approach is perhaps best captured, however, by the Court’s focus on content neutrality in free speech cases. That approach employs a simple, broad taxonomy in evaluating free speech claims, subjecting them to different levels of scrutiny depending on whether the speech restrictions at issue are content-neutral, content-based, or viewpoint-based.\textsuperscript{482} As Professor Steven J. the Constitution); Timothy B. Dyk, \textit{Newsgathering, Press Access, and the First Amendment}, 44 \textit{Stan. L. Rev.} 927 (1992).


Heyman has observed, this approach “has become the cornerstone of
the Supreme Court’s First Amendment jurisprudence.”483

The Court’s attempt to craft a one-size-fits-all methodology of ad-
judicating free speech issues may have much to recommend it as a
general rule.484 If we are concerned about the potential for abuse in-
herent in allowing courts to weigh the costs and benefits of each
speech act according to a balance of their own devising, it makes per-
fect sense to constrain them through the application of general rules.
Rules protect us by precluding judges from adding irrelevant or ille-
gitimate factors to the balance.

This approach, however, does carry its own risks.485 In particular,
it carries the risk that the Court, in attempting to shape actual dis-
putes to fit the Procrustean bed of content neutrality or other gener-
ally applicable rules, will often miss the facts and policies that counsel
different approaches in different cases. This approach also risks miss-
ing what is distinctive about the varied circumstances of speech, and
about the particular institutions and practices that contribute to a full
and rich public discourse. Moreover, by maintaining a focus on what
is internal to law—on how different speech acts should be classified
according to different legal categories—it ignores the fact that, as we
have seen in our discussion of professional academic freedom, various
institutions have their own norms and practices. They have their own
methods of self-governance, and their own distinct contribution to
make to the greater good.

In short, an institution-insensitive approach to the First Amend-
ment gains (some) clarity and predictability. It often, however, may
become unmoored from the particular practices and institutions that
make free speech so worthy of protection in the first place. It is simply
not true that a library is a university is a private speaker is a newspaper
is a religious community. Each acts distinctively; each serves a distinc-
tive purpose; each governs itself distinctively according to its own
norms; and each makes a distinct contribution to the broader envi-
ronment of free speech. Professor Post puts the point well:

First Amendment doctrine can recover its rightful role as an
instrument for the clarification and guidance of judicial de-

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483 Steven J. Heyman, Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First
Amendment Jurisprudence, 10 WM. & MARY BILL RTS. J. 647, 650 (2002).
485 For a powerful discussion of these issues, see generally Frederick Schauer, Harry Kal-
ven and the Perils of Particularism, 56 U. CHI. L. REV. 397 (1989) (reviewing HARRY KALVEN, JR.,
A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed., 1988)).
cisionmaking only if the court refashions its jurisprudence so as to foster a lucid comprehension of the constitutional values implicit in discrete forms of social order. The Court must reshape its doctrine so as to generate a perspicuous understanding of the necessary material and normative dimensions of these forms of social order and of the relationship of speech to these values and dimensions.\textsuperscript{486}

B. Grutter and First Amendment Institutions

This is where the third, final, and I argue, best reading of Grutter’s First Amendment comes in. What makes Grutter so important as a First Amendment case is that, like few other cases in the First Amendment jurisprudence, and more explicitly than most of those, it abandons the usual posture of institutional indifference. In its conclusion that educational autonomy is a significant interest under the First Amendment, and in its effort, however fraught and imperfect, to tie that interest to a broader understanding of the value of universities, Grutter does not simply look to generally applicable rules. It does not suggest that a university is governed by precisely the same rules that apply to a normal employer, or a library, or a street-corner speaker.\textsuperscript{487} Instead, it adopts a constitutional approach to free speech that is highly sensitive to the particular institutional character of the party before the Court. It takes institutions seriously as First Amendment subjects.

Of the readings of Grutter we have canvassed so far, this is the First Amendment reading of Grutter that carries the greatest potential implications and ought to spark the most interest and debate. By taking institutions seriously, Grutter points the way toward the possibility that the Court’s First Amendment approach could vary depending on the nature of “local and specific kinds of social practices.”\textsuperscript{488}


\textsuperscript{487} \textit{Cf}. Gail Paulus Sorenson, \textit{The “Public Forum Doctrine” and Its Application in School and College Cases}, 20 J.L. & EDUC. 445, 445–46 (1991) (noting the difficulties courts have had applying public forum doctrine to schools and colleges).

\textsuperscript{488} Post, \textit{supra} note 486, at 1272. It should be evident by now that this Article owes a significant intellectual debt to Professor Post’s work, although it differs from that work in its particular emphasis on First Amendment institutions rather than broader organizing principles for social discourse, and in its desire to descend from theory to more immediate operational concerns. For a more complete exposition of his vision of the First Amendment, focused not on First Amendment institutions but on different domains of social order, see generally Robert C. Post, \textit{Constitutional Domains: Democracy, Community, Management} (1995). For a similar distinction between Professor Post’s work and a
Indeed, Grutter does not just suggest this approach, but exemplifies it. Consider the gulf between this case and other affirmative action cases that the Court has decided in recent years. Nowhere has the Court been as sympathetic to the practices and aims of the institution whose affirmative action policies were under attack as it is here—not when it dealt with a municipal employer,\footnote{See Richmond v. J.A. Croson Co., 488 U.S. 469, 477–80, 493–94 (1989).} nor when it dealt with the federal government itself as an employer.\footnote{See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 204–06, 227 (1995) (addressing policy favoring minority contractors under the Small Business Act). One notable exception is Metro Broadcasting, Inc. v. FCC, which upheld preferential treatment for racial minorities in the grant of broadcast licenses. See generally 497 U.S. 547, 600 (1990). To the extent that Metro Broadcasting relied on diversity in upholding the housing scheme in that case, and applied a lower level of scrutiny to a federal program, it has been assumed widely to have been curtailed, if not overruled, by Adarand Constructors, Inc. v. Pena. See, e.g., Arnold H. Loewy, Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process, 77 N.C. L. Rev. 1479, 1495 n.47 (1999). In any event, because that case itself involved a First Amendment institution—broadcasters—it can be seen, if anything, as supporting Grutter v. Bollinger’s institution-sensitive approach to constitutional law.} If the Court had adopted the same approach in Grutter, it is quite likely the outcome would have favored the plaintiffs, not the Law School.

The Court says in its death penalty jurisprudence that “death is different,” but one could also argue that to the Court, education is different.\footnote{See, e.g., Schiro v. Farley, 510 U.S. 222, 238 (1994).} Speaking of the Court’s affirmative action cases, Professors Akhil Reed Amar and Neal Kumar Katyal once observed that the Court had said “a lot about contracting and rather little about education.”\footnote{Akhil Reed Amar & Neal Kumar Katyal, Bakke’s Fate, 43 UCLA L. Rev. 1745, 1746 (1996).} That observation is key to understanding this reading of Grutter’s First Amendment: it is a First Amendment that is sensitive to the special character of particular institutions and particular social practices. It does so by singling out universities as having a special interest in diversity sufficient to give them a compelling interest in race-conscious policies, and by subjecting those policies to what any reasonable observer must conclude is a far more deferential level of scrutiny than would apply to other institutions. As a result, Grutter truly suggests that not all institutions are equal under the First Amendment.\footnote{For this reason, I doubt Grutter carries much significance for the future of affirmative action programs outside the university. See generally Estlund, supra note 403; Rebecca Hanner White, Affirmative Action in the Workplace: The Significance of Grutter?, 92 Ky. L.J. 263 (2003–2004); Joshua Wilkenfeld, Note, Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger, 104 Colum. L. Rev. 2291 (2004). The Court of Appeals for}
At the same time, and unlike the educational autonomy and democratic readings of *Grutter* offered above, which are only concerned with the special role of universities, the institution-sensitive reading of *Grutter* carries potential implications far beyond the ivory tower. For where one institution has gone, others may try to follow. *Grutter* may counsel other institutions—religious institutions, media institutions, libraries, perhaps professionals, and even other institutions—to seek from the Court the same recognition that they have special roles to play in the social firmament and ought, perhaps, to be treated according to special rules. If one takes *Grutter* seriously as a First Amendment decision, as its language certainly permits, it may provide ammunition for a broader effort to overturn an institutionally agnostic, top-down approach to the First Amendment in favor of one that builds from the ground up. This approach would construct First Amendment doctrine in response to the actual functions and practices of particular social institutions.

As I have suggested, this approach is not wholly absent from the Court’s existing jurisprudence, although it is generally disfavored. This understanding of *Grutter*’s First Amendment implications, however, ties the scattered exceptional cases together under the common concept of taking First Amendment institutions seriously.

Thus, in the same week that it issued its opinion in *Grutter*, the Court decided *United States v. American Library Ass’n*, holding that Congress could validly require public libraries that receive federal funding to install filter software to block the receipt of obscene materials or child pornography by library computer users. Pivotal to that decision was that library users could request that the filters be disabled. For present purposes, however, the result is less important than the Court’s reasoning. The Court began by asking why we value libraries, and how they operate.

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494 For an argument that the Supreme Court already treats professional speech according to different rules than it applies to other speakers, in an attempt to “preserve its particular social function,” see Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 777 (1999).


497 See id. at 209.

498 See id. at 203–06.
tion in determining the constitutionality of the law was whether libraries were left free to “fulfill their traditional missions.” Accordingly, it held that libraries must be left with substantial discretion to exercise their professional role of collecting, storing, and distributing information. With this institution-specific approach in mind, the Court rejected any attempt to shoehorn the library’s practices into some juridical category like the “public forum.”

Similarly, Frederick Schauer and others have observed that the Court has sometimes set aside traditional modes of analysis such as public forum doctrine, when the government institution in question is fulfilling the role of a traditional First Amendment institution and is governed substantially by the norms and practices of that institution. Thus, in *Arkansas Educational Television Commission v. Forbes,* the Court, in a seeming departure from traditional public forum analysis, based its decision that a federally funded local broadcaster could exclude a candidate from a debate on the fact that the broadcaster was acting as a professional journalist and exercising editorial discretion. Furthermore, in *National Endowment for the Arts v. Finley,* the Court held that principles of content neutrality were inapplicable to the government where it was acting as an arts funding body—an institutional role that requires and presupposes the need to make content distinctions.

*Grutter’s* First Amendment—an institution-sensitive First Amendment that defers to the practices of particular kinds of First Amendment actors—provides the link between these otherwise far-flung cases. Viewed through a traditional First Amendment lens, *Grutter* and the other cases involve widely different issues: content discrimination doctrine, public forum doctrine, the constitutionality of affirmative action. Nor are the facts particularly similar. In each case, however, the Court confronted the practices of specific First Amendment institutions and recognized that traditional First Amendment doctrine would not preserve the institutions’ ability to “fulfill their traditional mis-

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499 Id. at 204.
500 See id.
501 See Am. Library Ass’n, 539 U.S. at 204–07; id. at 205 (noting that public forum principles were “out of place in the context of this case”). *See generally* Sorenson, *supra* note 487 (noting similar difficulties in cases involving schools and colleges).
503 See id. at 672–74; *see also* Schauer, *supra* note 32, at 91 (“[I]n the end it is the institutional character of public broadcasting as broadcasting . . . that appears to have determined the outcome of the case.”).
sions.”505 Faced with this dilemma, the Court allowed doctrine to give way to reality.506

At this point, even someone who is convinced that there is something to this reading of \textit{Grutter} is entitled to ask a few questions. How does it work? What does it mean, precisely? Why should we scrap a reasonable working set of doctrinal rules in favor of this reading of \textit{Grutter} if we do not yet know what rules that reading entails?

In offering a tentative answer to these questions, I am able to offer something less than a complete blueprint, but something more than a mere mood or sensibility.507 On this institution-oriented reading, \textit{Grutter}’s First Amendment entails at least the following principles.

First, and most obviously, the Court should recognize the special importance to public discourse of particular First Amendment institutions. It is not yet clear how many such institutions there are, how to resolve boundary disputes about whether a particular party falls within this institutional framework (for example, is a blog “the press?”),508 and whether the institutional turn I advocate here should cover a few important institutions or a large number. Regardless, some candidates are obvious, both because of their own distinctiveness and because the Court has already signaled its recognition of some of them: universities, print and broadcast media organizations, religious groups, libraries, and public schools.

Second, the Court should adopt a policy of substantial deference to these organizations, as it did to the Law School in \textit{Grutter}. It should do so both because of their distinctive importance to public discourse

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505 \textit{Am. Library Ass'n}, 539 U.S. at 204.
506 Cf. Katyal, \textit{supra} note 19, at 563 (“In short, \textit{Grutter} recognized a limited principle of comparative academic expertise—a principle that is built on how the Court treats other special institutions in American society.”).
507 I am comforted by the fact that I am in distinguished company in this. See Schauer, \textit{supra} note 32, at 118, 119–20 (suggesting that both he and the Supreme Court have yet to grapple fully with the implications of an institutionally sensitive approach to the First Amendment); Schauer, \textit{supra} note 28, at 27 (“I have not here attempted to say very much about what an institutional approach to the First Amendment would look like . . . .”); see also Post, \textit{supra} note 486, at 1281 (recognizing that his advice that the Court shape its doctrine in ways that are respectful of particular social practices is “rather abstract advice” that “certainly will not assist the Court in settling any particular controversy”). Although this Article cannot offer an equivalent of Professor Post’s sophisticated theoretical analysis, I hope it can advance some slightly more concrete suggestions about how to resolve particular controversies.
and because (as discussed below) of the institutional norms that already serve to constrain them.\footnote{509}

Third, the boundaries of the Court’s deference will involve two different sorts of limitations. The first is the limitation acknowledged by the Court in \textit{Grutter}—a First Amendment institution is entitled to deference “\textit{within constitutionally prescribed limits.”}\footnote{510} At some point, a First Amendment institution runs up against fundamental constitutional principles that simple deference cannot overcome. But this, I want to suggest, is the less important limitation. After all, as \textit{Grutter} suggests, deference to First Amendment institutions may allow those institutions to stretch, if not to break, otherwise applicable constitutional rules. Surely this explains the Law School’s ability to overcome what the Court at least nominally labeled “strict scrutiny” so easily. Indeed, what \textit{Grutter}’s First Amendment ultimately suggests is that, by allowing First Amendment institutions room to experiment with different means of carrying out their institutional missions, the Court really is allowing those institutions to help \textit{shape} constitutional law outside the courts.\footnote{511}

Fourth, the Constitution, then, does not provide the primary constraint on First Amendment institutions. What does? The answer is the institution itself. Taking First Amendment institutions seriously entails recognizing, far more than current First Amendment jurisprudence does, that these institutions are defined and constrained by their own institutional culture.\footnote{512} Universities, newspapers, religious groups—all these institutions live by their own norms and practices, which are often highly detailed and rigid. All of them also have means—dismissal, expulsion, denial of tenure—of enforcing those norms. The most powerful method of enforcement, however, is not the prospect of formal discipline but the simple fact that members of

\footnote{509} For detailed discussion on this point, see Post, \textit{supra} note 488, at 257–65.


\footnote{511} Professor Post provides a useful discussion of the interrelationship between constitutional law inside the courts and constitutional culture outside the courts. \textit{See Post, supra} note 486, at 1270–81; \textit{see also} Nagel, \textit{supra} note 236, at 1535–36 (arguing that \textit{Grutter}’s acceptance of the Law School’s admissions policies, despite the Supreme Court’s past declarations suggesting that such race-specific decision making violated the Constitution, might best be seen as a recognition that the Constitution is both a “legal document” and “a set of political practices and understandings,” and that it allows for “an aspect of constitutional self-definition that is inherently political and cultural”).

\footnote{512} \textit{Cf.} Post, \textit{supra} note 486, at 1273 (“The most general objection to any single free speech principle is that speech makes possible a world of complex and diverse social practices precisely because it becomes integrated into and constitutive of these different practices; it therefore assumes the diverse constitutional values of these distinct practices.”).
institutions operate within the norms of those institutions, internalizing the culture of an institution as their own ethos and observing its rules because they wish to do so.\footnote{513} Thus, the most powerful constraints on the behavior of First Amendment institutions are the constraints that come from the institutions themselves. In judging the nature and scope of a First Amendment institution’s liberty to act, the Court thus should begin, as it did in American Library Ass’n, by applying the norms and values of the institution itself. This is why the Court’s deference in Grutter stemmed from the fact that the Law School was acting according to a legitimate “academic decision[ ].”\footnote{514}

Fifth, if the Court is to set the boundaries of deference to First Amendment institutions according to the practices of those institutions themselves, it must also recognize that those boundaries are constantly shifting and changing. Institutional norms are not fixed. They change and evolve as institutions do. It once would have been unthinkable for an elite university to shift its admissions standards for the sake of racial and ethnic diversity—just as it once would have been unthinkable for many of the same select institutions to apply admissions standards to achieve absolute meritocracy without regard to race, ethnicity, or class. Thus, in determining the bounds within which First Amendment institutions are entitled to substantial constitutional deference, the Court should be responsive to shifts in institutional norms and practices over time. We have already seen that one possible criticism of Grutter, and of other academic freedom decisions issued by the Court, is that they fail to realize that the concept of professional academic freedom was itself a fluid one. This does not present an insuperable dilemma, by any means; in other contexts, courts are experienced at taking evidence on and deciding cases according to the evolving customary practice of an industry.\footnote{515} But the Court should be aware of the issue; it should not rush to enshrine a particular institutional norm as a fixed constitutional standard.

Finally—and this admittedly is more of a mood than a principle—taking First Amendment institutions seriously entails the recognition that constitutional law is not simply a creature of the courts. It

\footnote{513} For discussion, see generally, for example, Alex Geisinger, A Group Identity Theory of Social Norms and Its Implications, 78 Tul. L. Rev. 605 (2004); Richard H. McAdams, Group Norms, Gossip, and Blackmail, 144 U. Pa. L. Rev. 2237 (1996); W. Bradley Wendel, Nonlegal Regulation of the Legal Profession: Social Norms in Professional Communities, 54 Vand. L. Rev. 1955 (2001).

\footnote{514} Grutter, 539 U.S. at 328.

\footnote{515} Cf. Schauer, supra note 28, at 5–6, 9–10, 13–14.
is the product of a constantly shifting, negotiated relationship between a variety of parties and values: the courts’ own understanding of constitutional law, their understanding of the values and norms of institutions in the “real world” outside the courts, the institutions’ own understanding of their norms and values, and the institutions’ understanding of their role within the broader constitutional structure. In Professor Post’s terms, it is a constant negotiation between constitutional law and constitutional culture.

This negotiation takes place on both sides: just as courts are constantly adjusting their understanding of constitutional doctrine to take account of real-world social practices, so too are institutions constantly reevaluating their own norms according to their sense of the boundaries of the Constitution. So, for instance, universities’ understanding of academic freedom has been influenced over time both by professional debate over the concept and by the changing constitutional landscape. In short, one reason for courts to defer to First Amendment institutions is because this does not represent constitutional abdication. Instead, it represents a more sophisticated understanding of the degree to which First Amendment institutions already internalize constitutional values, and the extent to which they help shape constitutional values in turn.

This is decidedly still less than a blueprint. But *Grutter* and the other cases discussed above have already gone some of the distance toward giving us more concrete standards. At bottom, the basic understanding of what it means to take First Amendment institutions seriously is hardly mysterious. It means refusing to believe that one size fits all in constitutional doctrine. It means requiring the courts to defer substantially to decisions made by important First Amendment institutions within the shifting domain of their own institutional values. And, at a more abstract but wholly fundamental level, it entails the courts’ own recognition that they have a central role to play, but a *shared* role, in shaping our constitutional culture.

C. Democratic Experimentalism, Reflexive Law, and Grutter’s First Amendment

I have already argued that the institution-sensitive approach to the First Amendment I have drawn from *Grutter* is echoed elsewhere in the Court’s existing jurisprudence, if dimly and imperfectly. Here, I want to suggest briefly that it also finds echoes in a number of recent academic approaches to constitutional law. I will focus on two recent arguments that have been made for a more flexible, decentralized
approach to constitutional law that relies substantially on the subjects of constitutional law to shape their own norms and practices and yet that continues to ensure an important role for the courts.

The first such argument has been made by a number of scholars, prominently including, but not limited to, Professors Michael C. Dorf and Charles F. Sabel, who have advocated “a new model of institutionalized democratic deliberation that responds to the conditions of modern life.”

Under this approach, which is only briefly sketched here, courts would accord a variety of local institutions substantial latitude “for experimental elaboration and revision [of their activities] to accommodate varied and changing circumstances.” At the same time, courts would monitor these institutions to ensure that they met basic standards of legality and did not infringe individual rights.

Perhaps most importantly, experimentalist institutions would provide information about the relative success or failure of their projects. This in turn would inform both other institutions engaged in similar practices and the courts themselves, gradually shaping the courts’ own sense of the outer boundaries of permissible experimentation.

Thus, the courts would be cast in the role of coordinating authority. They would allow a web of local players to develop ways of addressing a particular policy issue—for example, nuclear safety, environmental regulation, or the treatment of drug criminals—while establishing a rolling set of benchmarks for “best practices” that flow up from the local experimenters rather than down from a court or regulator.

Although the value of democratic experimentalism perhaps can be seen best in areas such as administrative law or public policy, rather than in straight conflicts over rights, the experimentalist school con-

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517 Dorf & Sabel, supra note 516, at 283.

518 See id. at 288.

519 See id.


521 See Colburn, supra note 516, at 289.
tends that here, too, courts can act in a way that “call[s] into existence a system of experimentation” rather than simply “laying down specific rules.” In these cases, particularly when a debate over constitutional rights and duties poses questions of judicial competence arising either from the moral complexity or the factual complexity of the situation, a court can decide not to decide too much. It instead can lay down a general standard that could be met in a variety of ways, and so “devolv[e] deliberate authority for fully specifying norms to local actors.”

For example, in the field of sexual harassment—a statutory regime, albeit one with broader, quasi-constitutional aspects and implications—the Supreme Court has refused to lay down categorical rules governing workplace behavior. It instead has recognized the “constellation of surrounding circumstances, expectations, and relationships” in the workplace that render a concrete rule beyond the Court’s competence. Accordingly, by establishing a safe harbor for employers that take reasonable care to avoid and to remedy harassment, the Court has cast lower courts “in the role of monitoring employers’ monitoring of their workplaces,” while allowing employers to shape a variety of responses to the problem of workplace sexual harassment. In turn, we may expect a set of “best practices” to emerge as different policies are shown to be effective or ineffective in addressing the problem. Thus, rather than making itself a central rights-giver in this area, the Court has tasked local actors with the primary responsibility for crafting solutions while maintaining a monitoring and coordinating role.

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522 Dorf, supra note 516, at 961; see Dorf & Sabel, supra note 516, at 444–69.
523 Dorf, supra note 516, at 886 (noting that experimentalist courts resolve difficult problems by “giv[ing] deliberately incomplete answers”); cf. Horwitz, supra note 122, at 120–25 (arguing that courts, particularly in the early stages of a developing and uncertain area of constitutional law, should issue minimalist opinions rather than attempt to cover the doctrinal field too quickly). My argument in that article was based on concerns about relationships between courts, and did not discuss the role of extralegal actors.
524 Dorf, supra note 516, at 978.
525 See id. at 961.
528 Dorf, supra note 516, at 963.
A similar set of proposals is captured broadly by the overlapping concepts of “reflexive” or “autopoietic” law. In short, reflexive law is “regulation of regulation.” It advocates the abandonment, in at least some cases, of command-and-control regulation in favor of a regulatory model that “set[s] a general standard to govern self-regulation by the affected actors.” As noted above, the Court’s approach to sexual harassment law is an example of a reflexive regulatory strategy.

Similarly and relatedly, autopoietic theories of law begin with the presumption that society consists of a series of subsystems, such as politics, education, and the legal system, each of which operates according to its own internal and self-referential norms, and each of which interacts only imperfectly with other subsystems. Given these boundary issues, the best way to regulate is not by direct regulation, but by “specifying procedures and basic organizational norms geared towards fostering self-regulation within distinct spheres of social activity.” The autopoietic approach requires that local actors observe certain “basic procedural and organizational norms,” but beyond that, it gives substantial autonomy to those actors to craft their own substantive programs. The goal, ultimately, is to find a way to encourage local actors to internalize basic norms of self-regulation within the norms of their own subsystems.

The relationship between these approaches and the institution-sensitive approach to the First Amendment that I have argued forms Grutter’s First Amendment should be clear by now. Each approach


532 Id. at 393.

533 See Baxter, supra note 530, at 1993–94.

534 See Schauer, supra note 28, at 5.


536 Id.

537 See id.

538 The relationship between democratic experimentalism and reflexive law should be evident by now. See Dorf, supra note 531, at 386 (acknowledging the similarity).
begins from a presumption that local actors and local institutions should (and, according to autopoietic theory, must) have an important role to play in shaping even fundamental public policies. Each proceeds from the assumption that imposing general rules from above is doomed to result in suboptimal decisions, and that there should instead be a symbiotic, evolving relationship between the norms of local actors and the norms adopted by central regulatory authorities. Each also assumes that the best way to achieve this goal is to cast the central regulatory authority—here, the courts—in a coordinating role, in which it polices the outer boundaries of acceptable practice while allowing local actors substantially to craft their own policies. In turn, each actor—local and central—will learn from and influence the other.

There are important differences, of course. Crucial to Professor Dorf’s experimentalist project, for instance, is the demand that local institutions “justify the deference they demand by producing a record of performance that can withstand comparative assessments.” By contrast, the institution-sensitive approach to the First Amendment that I have advocated nowhere expressly provides for feedback to the courts or to similar institutions. Its central feature is deference tout court, without any formal program for monitoring or benchmarking. Deference is not, in and of itself, experimentation, nor is it necessarily reflexive in nature.

One should not, however, make too much of the distinction. For as I have argued, and as Professor Post has convincingly shown, the boundaries between constitutional law and constitutional culture as understood outside the courts already are constantly blurred. Although the institution-sensitive reading of Grutter described in this Part relies primarily on deference to First Amendment institutions, it is to be expected in the nature of things that those institutions will incorporate basic constitutional norms into their own understanding of themselves as functioning institutions. The courts, in turn, will incorporate their understanding of the shifting nature of the cultural norms and practices of First Amendment institutions into constitutional law as they police the shifting boundaries of constitutionally permissible deference. Indeed, the requirement that courts, in setting and policing those boundaries, pay attention to both basic constitutional norms and basic institutional practices suggests a fundamen-

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539 Dorf, supra note 516, at 981; see Colburn, supra note 516, at 289.
540 See generally Post, supra note 306.
tally experimentalist, or reflexive, approach. This approach is one in which the courts lay down a general procedural requirement—for example, is this a legitimate academic decision,\(^{541}\) or is this task properly within the role of a library,\(^{542}\) or is this an exercise of professional journalistic discretion?\(^{543}\)—while permitting the institutions substantial latitude to operate within these minimal standards.

Of course, that these approaches are similar does not validate the institution-sensitive reading of *Grutter*’s First Amendment, any more than my reading of *Grutter* can validate experimentalist or reflexive theories of law. Rather, these familial resemblances suggest two things. First, they suggest that the idea of taking First Amendment institutions seriously is no mere frolic. It has substantial roots in a common set of approaches to constitutional law. If that does not lend it legitimacy, it at least suggests—particularly when coupled with the fact that the Court has in fact adopted this approach on several occasions, most prominently in *Grutter*—that it is a viable, credible approach.

Second, it suggests a common complaint. Legal doctrine needs to be sufficiently abstract in order to constrain those who make decisions under its banner, and to cover a variety of factual situations without descending into unfettered discretion and judicial usurpation. At the same time, the tendency toward generally applicable rules of law, at least in the First Amendment arena, moves the courts in a direction that ultimately deprives them of the ability to give due regard to the varied social systems in which speech acts actually take place.\(^{544}\) If it no longer makes sense to fit all cases on the rack of content neutrality or other generally applicable First Amendment doctrines, we need a new approach before those doctrines become incoherent. A new balance must be struck. Taking First Amendment institutions seriously is one means of striking a new bargain between the courts and the First Amendment institutions that they oversee.

**D. Questions and Implications, with a Digression on State Action**

This Part has argued for a reading of *Grutter*’s First Amendment that focuses on the importance of taking so-called First Amendment institutions seriously. It has suggested that courts should recognize the

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\(^{541}\) See *Grutter*, 539 U.S. at 329.

\(^{542}\) See *Am. Library Ass’n*, 539 U.S. at 203–04.

\(^{543}\) See *Forbes*, 523 U.S. at 666.

\(^{544}\) Cf. *Dorf*, *supra* note 516, at 883–84 (noting that laws are intentionally vague because of the impossibility of foreseeing every possible contingency). *See generally* *Post*, *supra* note 486 (arguing that the Supreme Court must pay attention to social realities).
important role that First Amendment institutions play as loci for, and
definers of, public discourse. It has advocated that courts grant these
institutions substantial deference to govern themselves, subject to
generous constitutional limits and to procedural and substantive re-
quirements drawn from the norms and practices of the institutions
themselves. Finally, it has noted a close kinship between this reading
of Grutter and similar projects aiming to encourage the courts to take
a more generous role in allowing local actors to experiment for them-
selves in shaping their own practices and in working toward the reso-
lution of pressing social issues.

What questions does this approach raise? What implications does
it carry with it? Looking forward, what can we say about the prospects
and consequences for an approach that advocates taking First
Amendment institutions seriously? Looking backward, how well does
Grutter itself fulfill the desiderata for an institution-sensitive approach
to constitutional law?

It may be too early to make too settled a pronouncement about
these questions. But at least three significant points are worth making.
First, as argued above, Grutter is not about university education alone.
It speaks to the possibility of deference to a potentially wide range of
other institutions that play an equally important role in our system of
public discourse: religious institutions, media institutions, libraries,
the professions, arts funding authorities, and perhaps still other insti-
tutional actors.

The Court, of course, might reject those arguments out of hand.
If so, it would lend further credence to the idea that Grutter, like Regents of the University of California v. Bakke, is nothing more than a
“sport” as a First Amendment decision: “a chimera of a doctrine,
affirmed only for that day, to provide an acceptable ground on which
. . . [to] preserve affirmative action.” and not truly a statement of First
Amendment principles after all.545 This Article should make clear,
however, that, whatever the Court’s motives in arming itself with the
First Amendment in Grutter may have been, the case is far from a
mere sport. The Court has taken a broadly similar approach in recent
years in examining government broadcasters, arts funders, and public
libraries. It has wanted only a theory to justify its departure from set-
tled First Amendment doctrine, the language with which to do so, and
a set of rules by which to chart its course. Drawing on Grutter, this Ar-
ticle has sought to provide the Court with the tools it needs.

545 Byrne, supra note 17, at 320.
Second, this approach is not necessarily a charter of rights for institutions—even institutions, such as the press, that manage to find special recognition by name in the First Amendment. Nor is it an opportunity for the Court simply to surrender its own judgment absolutely to the “complex judgments” of particular favored institutions under the First Amendment. It is, in short, neither a brief in favor of absolute license for First Amendment institutions, nor an argument in favor of judicial abdication in favor of these institutions. To the contrary, in some instances an institution-sensitive approach to the First Amendment may limit the freedom to act of First Amendment institutions. And in some cases, an institutional approach to the First Amendment may impose greater duties on the courts that oversee them.

As is evident in Grutter itself, an institution-sensitive approach to the First Amendment may favor granting greater rights to those institutions in some cases. For example, under the educational autonomy reading of Grutter, which is consistent with the argument in this Part, universities may be permitted greater latitude than other institutions to craft and to enforce campus speech codes. In other cases, the special social obligations of a particular institution may give it less latitude to speak than a private individual might possess. No one demands that the proverbial soap-box speaker limit himself to a particular subject. No university department should hesitate, however, to require a university lecturer to confine himself or herself to the subject at hand and to refrain from taking a chemistry lecture as an occasion to talk about neoliberalism. A court would hesitate long and hard before enforcing a seemingly gratuitous “contract” without clear promises or consideration on either side, but it might be more willing to find a legally enforceable contract where the agreement takes place within the journalist’s professional norm of honoring the confidentiality of sources. In short, if the gift of taking First Amendment institutions seriously is that those institutions have substantial latitude to live by their own norms, the cost of taking them seriously is that they may be held accountable for failing to live up to those norms.

The posture of deference that I have described above thus does not utterly liberate the courts from the obligation to give cases involving First Amendment institutions serious consideration. As the democratic experimentalists have observed, liberty to experiment means little without careful monitoring. If the courts are to defer to First Amendment institutions, they must take seriously the obligations that these institutions have to live up to their own norms.
Amendment institutions based substantially on their compliance with their own norms, values, and practices, they will have to educate themselves far more carefully about the shifting content of those norms, values, and practices. In each case, as Frederick Schauer observes, the Court will be required to “inquire much more deeply into the specific character of the institution, and the function it serves, than it has [so far] been willing to do.”

Looking back now at *Grutter* from that perspective, it is far from clear that the Court did a proper job of taking seriously the First Amendment institution at issue there: a university or a professional department within a university. Its discussion of the social role of universities, although more complete and sophisticated than much of the discussion the Court has offered in prior cases, still exists at a high level of generality. The decision contains no indication of how or whether the university’s democratic function, as the Court describes it, coexists with its truth-seeking function, or with still other social roles served by the university—and thus whether the social value of race-conscious admissions programs conflicts with the social value of any other functions served by the university. Similarly, *Grutter* contains no indication of whether the Court believes all higher education institutions serve, or ought to serve, roughly the same purposes, or whether there is room for as many conceptions of academic freedom as there are different kinds of higher educational institutions.

There are still further problems, less important for situations like *Grutter* that involve admissions decisions, but with great implications for future academic freedom cases. *Grutter* contains no discussion about the norms of professional responsibility that play such a large role in discussions about the scope of professional academic freedom. It is difficult to defer to an educational institution on the basis that it is acting according to a legitimate academic decision without some understanding of precisely what constitutes a legitimate academic decision. What if the decision to engage in seemingly preferential admissions had been arrived at by a professional university administrator without faculty input? What if it had been imposed on the university administration by the board of governors? What if it was a result of coercion by some outside group, such as the AAUP or the AALS? None of these questions are answered in the case.

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548 Schauer, supra note 32, at 116.

549 See Metzger, supra note 81, at 13 (describing the “notion that rights entail responsibilities, that academic freedom should be wedded to conscientious conduct, and all the other classic maxims of professionalism” in the academy).
Nor does Grutter discuss the implications of an institution-specific approach to academic freedom for other constituents in campus life—most notably, professors and students. As the discussion above indicates, that omission leaves room for a variety of potential implications for student speech, admissions policies, and other matters. What Grutter means for a university’s freedom to shape its policies with respect to religious speech, hate speech, on-campus recruiting, and other issues has much to do not only with the university administration, but also with the other stakeholders involved. If universities are a special creature of the First Amendment, that still begs the questions who gets to be counted as a member of the university community, and what it means to be a member of that community. These disputes between component parts of the university community—tenure disputes, disciplinary appeals, disputes over campus rules and regulations—are precisely the sorts of academic freedom issues that arise most often in the courts. Yet Grutter has nothing to say about them. Nor, given the context of the case, does it fully acknowledge that, under professional understandings of academic freedom, those rights carry significant responsibilities.\(^{550}\) Under an institution-sensitive approach to the First Amendment, a professor, in fact, might have far fewer speech rights than other citizens.\(^{551}\)

Perhaps, then, Professor Guinier is right to see in Grutter the opportunity for further public discussion concerning “more foundational concerns about the democratic purpose of higher education.”\(^{552}\) If Grutter truly presages a more institution-specific approach to the First Amendment, it certainly suggests that the Court will have much more careful work to do to elaborate the nature and scope of its approach and to tie that approach closely to the particular functions and norms of different institutions. There is, indeed, a need for further and more careful discussion.

In any event, whether the Court continues to stick to its generally neutral approach to particular speakers under the First Amendment or begins to pay more careful attention to speech acts by particular institutions, Grutter’s significance as a First Amendment decision should be clear. If it is true that “American free speech doctrine has never been comfortable distinguishing among institutions,”\(^{553}\) then Grutter represents a rare exception. Whether it is in fact a forerunner

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\(^{550}\) See generally Metzger, Profession and Constitution, supra note 46; Metzger, supra note 81.

\(^{551}\) See generally Rabban, Faculty Autonomy, supra note 46.

\(^{552}\) Guinier, supra note 411, at 120.

\(^{553}\) Schauer, supra note 32, at 84.
of similar approaches where other institutions are concerned, or simply the exception that proves the rule, remains to be seen.

One last question must be addressed. Thus far, I have bracketed the distinction between public universities, such as the University of Michigan, and private universities. There is, however, a crucial distinction between them: each lies on a different side of the public/private divide. Indeed, *Grutter* took on its constitutional character precisely because it involved a public university. It is widely recognized that, under current constitutional doctrine, private universities enjoy a far broader scope of freedom than public universities. What role, if any, should this distinction play in taking First Amendment institutions seriously? How important is it?

For a number of reasons, I want to suggest that the distinction is less important than it may seem initially. First, the legal landscape is far less clear in drawing a firm line between public and private universities than one might assume based on standard state action doctrine. This is so even if one sets aside arguments that private universities are entitled to be viewed as state actors because they fulfill a public function, receive significant public funding, or are intertwined with the affairs of the government. It remains true even if one ignores the web of quasi-constitutional civil rights laws and other statutory requirements that may place public and private universities under many of the same obligations. The reason the public-private distinction may be less important in this context stems from state law, not federal state action doctrine.

State law provides two reasons why it may make less sense to treat private universities as utterly distinct from public universities in their obligations to observe norms of free speech. First, a number of courts have held that private universities must honor at least some free speech norms under state constitutions or statutes. Thus, in the seminal 1980 case of *State v. Schmid*, the New Jersey Supreme Court reversed the conviction of a non-student for distributing leaflets without

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555 For an examination of these arguments, see Siegel, supra note 554, at 1382–87.


permission on the campus of Princeton University. To support its holding, the court relied on a then-recent U.S. Supreme Court case acknowledging that state constitutions could sweep more broadly in protecting free speech, even in the absence of state action.\textsuperscript{558} Analogizing to this precedent, the court held that the state’s constitutional protection of free speech could reach “unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property.”\textsuperscript{559}

Although this willingness on the part of state courts to reach private action under state constitutional free speech provisions is decidedly in the minority,\textsuperscript{560} New Jersey was not alone in this approach.\textsuperscript{561} State courts might also be more willing to apply their states’ constitutional free speech provisions to private colleges and universities than to the shopping malls and other private actors that normally figure in these cases. Other states, building on this foundation, thus have enacted statutes attempting to guarantee that at least some of the players in the academic community enjoy free speech rights on private campuses.\textsuperscript{562} Thus, under state law, some free speech arguments may be available to students even on private campuses.

If this discussion suggests that students may not be entirely differently situated depending on whether they attend a public or private institution, what of the institutions themselves? If they are not arms of the state, why should they be in the same position as public universities? Here, too, the state constitutional landscape goes some of the way toward narrowing the gap between public and private universities. Most state constitutions grant their public universities some degree of independent constitutional status.\textsuperscript{563} Michigan, to take an example

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\item\textsuperscript{558} See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80–81, 85–88 (1980).
\item\textsuperscript{559} See Schmid, 423 A.2d at 628. For commentary, see Finkin, supra note 143; Comment, Testing the Limits of Academic Freedom, 130 U. Pa. L. Rev. 712, 712–18 (1982).
\item\textsuperscript{560} See 1 Jennifer Friesen, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 9-3, at 9-16 to 9-22 (3d ed. 2000).
\item\textsuperscript{561} See Commonwealth v. Tate, 432 A.2d 1382, 1387–91 (Pa. 1981) (applying state free speech provision to Muhlenberg College, a private institution).
\item\textsuperscript{562} See, e.g., CAL. EDUC. CODE § 94367 (West 2002 & Supp. 2005); Arthur L. Coleman & Jonathan R. Alger, Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses, 23 J.C. & U.L. 91, 93 n.6 (1996). Whether such statutes are themselves constitutional, however, is an open question. See Byrne, supra note 20, at 174 n.171.
\item\textsuperscript{563} See, e.g., John A. Beach, The Management and Governance of Academic Institutions, 12 J.C. & U.L. 301, 310 n.34 (1985); Joseph Beckham, Reasonable Independence for Public Educa-
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close to the heart of Grutter, states in its constitution that the Board of Regents of the University of Michigan has “general supervision of the institution and the control and direction of all expenditures from the institution’s funds.”\textsuperscript{564} This provision has been interpreted as granting the university a general right against state interference in academic affairs.\textsuperscript{565} Thus, public universities are already in an odd position with respect to state action doctrine—part of the state for some constitutional purposes, but separate from it for others.\textsuperscript{566} As Professor Byrne notes, “[a] state university is a unique state entity in that it enjoys federal constitutional rights against the state itself.”\textsuperscript{567}

These unusual features of state law suggest that the public-private distinction is in some ways less important than outside observers might assume. I want to suggest, however, two additional reasons, linked less to existing law than to the potential of Grutter’s First Amendment, why the public-private distinction does not present a significant factor in taking First Amendment institutions seriously, at least with respect to universities. First, concerns about the public-private distinction in the university context normally concern the opposite problem. They involve questions of whether stakeholders within the private university community, such as professors or students, enjoy fewer rights than do their counterparts at public universities.\textsuperscript{568} Here, however, I have suggested that Grutter’s reading of the First Amend-

\textsuperscript{564} Mich. Const. art. VIII, § 5. For discussion of the effect this fact might have had on the Grutter litigation, see Evan Caminker, A Glimpse Behind and Beyond Grutter, 48 St. Louis U. L.J. 889, 892–93 (2004).

\textsuperscript{565} See Byrne, supra note 17, at 327.


\textsuperscript{567} Byrne, supra note 17, at 300; see Hopwood v. Texas, 78 F.3d 932, 943 n.25 (5th Cir. 1996) (“Saying that a university has a First Amendment interest in [academic freedom] is somewhat troubling. Both the medical school in Regents of the University of California v. Bakke and, in our case, the law school are state institutions. The First Amendment generally protects citizens from the actions of government, not government from its citizens.”).

\textsuperscript{568} See, e.g., Olivas, supra note 554, at 1836–37.
ment guarantees academic institutions as a whole a substantial right of autonomy from governmental interference. Thus, Grutter’s First Amendment does not require us to transport First Amendment norms to the private sector, a phenomenon whose problems were so richly discussed by Julian Eule,\textsuperscript{569} but to incorporate private sector norms into the First Amendment. What implications this trend might have for student and faculty rights are, as I noted above, unclear at this point. For now, what is clear is that taking First Amendment institutions seriously demands giving public universities more freedom from government interference, and so brings the legal status of private and public universities closer together.

Second, as I have argued, taking First Amendment institutions seriously demands that we take them seriously as institutions. This point is particularly clear where the institution, like the Law School, is a public one, which might be judged according to the standards generally applicable to other state actors or which might be judged according to the purposes and norms of the particular kind of institution it happens to be.\textsuperscript{570} Ultimately, it mattered less to the Supreme Court in Grutter that the Law School was a public institution, although that fact brought the case within the scope of the Fourteenth Amendment. The Court certainly did not treat the Law School as occupying a precisely similar position when considering affirmative action policies as any other government actor would. Rather, what mattered to the court was the nature of the institution. It was a university, engaged in legitimate academic decision making. That fact insulated it considerably from the rigors of constitutional strict scrutiny.

This approach need not be, and is not, limited to universities alone. As we have seen, when it came time to apply standard public forum doctrine to another “government” actor—the Arkansas public broadcaster in Forbes—the Court balked. It instead preferred to focus on the institutional aspects and professional norms of the entity qua media organization.\textsuperscript{571} Again, what mattered to the Court was the institutional status of the government entity rather than its public status.

In short, when we take First Amendment institutions seriously, it is less important to ask whether a particular institution is public or private. Instead, we should be asking whether a particular institution, be it public or private, is “the university,” or “the newspaper,” or some

\textsuperscript{569} See generally Julian N. Eule & Jonathan D. Varat, Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse, 45 UCLA L. Rev. 1537 (1998).

\textsuperscript{570} See Schauer, supra note 32, at 116.

\textsuperscript{571} See Forbes, 523 U.S. at 672–75.
other category of speaker.\textsuperscript{572} Regardless of their public or private status, these institutions operate “within a specialized professional culture” whose features are more salient to understanding their role and function than the source of their funds.\textsuperscript{573}

The Court’s First Amendment approach does not yet fully appreciate and incorporate these distinctions among institutions.\textsuperscript{574} Yet, as cases like \textit{Grutter}, \textit{American Library Ass’n}, \textit{Finley}, and \textit{Forbes} illustrate, neither is the Court entirely comfortable with the application of standard, one-size-fits-all First Amendment doctrine to these institutions. The institution-sensitive reading of the First Amendment that I have advanced here suggests that the Court’s reluctance to apply standard doctrinal tests is well founded, and that the most salient consideration in these cases should be the nature of the institution and its role in strengthening public discourse. Thus, the public-private distinction, although not irrelevant, may fade into the background in many cases. At the very least, it should be less relevant in cases involving conflicts between the institution (whether public or private) and the state, although its relevance for cases involving intramural disputes is still uncertain.\textsuperscript{575}

\section*{Conclusion}

As I said at the outset of this Article, there will be more than enough discussion of the important Fourteenth Amendment implications of \textit{Grutter v. Bollinger}. This Article has suggested that something more is needed. Serious attention must be paid to the First Amendment implications of \textit{Grutter}.


\textsuperscript{574} See Post, supra note 486, at 1273. Professor Post writes that all legal values are rooted in the experiences associated with local and specific kinds of social practices. Because law is ultimately a form of governance, it does not deal with values as merely abstract ideas or principles. . . . The most general objection to any single free speech principle is that speech makes possible a world of complex and diverse social practices precisely because it becomes integrated into and constitutive of these different practices; it therefore assumes the diverse constitutional values of these distinct practices.

\textsuperscript{575} See generally Finkin, supra note 143.
This Article has offered three potential readings of \textit{Grutter}'s First Amendment implications. First, the case may be read simply as counseling a broad degree of deference to academic decisions made by \textit{educational} institutions. This reading says little about the implications of the case beyond that narrow set of circumstances. Even within this confined field, however, I have suggested that an institutional autonomy approach to academic freedom could question or upset a number of settled First Amendment cases, and point toward surprising results in a number of cases in the future. Second, \textit{Grutter} might be read as advancing a particular \textit{substantive} vision of education as a democratic good, and perhaps by extension a particular substantive vision of the First Amendment as a whole. This reading is fraught with even greater problems. It sits uneasily with the Court’s approach elsewhere in First Amendment jurisprudence, and it fails to acknowledge the difficulty in enshrining in the First Amendment any particular vision of education or academic freedom when those values are deeply contested outside the courts, in the very communities at issue.

Finally, and most intriguingly, \textit{Grutter}'s First Amendment can be read as a First Amendment that finally and fully takes First Amendment institutions seriously. This reading counsels a particular sort of deference to a wider range of institutions than universities alone. It suggests that the Court ought to recognize the unique social role played by a variety of institutions whose contributions to public discourse play a fundamental role in our system of free speech. Equally, it suggests that the Court ought to attend to the unique social practices of these institutions, allowing the scope of its deference to be guided over time by the changing norms and values of those institutions. In this way, taking First Amendment institutions seriously may be one method of recognizing and incorporating into First Amendment jurisprudence a concern for the varied and particular social domains in which speech occurs. Just as important, this approach acknowledges that constitutional law is not the sole preserve of the courts. It is a shared activity, in which legal and nonlegal institutions alike are engaged in a cooperative attempt to build a constitutional culture that is responsive to the real world of free speech.

Whether \textit{Grutter}'s discussion of the First Amendment proves to be long-lasting, or merely a ticket good for one day and one trip only, these readings of \textit{Grutter}'s First Amendment demonstrate that it richly deserves to be read and considered for all it is worth. It deserves to be treated as an invitation to ponder a First Amendment that gives full consideration to the unique role played by various First Amendment institutions—universities, libraries, private associations, the media,
religious groups—and that allows them to flourish and to develop their own norms and rules without fitting into a preconceived, generally applicable, sometimes ill-suited legal framework. Moreover, it deserves consideration because the limits and implications of that approach are still unclear.

I close with a simple plea. Grutter will obviously have its day under the microscope of the Fourteenth Amendment scholars. It would be a great shame, however, if First Amendment scholars, casebook editors, treatise writers, and other gatekeepers of the First Amendment canon give Grutter the same treatment they have accorded Bakke and relegate it to the footnotes, or ignore it altogether. Grutter has not yet earned its place in the First Amendment canon, but it is surely knocking at the door.
Abstract: The Individuals with Disabilities in Education Act (the “IDEA”) is a broad federal mandate intended to make a “free appropriate public education” available to all disabled students. More importantly, however, the IDEA encourages schools to enable parents to collaborate with their child’s educators. In the event that parents and educators disagree about a child’s educational plan, the IDEA channels this conflict through an administrative appeals process. But despite the fact that the IDEA’s due process hearing is one of its most prominent procedural safeguards, the IDEA fails to specify which party bears the burden of proof during the proceedings. The existing conflict of authority regarding the allocation of the burden of proof at due process hearings must be resolved in order achieve the IDEA’s mandate. A modified burden-shifting scheme would best mirror the IDEA’s delicate balancing of the rights of disabled children and the need to impose a realistic mandate on school districts.

Introduction

Originally enacted in 1975, the Individuals with Disabilities in Education Act (the “IDEA”) created a broad federal mandate to make “a free appropriate public education” available to every disabled student.1 To this end, the IDEA allocates federal funding to state educational agencies, contingent upon their schools’ compliance with nu-
merous statutory requirements. More importantly, however, the IDEA contemplates a process whereby schools enable parents to collaborate with their child’s educators to better serve their child’s needs. Thus, one of the IDEA’s central requirements is that recipient schools develop an individualized education program (an “IEP”) for each disabled student. Essentially, an IEP is a written plan detailing how the school intends to provide the student with the IDEA’s required “free appropriate public education” (“FAPE”).

Ideally, the IEP represents the product of a cooperative process between the school and the student’s parent(s). Nevertheless, as a significant volume of litigation attests, the IEP process can produce vigorous conflicts between school officials and parents. The circumstances of one recent case are particularly illustrative. In the year approaching his entry into eighth grade, the parents of Brian S. sought to have his eligibility for special education services evaluated by a local public middle school. Brian had been diagnosed with Attention Deficit Hyperactivity Disorder and learning disabilities. After an initial evaluation, the school issued an IEP, which proposed that Brian be enrolled in special education classes and receive speech therapy. After Brian’s parents expressed their concern with the school’s class sizes, the committee modified the plan to permit Brian to receive the

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3 See id. § 1414(b).
4 Id. § 1414(d).
5 See id. §§ 1400(d)(1)(A), 1414(d). One of the most important requirements of the IDEA, the IEP is an educational roadmap, as it details the student’s present level of functioning and sets out both long- and short-term educational objectives. Id. § 1414(d); see Barbara J. Morgan, Case Comment, Burden of Proof—A School Board Bears the Burden of Proving That the Education of a Handicapped Child Is “Appropriate” Under the Education for All Handicapped Children Act of 1975: Lascari v. Board of Education of Ramapo Indian Hills Regional High School District, 116 N.J. 30, 560 A.2d 1180 (1989), 22 Rutgers L.J. 273, 278 (1990). The IDEA’s FAPE mandate has been interpreted to require that the local education agency provide the student with “some educational benefit,” simply a “basic floor of opportunity.” Bd. of Educ. v. Rowley, 458 U.S. 176, 189–201 (1982). Thus, the IDEA does not affirmatively require U.S. public schools to provide handicapped students with educational programs designed to maximize their educational potential. See id. at 198.
7 Judith DeBerry, When Parents and Educators Clash: Are Special Education Students Entitled to a Cadillac Education?, 34 St. Mary’s L.J. 503, 504–05 (2003).
9 Id. at 450.
10 Id. Until that time, Brian had attended a local private school. Id.
11 Id. at 450–51.
same services at another school within the system in smaller classes.\(^\text{12}\) Despite this proposed modification, Brian’s parents rejected the IEP and chose to enroll him in a private school.\(^\text{13}\)

The IDEA channels this type of parent-educator conflict through an administrative appeals process, one of its most prominent procedural safeguards.\(^\text{14}\) But despite the IDEA’s otherwise specific procedures, it is silent on a crucial threshold issue—specification of the burden of proof borne by each party at its initial administrative due process hearing.\(^\text{15}\) This omission introduces an awkward tension, because the IDEA outlines extremely specific due process provisions yet fails to specify the burden of proof for the administrative and court proceedings those provisions create.\(^\text{16}\) In Brian’s case, this issue stimulated a lengthy series of appeals concerning which party is to bear the burden of proof at administrative due process hearings under the IDEA.\(^\text{17}\)

In July 2004, the U.S. Court of Appeals for the Fourth Circuit resolved Brian’s case by allocating the burden of proof to the parents as the party challenging the school’s IEP.\(^\text{18}\) In doing so, the court widened the existing split among the federal circuit courts of appeals regarding the proper allocation of the burden of proof at this stage in the IDEA appeals process.\(^\text{19}\) Relying on a theory of implied legislative

\(^{12}\) Id.

\(^{13}\) \textit{Weast}, 377 F.3d at 451.


\(^{15}\) See Thomas F. Guernsey, \textit{When the Teachers and Parents Can’t Agree, Who Really Decides? Burdens of Proof and Standards of Review Under the Education for All Handicapped Children Act}, 36 Clev. St. L. Rev. 67, 72 (1987–1988). In outlining its impartial due process hearing and administrative procedures, the IDEA does not make reference to the burden of proof at the due process hearing. See 20 U.S.C. § 1415. In describing the parent’s right to bring a civil action to enforce the IDEA’s requirements, the IDEA only provides for the standard of review that governs at appeals beyond the initial due process hearing, which is a preponderance of the evidence standard. \textit{Id.} § 1415(i)(2)(B)(iii). Given the IDEA’s procedural complexity, this Note confines its analysis to the allocation of the burden of proof at due process hearings under the IDEA. See \textit{id.} § 1415; \textit{see infra} notes 56–70 and accompanying text.

\(^{16}\) See Guernsey, \textit{supra} note 15, at 68–69.

\(^{17}\) See \textit{Weast}, 377 F.3d at 451–52.

\(^{18}\) \textit{Id.} at 456.

\(^{19}\) See \textit{id.}; see also Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1291–92 (11th Cir. 2001); Renner v. Bd. of Educ., 185 F.3d 635, 642 (6th Cir. 1999); Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998); E.S. v. Indep. Sch. Dist., 135 F.3d 566, 569 (8th Cir. 1998); Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1398–99 (9th Cir. 1994); Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1034–35 (3d Cir. 1993); Johnson v. Indep. Sch. Dist., 921 F.2d 1022, 1026 (10th Cir. 1990); Doe v. Defendant I, 898 F.2d 1186,
intent and emphasizing the school district’s greater experience and resources, the U.S. Courts of Appeals for the Second, Third, Eighth, and Ninth Circuits allocate the burden of proof to the school district to defend its IEP’s adequacy. Declining to venture beyond traditional evidentiary doctrine without a firmer congressional mandate, the U.S. Courts of Appeals for the First, Fourth, Fifth, Sixth, Tenth, and Eleventh Circuits allocate the burden to the party that challenges the IEP or seeks to change the status quo, typically the parent.

Resolution of this issue is necessary for the IDEA’s continued effectiveness because the due process hearing is among its most fundamental procedural safeguards. At these hearings, the allocation of the burden of proof often determines the outcome, especially when the proceedings involve closely contested battles of expert testimony regarding the student’s needs. But foremost, the IDEA’s procedural and substantive requirements must complement each other in order for the statute to serve as an effective mandate. By granting disabled students the right to a “free appropriate public education” supported by procedural safeguards, the IDEA struck a delicate balance between protecting the rights of disabled children and imposing realistic obligations on school districts. This Note argues that the allocation of the burden of

1191 (6th Cir. 1990); Doe v. Brookline Sch. Comm., 722 F.2d 910, 917 (1st Cir. 1983); Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983).

20 Walczak, 142 F.3d at 122; E.S., 135 F.3d at 569; Clyde K., 35 F.3d at 1398–99; Fuhrmann, 993 F.2d at 1034–35.

21 Weast, 377 F.3d at 456; Devine, 249 F.3d at 1291–92; Renner, 185 F.3d at 642; Johnson, 921 F.2d at 1026; Doe v. Defendant I, 898 F.2d at 1191; Doe v. Brookline Sch. Comm., 722 F.2d at 917; Tatro, 703 F.2d at 830. Although in most cases the party challenging the status quo will be the student’s parent, in some instances it is possible that the school district will assume the position of the challenging party. See Tatro, 703 F.2d at 830–31.

22 See Rebecca Weber Goldman, Comment, A Free Appropriate Education in the Least Restrictive Environment: Promises Made, Promises Broken by the Individuals with Disabilities Education Act, 20 U. DAYTON L. REV. 243, 280–81 (1994). The due process hearing is essential because it represents the primary mechanism by which parents can enforce a school’s statutory obligation to provide their student with a FAPE. See Guernsey, supra note 15, at 70–71; Goldman, supra, at 280–81.

23 See Guernsey, supra note 15, at 68 (observing that the burden of proof significantly influences the outcome of due process hearings); Elizabeth L. Anstaett, Note, Burden of Proof Under the Education for All Handicapped Children Act, 51 OHIO ST. L.J. 759, 759 (1990) (explaining that the allocation of the burden of proof can determine the outcome of a hearing because educational placements are the subject of expert disagreement); Rachel Ratcliff Womack, Comment, Autism and the Individuals with Disabilities Education Act: Are Autistic Children Receiving Appropriate Treatment in Our Schools?, 34 TEX. TECH. L. REV. 189, 192–93 (2002).

24 See Daniel & Coriell, supra note 6, at 594.

proof at IDEA due process hearings should achieve this same balance. Specifically, a proper allocation would still impose the evidentiary onus on the plaintiff but would also incorporate burden-shifting to level the evidentiary playing field between school districts and parents.

Part I of this Note traces the origin and evolution of the IDEA’s various safeguards. It focuses on the two federal district court cases that gave rise to the IDEA and how they allocated the burden of proof at the initial administrative hearing. Part I also reviews the IDEA’s procedural safeguards to highlight their extensive commitment to due process. Part II details the debate among the federal circuit courts of appeals and scholars that have addressed the allocation of the burden of proof at IDEA due process hearings. Part II.A presents the rationales of the federal circuit courts of appeals that allocate the burden to the local education agency. Part II.B presents the rationales of those circuits that allocate the burden to the challenging party. Part II.C outlines the major scholarly proposals for possible allocations. Finally, Part III presents a proposal for resolving this conflict that is most consistent with the IDEA’s statutory framework.

I. The IDEA’s Procedural Safeguards in Perspective

Two federal district court cases preceded the enactment of the IDEA in 1975. In 1972, in Pennsylvania Ass’n for Retarded Children v. Pennsylvania (PARC), the United States District Court for the Eastern District of Pennsylvania became the first federal court to hold that handicapped students possess a right to a free public education that cannot be denied without due process. The United States District Court for the District of Columbia reached a similar conclusion in 1972

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26 See infra notes 195–207 and accompanying text.
27 See infra notes 195–207 and accompanying text.
28 See infra notes 36–75 and accompanying text.
29 See infra notes 36–54 and accompanying text.
30 See infra notes 55–75 and accompanying text.
31 See infra notes 76–187 and accompanying text.
32 See infra notes 88–107 and accompanying text.
33 See infra notes 108–140 and accompanying text.
34 See infra notes 141–187 and accompanying text.
35 See infra notes 203–219 and accompanying text.
in *Mills v. Board of Education*. Before these decisions brought the needs of disabled children to Congress’s attention, the U.S. public education system systemically underserved and excluded such students. The allocation of the burden of proof in these cases remains relevant because the IDEA ultimately reflected much of *PARC* and *Mills*.

In *Mills* and *PARC*, classes of handicapped students sought declaratory and injunctive relief to obtain a public education. Once the defendant’s liability had been established in each case, the district courts oversaw the fashioning of judgment orders to integrate handicapped children into the public education system and prevent their future exclusion. *PARC*’s Amended Stipulation and the *Mills* Judgment Decree both outline many procedural protections that the IDEA later incorporated. For example, both orders mandated a due process hearing and detailed its procedures with specificity.

The *PARC* order addressed at some length the evidentiary standards for the due process hearing it mandated. First, it required substantial evidence to support a proposed change in any handicapped student’s status. More importantly, however, it provided that the school district’s production of an official report would “discharge its burden of going forward with the evidence.” Further, the order

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38 See 348 F. Supp. at 873–76.
39 See 20 U.S.C. § 1400(c) (2) (A)–(E) (2000). Notably, the congressional findings codified in the IDEA state that prior to its enactment, one million American children with disabilities were entirely excluded from public schools. Id. § 1400(c) (2) (C); see DeBerry, supra note 7, at 508–09.
43 See *Mills*, 348 F. Supp. at 877–83; *PARC*, 343 F. Supp. at 302–06. See generally 20 U.S.C. § 1415 (outlining procedural safeguards). Like the IDEA, the *Mills* Judgment Decree required school districts to formulate educational proposals for each student. 20 U.S.C. § 1414(d) (2); 348 F. Supp. at 879. Similarly, *Mills* also required schools to send a procedural safeguards notice, informing parents of their appeal rights in the event of a dispute. See 20 U.S.C. § 1415 (d) (2) (j); 348 F. Supp. at 879. *Mills*’ hearing procedures, including its provisions regarding the contents of the safeguards notice, the parent’s right to counsel, and the impartiality of the hearing officer, are largely similar to those of the IDEA. See 20 U.S.C. § 1415(f); 348 F. Supp. at 880–83. *PARC*’s Amended Stipulation contains highly similar safeguards to those found both in *Mills* and in the current IDEA. See 20 U.S.C. § 1415(f); 348 F. Supp. at 880–83; *PARC*, 343 F. Supp. at 303–06.
45 343 F. Supp. at 305.
46 Id.
47 Id. This language appears to refer to the burden of producing evidence. See CHARLES MCCORMICK, MCCORMICK ON EVIDENCE § 336 (John W. Strong ed., West 5th ed. 1999).
stated that upon the school district’s production of such a report, the parent would be required to introduce evidence to support his or her position. Thus, insofar as the burden of production was concerned, the PARC order contemplated a burden-shifting scheme in which the school district and then the parents would be required to offer evidence. Though the PARC order failed to specify which party was to bear the ultimate burden of persuading the trier of fact, at least one court has read its allocation to indicate that this ultimate burden would rest with the school district.

An equivalent portion of the Mills order also addresses the allocation of the burden of proof. In outlining hearing procedures, the Mills court required the school district to bear the burden of proof regarding any educational placement, denial, or transfer at issue in the hearing. In sum, both of these common law predecessors to the IDEA allocated at least the initial burden of producing evidence to the educational agency rather than to the challenging party. Moreover, the Mills court explicitly assigned both the burden of production and the burden of persuasion to the school district.

The IDEA grafted many of Mills and PARC’s proposed procedural safeguards to ensure that the rights of students and their parents would be adequately protected. On the whole, these safeguards focus on two important areas. First, they ensure schools’ procedural compliance in identifying and formulating IEPs for disabled students. Second, they provide a dispute resolution mechanism to address any conflicts that emerge during the IEP process—the due process hearing. As an ini-

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48 PARC, 343 F. Supp. at 305.
49 See id.
50 Weast v. Schaffer, 377 F.3d 449, 455 (4th Cir. 2004), cert. granted, 125 S. Ct. 1300 (2005); see PARC, 343 F. Supp. at 305.
52 See id. at 881.
53 See id.; PARC, 343 F. Supp. at 305.
54 See Mills, 348 F. Supp. at 881.
55 See 20 U.S.C. § 1400(d) (1) (b) (2000); see also id. § 1415 (codifying procedural safeguards); supra note 43 and accompanying text (detailing the IDEA’s codification of its case law predecessors’ safeguards).
57 See id. §§ 1415(d) (mandating that school district issue a “procedural safeguards notice” upon the student’s initial referral), id. § 1415(b)(1) (requiring school district to allow parent to participate in all meetings regarding the student’s educational placement); id. § 1415(b)(3) (requiring school district to provide parent with written notice regarding changes to the student’s IEP).
58 See id. § 1415(e) (authorizing state and local educational agencies to provide mediation services to parents); id. § 1415(f) (outlining “impartial due process hearing” and its
tional step, the IDEA requires that a “procedural safeguards notice” be provided to the parent upon the student’s initial referral for evaluation. This notice must contain a full, plain language explanation of the student’s rights.

Once the student is evaluated, the parent retains the right to participate in all meetings regarding the child’s placement or services. In addition, parents are entitled to receive prior written notice whenever the school proposes to change the student’s IEP or refuses to accommodate a request for a change. Furthermore, parents are able to obtain a free independent educational evaluation of their child, and they are entitled to examine all their child’s records. Beyond these procedural mechanisms, the IDEA also authorizes funding for information centers designed to assist parents in learning about how the statute might accommodate their child’s needs.

Should a dispute arise during the IEP process, parents can request an impartial due process hearing. Upon the filing of a hearing request, the school must offer parents the option of free mediation, and it must also notify them of any available community services that might assist them. If the hearing proceeds, the IDEA requires the disclosure of any evaluations between the parties at least five days prior to the hearing date. At the hearing, parents may be represented by counsel and have the right to present evidence, confront witnesses, and obtain findings of fact. Though the hearing decision is enforceable against the parties, either party can appeal the outcome by bringing a civil ac-

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59 See id. § 1415(d).
60 See id.
62 Id. § 1415(b)(3). Among other requirements, such notices must contain a description of the action proposed or refused, the school’s justification for the action, and a statement relating the IDEA’s procedural safeguards. Id. § 1415(c)(1)–(7).
63 Id. § 1415(b)(1).
64 Id. § 1482.
65 Id. § 1415(f)–(g). This provision allows a state to elect to have either a one- or two-tiered administrative appeals structure. See id. The due process hearing may be conducted by either the local or state educational agency, as determined by either state law or by the policy of the state agency. Id. § 1415(f). Thus, a state can elect to have a single hearing conducted by either the local or state educational agency, or two hearings—one at the local level and then a second at the state level. See id.
67 Id. § 1415(f)(2).
68 Id. § 1415(h).
tion in either state or federal court. Prevailing parents are entitled to petition for an award of reasonable attorneys' fees.

In contrast to both Mills and PARC's procedural provisions, the IDEA fails to address the burden of proof at the due process hearing. This omission gives rise to a question of statutory interpretation: does the IDEA express an implied congressional intent to incorporate the type of allocation to the school district outlined by Mills and PARC? Or should the IDEA's silence be interpreted to express an adherence to a traditional allocation of the burden of proof? In requiring the plaintiff, typically the parent, to bear the burden of proof, one group of federal circuit courts of appeals emphasizes traditional evidentiary principles and limits its statutory inquiry to Congress's express intent. In assigning the burden of proof to the school district, the remaining circuits rely on an implicit reading of Congress's intent and find that policy considerations warrant a departure from the traditional allocation of the burden of proof.

II. DIVERGENT READINGS OF THE IDEA'S LEGISLATIVE INTENT AND THE PROPER ROLE OF TRADITIONAL EVIDENTIARY PRINCIPLES AMONG THE FEDERAL CIRCUIT COURTS OF APPEALS

What most courts and scholars refer to as the “burden of proof” actually encompasses two burdens. First is the burden of produc-

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69 Id. § 1415 (i) (2) (A).
70 Id. § 1415(i) (3) (B).
74 See Weast, 377 F.3d at 456; Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1291–92 (11th Cir. 2001); Renner v. Bd. of Educ., 185 F.3d 635, 642 (6th Cir. 1999); Johnson v. Indep. Sch. Dist., 921 F.2d 1022, 1026 (10th Cir. 1990); Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990); Doe v. Brookline Sch. Comm., 722 F.2d 910, 917 (1st Cir. 1983); Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983).
75 See Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998); E.S. v. Indep. Sch. Dist., 135 F.3d 566, 569 (8th Cir. 1998); Clyde K. v. Puyallup Sch. Dist., 35 F.3d 1396, 1398–99 (9th Cir. 1994); Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1034–35 (3d Cir. 1993).
76 McCormick, supra note 47, § 336. Typically there is a relationship between the two burdens because the party charged with the burden of production usually assumes the burden of persuasion as well. See id. § 337. In addition, the burden of persuasion is often more determinative because it is the ultimate evidentiary burden and has a critical impact in cases “where the trier of fact is actually in doubt.” Id. § 336. The burden of proof, however, is an ambiguous term. See id. Given the ultimate significance of the burden of persuasion, many references to the “burden of proof” can be read to refer primarily to the bur-
tion, or the burden of bringing forth sufficient evidence regarding a fact at issue.\textsuperscript{77} Second is the burden of persuasion, or the ultimate burden of convincing the fact finder in satisfaction of the applicable standard of proof.\textsuperscript{78} Under traditional evidentiary doctrine, courts allocate both the burden of production and the burden of persuasion to the plaintiff.\textsuperscript{79} The rationale is that the plaintiff is the one seeking to change the present state of affairs and thus is the most logical party to risk a failure of proof.\textsuperscript{80}

Nevertheless, there is no hard and fast rule governing the allocation of the burden of proof.\textsuperscript{81} Fairness, convenience, or other policy considerations can justify a nontraditional allocation, that is, an assignment of the burden to the defendant.\textsuperscript{82} Consequently, the IDEA’s silence as to which party should bear the burden of proof at its due process hearings provokes a central question: do special considerations justify a nontraditional allocation of the burden of proof to the school district?\textsuperscript{83} In formulating a response to this question, the federal circuit courts of appeals rely on divergent sources.\textsuperscript{84} Some circuits stress school districts’ affirmative obligations to students under the IDEA and present fairness arguments regarding the parties’ respective advantages as IDEA litigants.\textsuperscript{85} Others reaffirm a traditional allocation by strictly construing the IDEA’s legislative intent and empha-

\textsuperscript{77} McCormick, supra note 47, § 336.

\textsuperscript{78} Id.

\textsuperscript{79} See id. § 337.

\textsuperscript{80} See id.

\textsuperscript{81} See id. Professor J.H. Wigmore’s treatise states that “[t]he truth is that there is not and cannot be any one general solvent for all cases. It is merely a question of policy and fairness based on experience in the different situations.” Wigmore, supra note 76, § 2486.

\textsuperscript{82} See McCormick, supra note 47, § 337. In addition, although it is most natural to place the burden on the party who urges change, it can also be appropriate under certain circumstances to impose the burden of proof on a party when the facts with regard to a certain issue lie particularly within that party’s knowledge. See id. According to Professor Charles McCormick, this proposition is a near-exception to the traditional rule. Id. Nevertheless, a party can still be required to plead and prove matters in circumstances where the opposing party retains the relevant proof. Id. Additionally, it may be warranted under certain circumstances to allocate the two evidentiary burdens to different parties or to shift the burdens. Id.

\textsuperscript{83} See McCormick, supra note 47, § 337.

\textsuperscript{84} See Weast v. Schaffer, 377 F.3d 449, 452–53 (4th Cir. 2004), cert. granted, 125 S. Ct. 1300 (2005) (relying on traditional evidentiary doctrine and a narrow construction of Congress’s legislative intent); Oberti v. Bd. of Educ., 995 F.2d 1204, 1207, 1218–20 (3d Cir. 1993) (emphasizing the IDEA’s remedial purpose); Tatro v. Texas, 703 F.2d 823, 830 (5th Cir. 1983) (focusing on the IEP’s central role and the issue of fairness).

\textsuperscript{85} See, e.g., Oberti, 995 F.2d at 1218–20.
sizing the protection already afforded by its procedural safeguards. The following discussion outlines these arguments along with leading scholarly responses to this issue.

A. The Primacy of Policy Considerations Among Federal Circuit Courts of Appeals Allocating the Burden of Proof to the Local Educational Agency

Several federal circuit courts of appeals have simply declared that they adhere to the rule that the school system must bear the burden of proving its IEP’s adequacy at the due process hearing. Among the courts that do so, the U.S. Court of Appeals for the Third Circuit provides the clearest rationale. In developing its rationale, the Third Circuit relied in part on a 1989 New Jersey Supreme Court decision that first considered the issue, *Lascari v. Board of Education*. *Lascari* allocated the burden of proof to the school district because the IDEA charges it with the responsibility for implementing IEPs. According to the *Lascari* court, this allocation was most consistent with the IDEA’s extensive procedural safeguards and also with the evidentiary consideration that the burden of proof should be placed on the party best able to meet it. Additionally, the court stressed that school districts had educational experts at their disposal, already possessed the child’s records, and would be more familiar with the applicable state and federal law.

In sum, the Third Circuit requires the school district to bear the burden of showing that its placement is appropriate, regardless of whether the school district or the parent is the party seeking change. For this circuit, the affirmative nature of the IDEA’s obligations for school districts adequately justifies assigning them the bur-
den of proof. In addition, the Third Circuit relies on a related evidentiary argument, holding that fairness requires the school district to bear the risk of a failure of proof because it has superior access to the necessary evidence and a greater capability to explain that evidence’s relevance. Subsequently, the Third Circuit has applied its adoption of Lascari’s reasoning in a series of cases that affirmed an overriding concern for the welfare of handicapped children.

For example, in 1993 in Oberti v. Board of Education, the Third Circuit held that the school district should bear the burden of proof at both the due process hearing and at the district court level under the IDEA. In doing so, the court found that requiring parents to prove that the school district has failed to comply with the IDEA would undermine its explicit desire to protect disabled children’s rights. The court stated that imposing such a burden on the parent would diminish judicial enforcement of the IDEA’s requirements. Finally, in citing a study that found parents are at a general disadvantage in IDEA disputes because they usually lack the specific expertise of their child’s educators, the court emphasized the school district’s practical advantage in IDEA litigation.

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95 See Carlisle, 62 F.3d at 533; Oberti, 995 F.2d at 1207, 1218–20; Fuhrmann, 993 F.2d at 1034–35.
96 See Fuhrmann, 993 F.2d at 1034–35; Lascari, 560 A.2d at 1187–88.
97 See Carlisle, 62 F.3d at 533; Oberti, 995 F.2d at 1207, 1218–20.
98 995 F.2d at 1207, 1218–20. It is important to note, however, that an argument can be made that Oberti’s holding only pertains to the allocation of the burden of proof for a specific type of IDEA claim. See id. Rather than concluding that the school district must always bear the burden of proving its compliance with the IDEA, the court implied that the school simply bears the burden of proving its compliance with the IDEA’s mainstreaming requirement. Id. at 1207, 1219. Essentially, the IDEA requires that children with disabilities be educated in the “least restrictive environment,” meaning that they are to be educated in settings that include nondisabled students wherever possible. 20 U.S.C. § 1412(5)(a) (2000). Thus, the IDEA articulates a strong preference for mainstreaming, that is, for educating disabled students in settings where they are able to benefit from interaction with their nondisabled peers. See id. In Oberti, for instance, the parents alleged that the school district violated the IDEA by placing their son in a segregated special education class due to his disruptive behavior. 995 F.2d at 1206, 1208. The Third Circuit concluded that the IDEA’s strong presumption for mainstreaming would be contradicted if the burden of proof was imposed on the parents for mainstreaming claims. Id. at 1219. The court reasoned that to do so would effectively require parents to prove their child should be included in a less restrictive environment, which is plainly inconsistent with the IDEA’s explicit preference for mainstreaming. See 20 U.S.C. § 1412(5)(a); Oberti, 995 F.2d at 1219.
99 Oberti, 995 F.2d at 1219.
100 Id.
101 Id.
The Third Circuit further refined its position in 1995, in *Carlisle Area School v. Scott P.*[^102] In *Carlisle*, the court refused to assign the burden of proof to school districts for claims involving “mainstreaming,” which the IDEA explicitly prefers.[^103] Instead, the *Carlisle* court held that the school district should not be required to bear the burden of proof when it advocates for a less restrictive placement.[^104] Addressing the burden of proof more generally, the court stated that although the school district is required to prove affirmatively the appropriateness of its own IEP, it is not required to prove the inappropriateness of an alternate plan that a parent proposed.[^105] The court observed that this type of requirement would impose too substantial of a burden on the school district.[^106] Hence, although in *Carlisle* the Third Circuit recognized a narrow limitation to its allocation, the court still ultimately affirmed its position that the IDEA’s affirmative obligations justify a nontraditional allocation of the burden of proof to the school districts.[^107]

B. *Siding with the Status Quo: The Reliance on Traditional Evidentiary Principles Among the Federal Circuit Courts of Appeals Allocating the Burden of Proof to the Challenging Party*

Relying on a narrower reading of the IDEA’s legislative intent, the U.S. Court of Appeals for the First Circuit was one of the first courts to allocate the burden of proof to the challenging party.[^108] In 1983, the First Circuit held in *Doe v. Brookline School Committee* that the party seeking to modify the status quo should bear the burden of proof in proceedings under the IDEA.[^109] Applied to the facts presented in *Doe*, the burden fell upon the school district because it was the party seeking to alter the existing IEP by discontinuing payment for the student’s private school tuition.[^110] The court relied upon the congressional preference for maintenance of the current educational placement to support this allocation.[^111] Specifically, the court interpreted the IDEA’s “stay-put” provision, which mandates that a student remain in his or her cur-

[^102]: 62 F.3d at 533.
[^103]: Id.
[^104]: Id.
[^105]: Id.
[^106]: Id.
[^107]: See *Carlisle*, 62 F.3d at 533.
[^109]: Id.
[^110]: Id.
[^111]: See *id*. 
rent educational placement during the pendency of any appeal, to express the IDEA’s strong preference for the preservation of the status quo.\textsuperscript{112} Accordingly, the court concluded that the most consistent allocation of the burden of proof would be to the party seeking to modify the placement that the IDEA otherwise preserves.\textsuperscript{113}

In contrast to the First Circuit’s reliance on the IDEA’s “stay-put” provision, the U.S. Court of Appeals for the Fifth Circuit’s reasoning has become the dominant rationale among the federal circuit courts of appeals allocating the burden to the challenger.\textsuperscript{114} In 1983, in \textit{Tatro v. Texas}, the Fifth Circuit first allocated the burden to the challenging party, reasoning that the IEP’s central role created a presumption in favor of the placement it established.\textsuperscript{115} In \textit{Tatro}, the parents of a child with spina bifida appealed a school district’s denial of their request for catheterization services so that she could attend a preschool program.\textsuperscript{116} In holding that the district was required to amend the student’s plan to provide catheterization, the Fifth Circuit concluded in an oft-quoted passage that “because the IEP is jointly developed by the school district and the parents, fairness requires that the party attacking its terms should bear the burden of showing why the educational setting established by the IEP is not appropriate.”\textsuperscript{117} The U.S. Courts

\textsuperscript{112} See id. at 915–17. The IDEA contains a so-called “stay-put” provision, whereby the child is required to stay in his or her current educational placement during an appeal unless the school district and the student’s parents agree to an alternate placement. 20 U.S.C. § 1415(j) (2000). Some scholars, however, critique courts’ reliance on the stay-put provision as a justification for requiring the party challenging the status quo, typically the plaintiff, to bear the burden of proof. See Dixie Snow Huefner & Perry A. Zirkel, \textit{Burden of Proof Under the Individuals with Disabilities Education Act}, 9 INDIVIDUALS WITH DISABILITIES EDUC. L. REP. 1, 8 (1993). They contend that the stay-put provision does not establish a presumption that the current placement is appropriate and, instead, they interpret the provision’s purpose to be shielding the student from being switched between multiple placements during an appeal. See id.

\textsuperscript{113} See Doe v. Brookline Sch. Comm., 722 F.2d at 917.

\textsuperscript{114} See Devine v. Indian River County Sch. Bd., 249 F.3d 1289, 1291 (11th Cir. 2001); Johnson v. Indep. Sch. Dist., 921 F.2d 1022, 1026 (10th Cir. 1990); Doe v. Defendant I, 898 F.2d 1186, 1191 (6th Cir. 1990); Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1158 (5th Cir. 1986); \textit{Tatro}, 703 F.2d at 830.

\textsuperscript{115} 703 F.2d at 830.

\textsuperscript{116} Id. at 825.

\textsuperscript{117} Id. at 830; see Devine, 249 F.3d at 1291 (quoting \textit{Tatro}); Johnson, 921 F.2d at 1026 (same); Doe v. Defendant I, 898 F.2d at 1191 (same); Alamo Heights, 790 F.2d at 1158 (same). The reasoning the Fifth Circuit forwarded in \textit{Tatro} has been critiqued by proponents who urge courts to allocate the burden of proof to the school. See 703 F.2d at 830–31; Anstaett, supra note 23, at 766; Womack, supra note 23, at 215. Anstaett and Womack both stress that schools and parents hardly assume equal roles within the IEP development process, making it inaccurate to characterize the plan as the joint product of all participants. Anstaett, supra note 23, at 766; Womack, supra note 23, at 215.
of Appeals for the Fourth, Sixth, Tenth, and Eleventh Circuits have since subscribed to Tatro’s allocation of the burden.\textsuperscript{118}

Thus, Tatro implied that the IEP represents the joint product of the school and the parents’ efforts, embodying a sort of contract between them to an educational placement and package of services.\textsuperscript{119} Adopting this premise, the court then required the party attacking the plan to prove why it should be permitted to deviate from the terms it had previously agreed to.\textsuperscript{120} In Tatro, the school district had to demonstrate why the placement it had endorsed—an early childhood education program—was now inappropriate because the student’s attendance would require the school to provide catheterization services.\textsuperscript{121} As a result, Tatro produced the counterintuitive result of imposing the burden of proof on the school district.\textsuperscript{122} In most cases, one would expect an allocation to the parent as the challenging party.\textsuperscript{123}

\begin{itemize}
\item \textsuperscript{118}See Weast, 377 F.3d at 456; Devine, 249 F.3d at 1291; Johnson, 921 F.2d at 1026; Doe v. Defendant I, 898 F.2d at 1191; Tatro, 703 F.2d at 830. The Fifth Circuit also derived this allocation from the standard of review adopted by the then-leading Supreme Court precedent in the area. See Bd. of Educ. v. Rowley, 458 U.S. 176, 206–07 (1982). In 1982, in Board of Education v. Rowley, the Court held that the IDEA expressed a congressional intent to defer to the expertise of state educators in determining how to educate handicapped children appropriately. See id. at 206–08.
\item \textsuperscript{119}See 703 F.2d at 830.
\item \textsuperscript{120}See id.
\item \textsuperscript{121}See id. at 830–31.
\item \textsuperscript{122}See id. Interestingly, both the First and Fifth Circuits’ allocations to the challenging party resulted in imposing the burden of proof on the school district, not the parent. See Doe v. Brookline Sch. Comm., 722 F.2d at 915–17; Tatro, 703 F.2d at 830–31. Though this may be an insignificant parallel, it does suggest that factual happenstance, in addition to the desire to adhere to traditional evidentiary rules, influences how courts address this issue. See Doe v. Brookline Sch. Comm., 722 F.2d at 915–17; Tatro, 703 F.2d at 830–31.
\item \textsuperscript{123}See Tatro, 703 F.2d at 830; see also McCormick, supra note 47, § 336 (explaining that generally courts assign the burden of proof to the plaintiff because it is the party challenging the status quo). For instance, the court allocated the burden of proof to the parent as the challenging party in the 1986 case of Alamo Heights v. State Board of Education, in which the Fifth Circuit reiterated Tatro’s essential holding that the party attacking the IEP’s terms should bear the burden of demonstrating why the setting it establishes is now inappropriate. See Alamo Heights, 790 F.2d at 1158; Tatro, 703 F.2d at 830. Alamo Heights slightly expanded Tatro, however. See Alamo Heights, 790 F.2d at 1156, 1158–59; Tatro, 703 F.2d at 830. Although the parent in Alamo Heights had not presented any claims attacking the setting contained in her son’s IEP, the Fifth Circuit still allocated the burden of proof to her because she sought to add services to the agreed-upon plan. See 790 F.2d at 1156. Thus, the court read Tatro to also impose the burden of proof upon a party that sought to add services to the IEP. See id. at 1158–59; Tatro, 703 F.2d at 830; see also Christopher M. v. Corpus Christi Ind. Sch. Dist., 933 F.2d 1285, 1288, 1290–91 (5th Cir. 1991) (holding likewise that disabled student bore burden of proof because he sought to have his school day extended to seven hours, rather than two hours as proposed in his IEP).
\end{itemize}
In 1990, in *Doe v. Defendant I*, the U.S. Court of Appeals for the Sixth Circuit joined the Fifth Circuit in allocating the burden of proof at due process hearings under the IDEA to the party attacking the IEP’s terms.\(^{124}\) The Sixth Circuit has since refused to modify its application of *Tatro*’s holding.\(^{125}\) For instance, in 1990 in *Cordrey v. Euckert*, the Sixth Circuit declined an invitation by the petitioning parents and an amicus curiae to impose the burden of proof on issues pertaining to procedural compliance under the IDEA to the school district.\(^{126}\) Though the court acknowledged that the IDEA affirmatively required the local educational agency to comply with its comprehensive procedures, it found no definitive authorization within the IDEA itself or any other compelling justification that would warrant a departure from the traditional allocation of the burden of proof.\(^{127}\)

In 2004, in *Weast v. Schaffer*, the U.S. Court of Appeals for the Fourth Circuit similarly refused to deviate from the traditional rule that the party initiating a proceeding bears the burden of proof.\(^{128}\) In *Weast*, the parents of a student with Attention Deficit Hyperactivity Disorder and learning disabilities challenged the adequacy of a school’s proposed IEP, seeking reimbursement for private school tuition.\(^{129}\) In its opinion, the Fourth Circuit examined evidentiary doctrine, comparable federal statutory entitlements, and various policy arguments.\(^{130}\) The court rejected opposing circuits’ analyses that allocated the burden of proof to the school district, concluding that those decisions offered little supporting reasoning.\(^{131}\)

Instead, the *Weast* court relied heavily on traditional evidentiary doctrine, stating that the party seeking relief normally bears the burden of proof when a statute is otherwise silent on the issue.\(^{132}\) In support, the court cited to both Charles McCormick’s and J.H. Wigmore’s treatises to underscore that courts traditionally allocate the burden of proof to the party who initiates a proceeding to enforce a statutory obligation.\(^{133}\) In doing so, the court reasoned that the bur-

\(^{124}\) See *Doe v. Defendant I*, 898 F.2d at 1191.
\(^{125}\) See *Cordrey v. Euckert*, 917 F.2d 1460, 1466 (6th Cir. 1990).
\(^{126}\) See id.
\(^{127}\) See id. at 1466, 1469–70.
\(^{129}\) 377 F.3d at 450–51.
\(^{130}\) See id. at 452–56.
\(^{131}\) Id. at 453.
\(^{132}\) Id. at 452, 455–56.
\(^{133}\) Id. at 452, 455; see McCormick, *supra* note 47, § 337; Wigmore, *supra* note 76, § 2485.
den of proof should indicate which party should lose the action if no evidence is offered by either party.\textsuperscript{134} Thus, the court concluded that to allocate the burden of proof to the school district would effectively presume every IEP’s inadequacy.\textsuperscript{135}

Consequently, the \textit{Weast} court rejected any contention that the school district should bear the burden of proof because of its affirmative statutory obligations under the IDEA.\textsuperscript{136} The court also refused to grant weight to the practical consideration that school districts have the advantage in IEP litigation.\textsuperscript{137} Stating that “[w]e do not automatically assign the burden of proof to the side with the bigger guns,” the court emphasized that the IDEA’s procedural safeguards create a roughly level playing field between parents and school districts.\textsuperscript{138} In particular, the court highlighted parents’ involvement in IEP development, their right to examine records within the school’s possession, and the ability of prevailing parents to recover attorneys’ fees.\textsuperscript{139} Thus, the court implied that Congress accounted for a school district’s potential advantages at the hearing and chose to reduce any informational or resource advantage through the IDEA’s existing procedural protections.\textsuperscript{140}

\textbf{C. Splitting the Difference: Existing Burden-Shifting Proposals}

Several academic proposals have addressed the proper allocation of the burden of proof at due process hearings under the IDEA.\textsuperscript{141} As this Section details, many proposed allocations favor some type of burden-shifting scheme, whereby courts would separate the burdens of production and persuasion and assign them to different parties depending on the stage of the proceeding.\textsuperscript{142} For instance, one proposal

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\item \textsuperscript{134} \textit{Weast}, 377 F.3d at 455.
\item \textsuperscript{135} See id. at 455–56.
\item \textsuperscript{136} \textit{Id.} at 453.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 453–54.
\item \textsuperscript{139} \textit{Weast}, 377 F.3d at 454.
\item \textsuperscript{140} See id.
\item \textsuperscript{142} See Guernsey, supra note 15, at 72–77 (arguing for an allocation that would separate the burden of proof on substantive and procedural issues); Anstaett, supra note 23, at 770–72 (calling for an allocation that would only require the parent to discharge the minimal burden of producing evidence that their student’s disability qualified for services under the IDEA); Recent Case, supra note 141, at 1082–85 (contending that courts should adopt a burden-shifting scheme similar to that embodied in the Americans with Disabilities Act’s
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separates the burden of proof on procedural issues from the burden on substantive issues, suggesting various ways the former might be assigned to the school district. Alternatively, a second proposal analogizes due process hearings to Social Security disability appeals, contending the parent should only be required to discharge the initial burden of producing evidence of the student’s disability. Under this scheme, the school district would bear the ultimate burden of persuading the fact finder. Finally, a third proposal contends that the IDEA should incorporate a burden-shifting scheme similar to that embodied in the Americans with Disabilities Act’s (“ADA”) reasonable accommodation provision. Using this approach, after the parent presented a prima facie case that the student’s disability fell into a statutory category, the burden would shift to the school district to prove that it accommodated the student’s disability through an adequate IEP.

An early proposal draws a distinction between the burden of proof on procedural and substantive issues. Insofar as the IDEA is concerned, this proposal argues that the application of traditional evidentiary theory is arguably ineffective for procedural issues. This proposal contends that the IDEA’s elaborate safeguards place an emphasis on procedural compliance that justifies imposing the burden of proving adherence to the statutory requirements on the school district. Several rationales support splitting the burden of proof on procedural and substantive issues in this manner.

First, splitting the burden would be responsive to Board of Education v. Rowley, a 1982 U.S. Supreme Court case addressing the standard of review applicable to the IDEA. In this leading case, the Court addressed what the IDEA’s “free appropriate public education” mandate required of schools. The Court held that schools must provide

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143 See Guernsey, supra note 15, at 72–77.
144 See Anstaett, supra note 23, at 771.
145 See id.
146 See Recent Case, supra note 141, at 1084.
147 See id.
149 See id. at 74–75.
150 See id.
151 See id. at 75–77.
152 See 458 U.S. at 189–201; see also Guernsey, supra note 15, at 75 (describing the organization of a court’s inquiry under Rowley).
handicapped students with “some educational benefit,” simply a “basic floor of opportunity.”\textsuperscript{154} In \textit{Rowley}, the Court also indicated that judicial review under the IDEA should begin with an inquiry into the school’s compliance with the statute’s procedural safeguards.\textsuperscript{155} Thus, \textit{Rowley}’s primary emphasis on procedural compliance might justify allocating the burden of proof on this issue to the school district.\textsuperscript{156}

Second, allocating the burden of proof to the school district to demonstrate procedural compliance would also be consistent with the statute’s remedial goals.\textsuperscript{157} The IDEA’s procedural safeguards are integral to providing each disabled student with an enforceable right to a “free appropriate public education.”\textsuperscript{158} Accordingly, the school district should be required to demonstrate compliance because the IDEA explicitly recognizes a desire to protect the rights of disabled students.\textsuperscript{159} Third, though parents can access their child’s records under the IDEA’s procedural provisions, this entitlement falls short of formal discovery.\textsuperscript{160} Also, this limited disclosure requirement typically produces records that are more useful on substantive issues and may not even contain evidence of procedural violations.\textsuperscript{161}

According to this proposal, two different allocations could be used to place some of the burden on the school district to disprove allegations of procedural violations.\textsuperscript{162} One approach is to allocate the burden of production to the school district on this issue, which would respond to the reality that evidence of procedural violations lies almost exclusively within the school district’s control.\textsuperscript{163} Once the school district satisfied its burden by producing sufficient evidence to demonstrate compliance, the burden of persuasion on the issue would then shift to the parents.\textsuperscript{164} This scheme, however, might not fully respond to the contention that the IDEA is expressly remedial.\textsuperscript{165} After all, the burden of persuasion would still be assigned to the parent, despite the IDEA’s desire to safeguard the student’s rights.\textsuperscript{166}
A second approach could take the form of a scheme similar to that used under the Civil Rights Act of 1964.\textsuperscript{167} In contrast to the first approach, the parents would carry the burden of producing evidence sufficient to reasonably demonstrate a procedural violation.\textsuperscript{168} At that point, the burden of production would shift to the school district to produce rebuttal evidence.\textsuperscript{169} Due to the difficulties parents face in assembling proof, the amount of evidence required to meet their burden could be nominal.\textsuperscript{170} One proposed standard is that parents should be required to allege “a specific violation of a procedural right provided by the Act [the IDEA] or its supporting regulations along with information sufficient to allow a reasonable person to infer the existence of that procedural violation.”\textsuperscript{171}

In opposition to this type of proposal, others argue that parents who seek to take advantage of the due process rights afforded by the IDEA should not be forced to bear the burden of persuasion on any claim.\textsuperscript{172} One counter-proposal analogizes the IDEA proceedings to Social Security disability cases because they are an area of administrative law in which the burden of persuasion has been shifted to the agency to respect the individual’s rights.\textsuperscript{173} This proposal suggests that the IDEA due process hearings should resemble Social Security disability appeals, where the claimant is initially required to offer probative evidence that he cannot work due to a disability, then the agency must meet its burden of persuasion by demonstrating that feasible work is available to the claimant.\textsuperscript{174} Applied to a due process hearing, the parent first would be required to discharge the burden of producing evidence of the student’s disability, but then the ultimate burden of persuasion would shift to the school district to defend its IEP.\textsuperscript{175} This proposal echoes the concern that allocating the burden of per-

\textsuperscript{167} See 42 U.S.C. § 2000e, 2000e-1–4; McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (holding that the Title VII plaintiff bears the initial burden of establishing a prima facie case of discrimination, then the burden shifts to the defendant to offer a legitimate, nondiscriminatory reason for the contested employment action); Guernsey, supra note 15, at 76–77.


\textsuperscript{170} See Guernsey, supra note 15, at 77.

\textsuperscript{171} See id.

\textsuperscript{172} See Anstaett, supra note 23, at 770–72; Womack, supra note 23, at 215–16.

\textsuperscript{173} See Anstaett, supra note 23, at 771.

\textsuperscript{174} Id.

\textsuperscript{175} See id.
suasion to the school district is preferable because it is better able to build its case.\textsuperscript{176} Also, a pro-parent standard is arguably necessary for the IDEA to protect student rights and ensure schools’ compliance.\textsuperscript{177}

Finally, an analysis of the Fourth Circuit’s 2004 decision in \textit{Weast} proposes that courts should adopt a modified burden-shifting approach that mirrors that practiced in the ADA’s reasonable accommodation provision.\textsuperscript{178} Specifically, this analysis rejects any attempt to analogize the IDEA to civil rights statutes that do not place the burden of proof on defendants.\textsuperscript{179} Unlike civil rights legislation, it contends, the IDEA imposes “affirmative obligations” on state actors.\textsuperscript{180} Accordingly, \textit{Weast}’s analytical misstep was its failure to appreciate the affirmative obligations that the IDEA places on school districts.\textsuperscript{181} Instead, a modified burden-shifting approach would ensure that the party in the best position to offer evidence will carry an appropriate burden.\textsuperscript{182}

Drawing a parallel to the ADA’s reasonable accommodation provision, this proposal suggests that the IDEA adopt a regime where the plaintiff would first have to establish a prima facie case that the student’s disability falls into an applicable category covered by the statute.\textsuperscript{183} Upon the parent’s satisfaction of this burden, the burden would shift to the school district to prove its IEP’s adequacy.\textsuperscript{184} Hence, each party could carry an appropriate burden—the plaintiff parent because he or she typically possesses greater knowledge about the student’s disability and the defendant school district because it typically has the experience and resources to determine how the student’s needs might be met in an educational plan.\textsuperscript{185} Thus, this framework hypothesizes that both parties would bear the burden of proof on matters for which they have greater access to the relevant information.\textsuperscript{186} If the child’s eligibility under the IDEA is not contested, the scheme would allocate the burden of proof in its entirety to the school district.\textsuperscript{187}

\textsuperscript{176} See id at 771–72.
\textsuperscript{177} See id.
\textsuperscript{178} See \textit{Weast}, 377 F.3d at 452–56; Recent Case, supra note 141, at 1082–85.
\textsuperscript{179} See Recent Case, supra note 141, at 1082–83.
\textsuperscript{180} See id. at 1083–84.
\textsuperscript{181} See id. at 1083.
\textsuperscript{182} See id. at 1083–84.
\textsuperscript{183} See id. at 1084.
\textsuperscript{184} See Recent Case, supra note 141, at 1084.
\textsuperscript{185} See id.
\textsuperscript{186} See id.
\textsuperscript{187} See id.
III. The Appropriate Procedural Compromise: Tailoring the Allocation of the Burden of Proof to Balance the IDEA’s Remedial Purpose and School Districts’ Obligations

The IDEA and its procedural safeguards aspire to make “a free appropriate public education” available to all disabled students.\(^\text{188}\) Because the due process hearing is the IDEA’s most fundamental procedural safeguard, resolution of this conflict of authority is necessary for the IDEA’s continued effectiveness as a statutory mandate.\(^\text{189}\) Due to the IDEA’s silence regarding the allocation of the burden of proof at due process hearings, its procedural and substantive requirements currently cannot function together to promote its goals.\(^\text{190}\) In addition, on a practical level the unsettled state of the law discourages parents from commencing actions to enforce their children’s rights, mainly because they lack sufficient information to calculate their chances of success.\(^\text{191}\) At the same time, due to the lack of uniformity different jurisdictions arrive at different outcomes depending on their allocation of the burden of proof, which could inhibit students’ interstate mobility.\(^\text{192}\) Although the Supreme Court has granted certiorari to review this issue, it would be more desirable for Congress to amend the IDEA’s procedural provisions to specify the burden of proof at due process hearings.\(^\text{193}\) Congressional amendment would


\(^{189}\) See id. §§ 1400(d)(1)(A), 1415; Guernsey, supra note 15, at 68, 70–71 (highlighting the centrality of the FAPE mandate within the IDEA, but observing that the statute provides little substantive guidance regarding the definition of this critical term); Anstaett, supra note 23, at 759 (observing that the allocation of the burden of proof at due process hearings is particularly important because IDEA disputes typically involve conflicting expert testimony); Goldman, supra note 22, at 280–81 (concluding that the parent’s right to obtain a due process hearing is among the IDEA’s most important safeguards); Womack, supra note 23, at 192–93 (stating that the allocation of the burden of proof has determined the outcome of many IDEA disputes).


\(^{191}\) See Anstaett, supra note 23, at 771–72. As one commentator notes, it is important that parents be able to calculate their chances of winning an IDEA dispute. Id. The Supreme Court has held that parents may be reimbursed for private school tuition when a court ultimately determines that the child’s IEP is inadequate and they had placed their child at a private school with an appropriate educational program during the pendency of their appeal. Id. (citing Burlington Sch. Comm. v. Mass. Dep’t of Educ., 471 U.S. 359, 369–74 (1985)).

\(^{192}\) See Huefner & Zirkel, supra note 112, at 12.

allow for a more extended debate that would better incorporate the sensitive policy considerations at issue.\textsuperscript{194}

The IDEA struck a delicate balance between respecting the rights of disabled children while imposing a realistic mandate on school districts.\textsuperscript{195} The allocation of the burden of proof under the IDEA should achieve this same balance.\textsuperscript{196} According to traditional evidentiary doctrine, courts should allocate both the burden of producing evidence and the burden of persuading the fact finder to the plaintiff because it is the most logical party to risk a failure of proof.\textsuperscript{197} Thus, traditional evidentiary principles imply that the party who challenges the status quo should bear much of the evidentiary onus in an IDEA dispute.\textsuperscript{198}

But despite the dictates of traditional evidentiary doctrine, fairness, convenience, and other policy considerations can justify a non-traditional allocation.\textsuperscript{199} Moreover, courts may separate the burdens


\textsuperscript{195} See 20 U.S.C. §§ 1400(d)(1)(A), 1415; Guernsey, supra note 15, at 68, 70–71; Anstaett, supra note 23, at 759; Goldman, supra note 22, at 280–81; Womack, supra note 23, at 192–93; see also supra notes 141–147 and accompanying text (presenting competing scholarly proposals responding to the need to tailor the allocation of the burden of proof to the IDEA’s purpose and goals).


\textsuperscript{197} See id.

\textsuperscript{198} See id. In addition, while it is most natural to place the burden on the party who urges change, it can also be appropriate under certain circumstances to impose the burdens of production or persuasion on a party when the facts with regard to a certain issue lie particularly within that party’s knowledge. See id. Professor McCormick’s treatment of this proposition, however, classifies it as a near-exception because he also notes that a party often must plead and prove matters to which the opposing party has superior access to the relevant proof. See id. It may be warranted under certain circumstances to allocate the two evidentiary burdens to different parties or to shift the burdens. See id.
of production and persuasion and even shift them from one party to the other when necessity dictates.\textsuperscript{200} Due to the affirmative obligations the IDEA imposes on school districts and the absence of a level evidentiary playing field for parents and school districts, a modified burden-shifting scheme is appropriate.\textsuperscript{201} In other words, the IDEA’s remedial purpose and substantial fairness considerations warrant a departure from the traditional allocation of the burden of proof to the plaintiff to an alternate scheme.\textsuperscript{202}

This departure should assume the form of a modified burden-shifting framework that would impose tailored burdens on both school districts and parents.\textsuperscript{203} In modifying the traditional allocation, a burden-shifting scheme for IDEA due process hearings should completely separate the burden of proof on substantive and procedural issues.\textsuperscript{204} Consistent with the IDEA’s central emphasis on due process, the statute should assign the burden for procedural issues to the school district.\textsuperscript{205} The burden for substantive issues, however, should rest with the party challenging the status quo, typically the parent.\textsuperscript{206}

\textsuperscript{200} See id.; Anstaett, \textit{supra} note 23, at 763.

\textsuperscript{201} See \textit{Oberti}, 995 F.2d at 1218–19 (assigning the burden of proof for mainstreaming claims under the IDEA to school districts due to the statute’s “express purpose” of protecting disabled children’s rights); \textit{Fuhrmann}, 993 F.2d at 1034–35; \textit{see also Lascari}, 560 A.2d at 1181–82, 1188 (allocating the burden of proof under New Jersey state law to the local school district due to the affirmative nature of the obligations the IDEA imposes on schools); Beyer, \textit{supra} note 194, at 41–43 (detailing parents’ relative disadvantages at IDEA due process hearings); Marchese, \textit{supra} note 194, at 343 (same); Streett, \textit{supra} note 194, at 41 (same); Goldman, \textit{supra} note 22, at 281–82 (same).

\textsuperscript{202} See \textit{Oberti}, 995 F.2d at 1218–19; \textit{Fuhrmann}, 993 F.2d at 1034–35; \textit{see also Lascari}, 560 A.2d at 1181–82, 1188; Beyer, \textit{supra} note 194, at 41–43; Marchese, \textit{supra} note 194, at 343; Streett, \textit{supra} note 194, at 41; Goldman, \textit{supra} note 22, at 281–82.

\textsuperscript{203} See \textit{Oberti}, 995 F.2d at 1218–19; \textit{Fuhrmann}, 993 F.2d at 1034–35; \textit{see also Lascari}, 560 A.2d at 1181–82, 1188; \textit{McCormick}, \textit{supra} note 47, § 337 (explaining burden-shifting more generally); Beyer, \textit{supra} note 194, at 41–43; Marchese, \textit{supra} note 194, at 343; Streett, \textit{supra} note 194, at 41; Goldman, \textit{supra} note 22, at 281–82.

\textsuperscript{204} See \textit{Guernsey}, \textit{supra} note 15, at 74; \textit{supra} notes 55–70, 89–97 and accompanying text.

\textsuperscript{205} See \textit{supra} notes 55–70 and accompanying text (outlining the IDEA’s procedural safeguards). “Procedural issues” would include any allegations that the school had failed to comply with the IDEA’s due process safeguards. \textit{See generally} 20 U.S.C. § 1415 (2000) (enumerating procedural safeguards). For instance, parents might allege that they had failed to receive written prior notice regarding a proposal to change their student’s IEP. \textit{See id.} § 1415(b)(3)(A). Alternatively, parents might allege that the school had failed to provide them with the opportunity to participate in meetings regarding their child’s educational placement. \textit{See id.} § 1415(b)(1).

\textsuperscript{206} See \textit{supra} notes 79–80, 108–123 and accompanying text. “Substantive issues” would include any allegations pertaining to the school’s obligation under the IDEA to provide the student with a “free appropriate public education.” \textit{See 20 U.S.C.} § 1400(d) (1)(A). In other words, “substantive issues” would encompass claims related to the sufficiency of the student’s IEP. \textit{See id.} Also, in some cases, the school district will assume the position of the
Separating the burden of proof in this manner would even the playing field in IDEA disputes but would preserve the integrity of traditional evidentiary principles, namely the proposition that the plaintiff must bear the risk of a failure of proof. 207

Consequently, the due process hearing would function quite differently, as the school district would bear the burdens of production and persuasion for procedural issues and the parent would bear those burdens for substantive issues. 208 Operating under this new allocation, the hearing officer would begin the hearing by examining any procedural claims. 209 For these claims, the officer would require the school district to satisfy its burden of production by offering sufficient evidence to support a reasonable inference that it complied with the IDEA’s due process safeguards. 210 In the officer’s final analysis, the school district would also bear the burden of persuasion. 211 After the hearing officer addressed the procedural allegations, he or she would continue the hearing by requiring the challenging party to satisfy its burden of production on substantive issues. 212 At that point, the parents would offer sufficient evidence that the school district failed to meet its statutory obligation under the IDEA to provide their child with
a “free appropriate public education.” The hearing officer would assign the burden of persuasion on substantive issues to the parents.

This allocation would respond to the tension between evidentiary principles, statutory interpretation challenges, and policy considerations that are present in the current circuit split. Several persuasive rationales support this modified scheme. First, separating the burden of proof on procedural and substantive issues would be most consistent with Congress’s legislative intent and the fact that the IDEA is a remedial statute that imposes affirmative obligations upon school districts. Second, this allocation would mirror the delicate policy balance that the IDEA struck to establish an effective yet realistic mandate for disabled students. Finally, this allocation would possess a practical adaptability to the type of fact patterns common to IDEA disputes.

A. Dividing the Burdens Is Most Consistent with Congress’s Legislative Intent and the IDEA’s Remedial Purpose

An evaluation of the IDEA’s case law predecessors, Pennsylvania Ass’n for Retarded Children v. Pennsylvania (PARC) and Mills v. Board of Education, illuminates Congress’s legislative intent. Although Congress modeled much of what became the IDEA from PARC and Mills, wholly grafting their procedural safeguards in some cases, it failed to replicate the cases’ allocation of the burden of proof to the educational agency. Thus, given Congress’s selective incorporation of some aspects of PARC and Mills’ procedural regimes, it appears that Congress did not intend to duplicate the cases’ allocation of the burden of proof to the local agency. In other words, the IDEA evidences that Congress copied some of PARC and Mills’ procedural

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213 20 U.S.C. § 1400(d)(1)(A) (providing that one of the IDEA’s purposes is to provide disabled students with a FAPE); see supra notes 79–80, 108–123 and accompanying text.
214 See Weast, 377 F.3d at 456; Devine, 249 F.3d at 1291–92; Johnson, 921 F.2d at 1026; Doe v. Defendant I, 898 F.2d at 1191; Doe v. Brookline Sch. Comm., 722 F.2d at 917; Tatro, 703 F.2d at 830.
215 See supra notes 81–87 and accompanying text.
216 See infra notes 220–272 and accompanying text.
217 See infra notes 220–235 and accompanying text.
218 See infra notes 236–265 and accompanying text.
219 See infra notes 266–272 and accompanying text.
safeguards, but did not do so for others. Thus, by its silence regarding the burden of proof, Congress would appear to have defaulted to the traditional allocation. This would indicate that the plaintiff should assume a share of the responsibility for producing evidence and persuading the fact finder.

As the courts that adhere to a traditional allocation have acknowledged, the statutory framework of the IDEA itself implies that a challenging party should bear much of the responsibility for proving its claims at the due process hearing. The IDEA establishes presumptions in favor of the status quo in several ways. Because the IEP is the sole mechanism that provides disabled students with a “free appropriate public education,” the IEP’s centrality endows the plan with a measure of presumed validity. At the same time, the IDEA contains little in the way of substantive requirements, suggesting a deference to local educators that is not overridden by the statute’s procedural safeguards. Finally, the IDEA’s stay-put provision, which requires that students remain in their current educational placements during any appeals, further reflects the IDEA’s subscription to the norm that the IEP is presumptively valid.

Although the IDEA is silent as to who bears the burden of proof at the due process hearing, the statute does specify its remedial goals clearly and imposes affirmative obligations upon school districts. In short, the IDEA consists of a rather vague affirmative obligation—the provision of a “free appropriate public education”—that is accomplished by the enforcement of an elaborate system of procedural safe-

226 See Weast, 377 F.3d at 456; Renner v. Bd. of Educ., 185 F.3d 635, 642 (6th Cir. 1999); Doe v. Bd. of Educ., 9 F.3d 455, 458 (6th Cir. 1993); Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1290–91 (5th Cir. 1991); Johnson, 921 F.2d at 1026; Cordrey v. Euckert, 917 F.2d 1460, 1469–70 (6th Cir. 1990); Doe v. Defendant I, 898 F.2d at 1191; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d at 1153, 1158 (5th Cir. 1986); Doe v. Brookline Sch. Comm., 722 F.2d at 917; Tatro, 703 F.2d at 830.
227 See infra notes 228–230 and accompanying text.
228 See 20 U.S.C. § 1414(d) (2000); Tatro, 703 F.2d at 830.
231 See 20 U.S.C. §§ 1400(d), 1414(d), 1415; supra notes 228–230 and accompanying text.
guards.\textsuperscript{232} Thus, the IDEA reflects the presumption that so long as its procedures are followed by participating schools, the end-product will be a plan that provides for the student’s needs and thus accomplishes the statute’s remedial goal.\textsuperscript{233} Consequently, the IDEA places a premium on due process that justifies a departure from the traditional allocation of the burden of proof to a modified burden-shifting approach.\textsuperscript{234} Because the IDEA’s provisions so strongly emphasize the need for procedural compliance, it is appropriate to assign the burdens of production and persuasion on procedural issues to the school district.\textsuperscript{235}

B. \textit{Competing Fairness Considerations Call for Splitting the Burden Rather Than Assigning It Completely to the School District}

A modified burden-shifting scheme is also responsive to the reality that there is not a level evidentiary playing field between parents and school districts.\textsuperscript{236} Requiring the school district to produce evidence and ultimately to prove its own procedural compliance acknowledges the practical realities of litigation under the IDEA.\textsuperscript{237} As even the courts that have allocated the burden of proof entirely to the parent have observed, school districts can easily out-maneuver parents in IDEA disputes.\textsuperscript{238} Nonetheless, although school districts undoubtedly remain the more sophisticated party in IDEA disputes, they are also subject to substantial policy pressures in balancing their

\textsuperscript{232} See 20 U.S.C. §§ 1400(d), 1414(d), 1415; \textit{supra} notes 14–16, 55–75 and accompanying text.
\textsuperscript{233} See \textit{Rowley}, 458 U.S. at 206; see also 20 U.S.C. § 1415 (enumerating procedural safeguards).
\textsuperscript{234} See \textit{Rowley}, 458 U.S. at 206; see also 20 U.S.C. § 1415 (enumerating procedural safeguards).
\textsuperscript{235} See \textit{Rowley}, 458 U.S. at 206; see also 20 U.S.C. § 1415 (enumerating procedural safeguards).
\textsuperscript{236} See \textit{Walczak}, 142 F.3d at 122; \textit{E.S.}, 135 F.3d at 569; \textit{Oberti}, 995 F.2d at 1219; \textit{Fuhrmann}, 993 F.2d at 1034–35; \textit{Lascari}, 560 A.2d at 1181–82, 1188; \textit{Beyer, supra} note 194, at 41–43; \textit{Marchese, supra} note 194, at 343; \textit{Streett, supra} note 194, at 41; \textit{Goldman, supra} note 22, at 281–82.
\textsuperscript{237} See \textit{Walczak}, 142 F.3d at 122; \textit{E.S.}, 135 F.3d at 569; \textit{Oberti}, 995 F.2d at 1219; \textit{Fuhrmann}, 993 F.2d at 1034–35; \textit{Lascari}, 560 A.2d at 1181–82, 1188; \textit{Beyer, supra} note 194, at 41–43; \textit{Marchese, supra} note 194, at 343; \textit{Streett, supra} note 194, at 41; \textit{Goldman, supra} note 22, at 281–82.
\textsuperscript{238} See \textit{Walczak}, 142 F.3d at 122; \textit{E.S.}, 135 F.3d at 569; \textit{Oberti}, 995 F.2d at 1219; \textit{Fuhrmann}, 993 F.2d at 1034–35; \textit{Lascari}, 560 A.2d at 1181–82, 1188; \textit{Beyer, supra} note 194, at 41–43; \textit{Marchese, supra} note 194, at 343; \textit{Streett, supra} note 194, at 41; \textit{Goldman, supra} note 22, at 281–82.
affirmative obligations to all their students. Due process hearings already impose high costs that caution against allocating the burden of proof in its entirety to the school district.

Thus, a modified scheme would first compensate for some of the IDEA’s procedural deficiencies, evening the playing field in the parent’s favor. Although the IDEA’s procedural safeguards aspire to produce parity between school districts and parents, it does not exist. The IDEA entitles parents to receive a “procedural safeguards notice” containing a plain language explanation of their rights upon the student’s initial referral for evaluation, but such a notice hardly equips a parent to handle the intricacies of the hearing process. Parents may be ineffective in challenging an IEP for many reasons.

First, though the IDEA mandates parental access to their child’s educational records and provides for the disclosure of any evaluations five days before the hearing, these provisions do not possess the rigor of the discovery process involved in civil litigation. One difficulty here is that the school district typically exerts direct control over those records, which are often only helpful in proving procedural violations. Additionally, school districts control the witnesses that would be critical to a successful hearing. Second, parents often lack

239 See Walczak, 142 F.3d at 122; E.S., 135 F.3d at 569; Oberti, 995 F.2d at 1219; Fuhrmann, 993 F.2d at 1034–35; Lascari, 560 A.2d at 1181–82, 1188; Beyer, supra note 194, at 41–43; Marchese, supra note 194, at 343; Streett, supra note 194, at 41; Goldman, supra note 22, at 281–82.

240 See Walczak, 142 F.3d at 122; E.S., 135 F.3d at 569; Oberti, 995 F.2d at 1219; Fuhrmann, 993 F.2d at 1034–35; Lascari, 560 A.2d at 1181–82, 1188; Beyer, supra note 194, at 41–43; Marchese, supra note 194, at 343; Streett, supra note 194, at 41; Goldman, supra note 22, at 281–82.

241 See Walczak, 142 F.3d at 122; E.S., 135 F.3d at 569; Oberti, 995 F.2d at 1219; Fuhrmann, 993 F.2d at 1034–35; Lascari, 560 A.2d at 1181–82, 1188; Beyer, supra note 194, at 41–43; Marchese, supra note 194, at 343; Streett, supra note 194, at 41; Goldman, supra note 22, at 281–82.

242 See Walczak, 142 F.3d at 122; E.S., 135 F.3d at 569; Oberti, 995 F.2d at 1219; Fuhrmann, 993 F.2d at 1034–35; Lascari, 560 A.2d at 1181–82, 1188; Beyer, supra note 194, at 41–43; Marchese, supra note 194, at 343; Streett, supra note 194, at 41; Goldman, supra note 22, at 281–82.

243 See 20 U.S.C. § 1415(d) (2000); see also Goldman, supra note 22, at 281 (explaining that although the IDEA provides parents with various rights to information, parents may still be unable to obtain the facts they need to succeed at a hearing).

244 See Beyer, supra note 194, at 41–43; Goldman, supra note 22, at 281–82; see also infra notes 245–255 and accompanying text (outlining the difficulties of IEP litigation from the parent’s perspective).

245 See 20 U.S.C. § 1415(f) (2); Guernsey, supra note 15, at 76; Streett, supra note 194, at 41.

246 See Guernsey, supra note 15, at 76; Streett, supra note 194, at 41.

247 See 20 U.S.C. § 1415(f) (2); Guernsey, supra note 15, at 76; Streett, supra note 194, at 41.
sufficient expertise or resources to critique the specific failures of the IEP. 248 It is often difficult for them to identify alternative educational strategies or placements that would better suit their child, and the IEP process relies extensively on technical jargon to discuss the child’s development. 249 The IDEA’s due process hearings are frequently won on technicalities that require a mastery of this language. 250

Third, a due process hearing requires financial resources. 251 Retaining an attorney and hiring experts represent substantial costs, despite the IDEA’s provisions that award attorney’s fees to prevailing parents and require school districts to inform parents of low-cost legal and advocacy services. 252 Fourth, the sheer length of the appeals process deters some parents, especially when a due process challenge can endure for several months or even years. 253 The due process system also imposes emotional pressures on parents, including the discomfort that can result when they must challenge educators with whom they have worked. 254 A related problem that parents often encounter is the perception among school personnel that they cannot be trusted to be “objective” about their child’s education. 255

At the same time, due process hearings produce strong policy ramifications for school districts that the existing federal circuit courts of appeals’ case law and scholarly literature do not fully elaborate. 256 Although many argue that allocating the burden of proof to the challenging party might result in assigning parents a burden they are un-equipped to meet, allocating the entire burden to school districts would similarly impose a heavy burden on the school districts. 257 Due process hearings are extremely costly to school districts, and they divert scarce resources from other educational expenditures. 258 Each new IDEA claim represents a commitment of additional resources school districts must divert to hire attorneys and experts to defend their placements, adding to the already substantial education costs of

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248 See Guernsey, supra note 15, at 76; Streett, supra note 194, at 41; Goldman, supra note 22, at 281. Steven Marchese states that “these parents may be unable to understand their children’s placements, let alone articulate different ones.” Marchese, supra note 194, at 343.

249 See id. at 343–44.

250 See id. at 344.

251 Beyer, supra note 194, at 41; Goldman, supra note 22, at 281.

252 20 U.S.C. § 1415(i) (3) (B); Beyer, supra note 194, at 41; Goldman, supra note 22, at 281.

253 Beyer, supra note 194, at 41–42; Goldman, supra note 22, at 281–82.

254 Beyer, supra note 194, at 41–42.

255 Marchese, supra note 194, at 343–44.

256 See infra notes 257–265 and accompanying text.

257 See Beyer, supra note 194, at 42; Morgan, supra note 5, at 287.

258 See Morgan, supra note 5, at 287.
students with disabilities.\textsuperscript{259} Such costs limit the pool of resources available for substantive rather than procedural expenditures.\textsuperscript{260}

In short, if the hearing process becomes too burdensome for school districts, it might diminish rather than increase school districts’ ability to meet their affirmative statutory obligations.\textsuperscript{261} The stakes for school districts at due process hearings can be extremely high.\textsuperscript{262} Current law entitles prevailing parents to private tuition reimbursement.\textsuperscript{263} Essentially, parents can reject a public school’s IEP, place their student in a private school, and successfully require the public school system to finance their child’s education if a court ultimately determines that the IEP was not designed to provide the student with a “free appropriate public education.”\textsuperscript{264} Thus, although some suggest that allocating the entire burden of proof to school districts is necessary to ensure their procedural compliance, school districts already have a strong financial incentive to meet their statutory obligations, both procedural and substantive.\textsuperscript{265}

C. Dividing the Burdens Is a Better Fit for the Common IDEA Fact Pattern

Finally, a modified allocation would also incorporate enough flexibility to allow it to be adapted to the fact patterns that are common to IDEA disputes.\textsuperscript{266} A successful allocation of the burden of proof at due process hearings under the IDEA must be tailored to meet the statute’s unique challenges, rather than imported from an-

\textsuperscript{259} Beyer, \textit{supra} note 194, at 42.

\textsuperscript{260} See Beyer, \textit{supra} note 194, at 42; Morgan, \textit{supra} note 5, at 287.

\textsuperscript{261} See \textit{supra} notes 256–260 and accompanying text.

\textsuperscript{262} See \textit{infra} notes 264–265 and accompanying text.

\textsuperscript{263} See \textit{Burlington}, 471 U.S. at 369–74.


\textsuperscript{265} See 20 U.S.C. § 1414(d); \textit{Burlington}, 471 U.S. at 369–74.

\textsuperscript{266} See \textit{Weast}, 377 F.3d at 450–52. In \textit{Weast}, for example, the parents of a child with Attention Deficit Hyperactivity Disorder and learning disabilities had their child evaluated by a public middle school to determine his eligibility for special education services under the IDEA. \textit{Id.} at 450. The school determined that the student’s disabilities qualified and then prepared an IEP. \textit{Id.} at 450–51. Dissatisfied with the terms of the proposed plan, the parents enrolled the student in a private school and then sought tuition reimbursement by bringing a claim in federal court alleging that the proposed IEP was not designed to provide the child with a FAPE. \textit{Id.} Thus, the central dispute between the parties did not concern the child’s eligibility; instead, its focus was whether the proposed IEP satisfied the IDEA’s FAPE mandate. \textit{Id.}; see \textit{Oberti}, 995 F.2d at 1207–08, 1220–24 (addressing whether the school complied with the IDEA when it relocated the student to a segregated special education class, not whether student’s disability qualified for services); \textit{Tatro}, 705 F.2d at 825, 830 (addressing whether the IDEA required the school to provide related medical services, not whether the student’s disability was eligible).
other statutory source, such as civil rights legislation or even other disability mandates.\textsuperscript{267} Under the burden-shifting schemes common to other disability statutes, once the plaintiff has established that his or her disability meets the statutory definition, the entire burden then shifts to the defendant to prove that it accommodated that disability.\textsuperscript{268} On a practical level, this approach would be ill-suited to balancing children’s rights and school districts’ needs, mainly because in most due process hearings the parties concede that the student’s disability qualifies for assistance under the IDEA.\textsuperscript{269} Instead, the focal point of most hearings concerns whether the school’s IEP is designed to provide the disabled student with a “free appropriate public education.”\textsuperscript{270} Thus, if the burden shifted to the school district once the parent established that the student’s disability qualified for assistance, the burden of proof would almost always rest with the school district.\textsuperscript{271} For this reason, no substantive reallocation of the burden of proof would actually result.\textsuperscript{272}

Conclusion

The conflict of authority regarding the proper allocation of the burden of proof at initial due process hearings under the IDEA must be resolved in order for the IDEA to serve as an effective mandate for disabled students and their parents. Whether a new allocation is produced through Supreme Court review or by Congress’s amendment of the IDEA, a modified burden-shifting scheme would best mirror the IDEA’s delicate balancing of the rights of disabled children and

\textsuperscript{267} See Guernsey, supra note 15, at 76–77; Anstaett, supra note 23, at 771; Recent Case, supra note 141, at 1083–84.

\textsuperscript{268} See Guernsey, supra note 15, at 76–77; Anstaett, supra note 23, at 771; Recent Case, supra note 141, at 1083–84.

\textsuperscript{269} See 20 U.S.C. § 1401(3)(A) (defining “child with a disability” broadly to include mental retardation; hearing, speech, language, orthopedic, visual, or other health impairments; serious emotional disturbances; autism; and specific learning disabilities).

\textsuperscript{270} See, e.g., E.S., 135 F.3d at 567–68, 569 (addressing whether the school district was required to provide one-one-on tutoring using a specific instructional method in order to provide student with a FAPE); Alamo Heights, 790 F.2d at 1155–58 (indicating that issue was not whether student’s disability qualified under the IDEA, but whether school district was required to provide summer services to handicapped child in order to satisfy the FAPE mandate).

\textsuperscript{271} See 20 U.S.C. § 1401(3)(A); Weast, 377 F.3d at 450–52; E.S., 135 F.3d at 567–68, 569; Oberti, 995 F.2d at 1207–08, 1220–24; Alamo Heights, 790 F.2d at 1155–58; Tatro, 703 F.2d at 825, 830.

\textsuperscript{272} See McCormick, supra note 47, § 337 (detailing the traditional allocation of the burden of proof to the plaintiff); Wigmore, supra note 76, § 2485 (same).
the need to impose a realistic mandate on school districts. Consistent with traditional evidentiary principles, the party challenging the status quo should bear the burden of proof on all substantive issues. On procedural issues, however, the school districts should bear the burden of proof to better respond to the IDEA’s remedial purpose and its premium on procedural compliance.

Anne E. Johnson
SEX, BUT NOT THE CITY: ADULT-ENTERTAINMENT ZONING, THE FIRST AMENDMENT, AND RESIDENTIAL AND RURAL MUNICIPALITIES

Abstract: Adult entertainment’s status as protected First Amendment speech has resulted in a confusing series of U.S. Supreme Court cases evaluating the zoning of adult businesses. Cases discussing the requirement that municipalities provide alternative avenues of communication for adult businesses have raised many questions as to how rural and residential municipalities may satisfy this obligation. This Note identifies three solutions that would help frame this inquiry. First, state or county legislative bodies should adopt countywide or statewide location restrictions on adult businesses. Second, courts should employ a regional analysis of the alternative avenues requirement when evaluating adult-entertainment zoning restrictions. Third, courts should undertake a supply-and-demand analysis when assessing what constitutes sufficient alternative avenues of communication. Adoption of these solutions would help to ensure that the First Amendment obligations of rural and residential municipalities reflect the unique burdens of such municipalities while maintaining appropriate protection for free speech.

INTRODUCTION

The topic of adult-entertainment zoning remains a controversial subject in municipal politics.\(^1\) Few zoning issues inspire as much legal and political hand-wringing as the locations of adult businesses in a municipality.\(^2\) Much of this controversy can be attributed to adult entertainment’s status as protected First Amendment speech, which requires municipalities to be especially careful in their regulation and restriction of such businesses.\(^3\)

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\(^1\) See Ben Z. Hershberg, Courts Struggle to Balance Rights of Adult Stores, Cities, COURIER-J. (Louisville, Ky.), Oct. 19, 2004, at 1A. For purposes of this Note, “adult-entertainment business” and “adult business” are used interchangeably and include live nude and semi-nude dancing establishments, adult movie theaters, adult bookstores, and other sexually oriented businesses.

\(^2\) See id.

\(^3\) See Barnes v. Glen Theatre, Inc., 501 U.S. 560, 566 (1991) (holding that adult entertainment for commercial purposes “is expressive conduct within the outer parameters of the First Amendment, though . . . only marginally so”); Hershberg, supra note 1, at 1A.
In recent years, many cities have engaged in well-publicized zoning action to regulate and even to eliminate the presence of adult-entertainment businesses within their borders.\textsuperscript{4} These efforts are largely a response to the adverse impacts adult businesses have on surrounding communities.\textsuperscript{5} A 1989 survey of studies done on the topic, for example, showed that the presence of adult-entertainment businesses in a neighborhood leads to decreases in property values, increases in property crimes and sex crimes, and general neighborhood deterioration.\textsuperscript{6} When several adult businesses are concentrated in a particular area, these effects are often worse.\textsuperscript{7}

Rural and predominantly residential municipalities are especially susceptible to the negative effects of adult businesses.\textsuperscript{8} The same 1989 study found that the negative impacts of adult businesses on communities are closely related to the businesses’ proximity to residential areas.\textsuperscript{9} In rural and residential municipalities, where most land is residential, adult businesses may be necessarily closer to residential areas.\textsuperscript{10} Accordingly, adult businesses arguably pose a greater risk to the quality of life in rural and residential municipalities than they do to the quality of life in large cities, where there exists a greater amount of commercially zoned acreage in which adult businesses may locate.\textsuperscript{11}

Despite these greater risks, zoning restrictions on adult businesses in rural and residential municipalities are evaluated under a First Amendment analysis developed primarily in consideration of cities with large amounts of commercially zoned acreage.\textsuperscript{12} The U.S. Supreme Court’s most complete discussion of this analysis took place in 1986 in \textit{City of Renton v. Playtime Theatres, Inc.}, in which the Court upheld the


\textsuperscript{6} Id. at 524. Some municipalities nevertheless have chosen to minimize the overall adverse effects of adult businesses by concentrating them in one area, thereby eliminating them from other neighborhoods entirely. See Boston, Mass., Zoning Code § 3–1A(d) (2004); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50, 52 (1986) (holding constitutional a zoning scheme that concentrated adult businesses in 5% of a city’s land area).

\textsuperscript{7} Id. at 524. Some municipalities nevertheless have chosen to minimize the overall adverse effects of adult businesses by concentrating them in one area, thereby eliminating them from other neighborhoods entirely. See Boston, Mass., Zoning Code § 3–1A(d) (2004); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50, 52 (1986) (holding constitutional a zoning scheme that concentrated adult businesses in 5% of a city’s land area).

\textsuperscript{8} See Minn. Attorney Gen., supra note 5, at 529–30; see also Karen DeMasters, \textit{Is a Buffer-Zone Law Fair if There Is No Room for a Buffer?}, N.Y. \textsc{Times}, Jan. 3, 1999, § 14, at 6.

\textsuperscript{9} See Minn. Attorney Gen., supra note 5, at 529–30.

\textsuperscript{10} See id.; DeMasters, supra note 8, at 6.

\textsuperscript{11} See Minn. Attorney Gen., supra note 5, at 529–30; DeMasters, supra note 8, at 6.

\textsuperscript{12} See Renton, 475 U.S. at 50, 53.
zoning ordinance of Renton, Washington, which effectively concentrated all adult-entertainment businesses in certain areas of the city.\textsuperscript{13} Under \textit{Renton}, an adult-entertainment zoning restriction is upheld if it is (1) intended to serve a substantial governmental interest and (2) permits reasonable alternative avenues of communication.\textsuperscript{14} To satisfy the second, “alternative avenues” requirement of this test, the city must show that a business owner has a reasonable opportunity to operate an adult business elsewhere within municipal boundaries.\textsuperscript{15}

The two-pronged \textit{Renton} test was created for a city with large percentages of commercially zoned land, and thus applying the second prong of the test to rural and residential municipalities, which have substantially less commercially zoned land, has been problematic.\textsuperscript{16} Courts have encountered great difficulty in determining how such communities may satisfy \textit{Renton}’s alternative avenues requirement.\textsuperscript{17} In these instances, the Supreme Court’s case law as applied to rural and residential communities is an uncertain guide.\textsuperscript{18}

Consider the following hypothetical scenario.\textsuperscript{19} A city attorney for Blackacre Village, a small town surrounded by larger commercial cities, is tasked with drafting the city’s first adult-entertainment zoning ordinance.\textsuperscript{20} Because it is a primarily residential municipality, only 5\% of Blackacre’s total land area is zoned for commercial use.\textsuperscript{21} To ensure Blackacre meets its constitutional obligations under the First Amendment, the attorney reviews \textit{Renton} to determine what constitutes sufficient alternative avenues of communication, the second requirement of the \textit{Renton} test.\textsuperscript{22} In doing so, the attorney encounters some significant, unanswerable questions.\textsuperscript{23} If \textit{Renton} requires cities to allow adult businesses to locate on 5\% of the municipality’s available land, does this mean Blackacre essentially must allow adult businesses throughout its small commercial core?\textsuperscript{24} Should the fact that other

\textsuperscript{13} \textit{Id.} at 50.
\textsuperscript{14} \textit{Id.}
\textsuperscript{15} \textit{See id.} at 54.
\textsuperscript{17} \textit{See Keego Harbor Co.}, 657 F.2d at 96; \textit{Saddle Brook}, 722 A.2d at 532.
\textsuperscript{18} \textit{See Saddle Brook}, 722 A.2d at 534.
\textsuperscript{19} The facts from this scenario are loosely based on \textit{Keego Harbor Co.}, 657 F.2d at 96, and \textit{Saddle Brook}, 722 A.2d at 532.
\textsuperscript{20} \textit{See Keego Harbor Co.}, 657 F.2d at 96; \textit{Saddle Brook}, 722 A.2d at 532.
\textsuperscript{21} \textit{See Keego Harbor Co.}, 657 F.2d at 96; \textit{Saddle Brook}, 722 A.2d at 532.
\textsuperscript{22} \textit{See Renton}, 475 U.S. at 50, 53.
\textsuperscript{23} \textit{See id.} at 53; \textit{Saddle Brook}, 722 A.2d at 532, 535–36.
\textsuperscript{24} \textit{See Renton}, 475 U.S. at 53.
nearby cities provide a wealth of adult-entertainment businesses lessen Blackacre’s obligation, at least for purposes of the First Amendment?\textsuperscript{25} What if a 1000-foot distancing requirement between adult businesses and churches, schools, and residential areas effectively bans these businesses from Blackacre entirely?\textsuperscript{26} The Supreme Court case law offers few answers to these questions, leaving the city attorney little direction in drafting the ordinance.\textsuperscript{27}

In response to these difficult questions, this Note argues that the Supreme Court’s adult-entertainment zoning jurisprudence leaves unanswered the following four problems facing rural and residential municipalities: the undetermined constitutionality of a total ban, vague standards for evaluating the alternative avenues requirement, an inability to enact sufficient distancing requirements, and a lack of regional zoning of adult businesses.\textsuperscript{28} To address these problems, this Note proposes three solutions: regional zoning of adult businesses, a regional analysis of Renton’s alternative avenues requirement, and a supply-and-demand analysis of Renton’s alternative avenues requirement.\textsuperscript{29}

Part I.A of this Note reviews the Supreme Court’s First Amendment jurisprudence on content-neutral laws as it applies to adult-entertainment zoning cases.\textsuperscript{30} Parts I.B, I.C, and I.D review in detail three Supreme Court cases that discuss the requirement of adequate alternative avenues of communication for adult-entertainment zoning laws.\textsuperscript{31} Part I.E analyzes three subsequent lower court cases that struggled to apply Supreme Court case law to rural and residential communities.\textsuperscript{32} Part II identifies and discusses the four problems that adult-entertainment Supreme Court case law creates for rural and residential municipalities and their adult-entertainment zoning laws.\textsuperscript{33} Part III proposes three solutions to these problems, which legislators, judges, and lawyers may adopt to ensure a more equitable application of First Amendment case law to rural and residential municipalities.\textsuperscript{34}

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\textsuperscript{25} See Saddle Brook, 722 A.2d at 535–36.
\textsuperscript{26} See id. at 532.
\textsuperscript{28} See infra notes 219–264 and accompanying text.
\textsuperscript{29} See infra notes 265–305 and accompanying text.
\textsuperscript{30} See infra notes 35–61 and accompanying text.
\textsuperscript{31} See infra notes 62–174 and accompanying text.
\textsuperscript{32} See infra notes 175–212 and accompanying text.
\textsuperscript{33} See infra notes 213–264 and accompanying text.
\textsuperscript{34} See infra notes 265–305 and accompanying text.
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I. The Supreme Court’s First Amendment Jurisprudence Concerning Adult-Entertainment Zoning and Its Application by Lower Courts

A. The Content-Neutrality Doctrine

Central to the Supreme Court’s adult-entertainment case law is the interpretation of adult-entertainment zoning ordinances as content-neutral rather than content-based. A content-neutral law controls expression without regard to the speech itself or the speech’s impact. In this sense, laws that regulate the time, place, and manner of speech, but not the actual speech itself, are content-neutral. Therefore, an adult-entertainment zoning law that regulates the location of a business is said to regulate only the secondary effects of such speech, rather than the speech itself. In contrast, a content-based law singles out certain messages, topics, or forms of expression for regulation and restriction.

Although the theoretical distinction between content-neutral and content-based laws may be clear, scholars have noted that the practical

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35 See City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986). The prevailing scholarly consensus is that adult-entertainment zoning ordinances are, in most instances, not content-neutral, despite Supreme Court holdings to the contrary. See, e.g., Clay Calvert, Free Speech and Content-Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine, 29 McGeorge L. Rev. 69, 103 (1997); Erwin Chemerinsky, Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court’s Application, 74 S. Cal. L. Rev. 49, 59 (2000); Geoffrey R. Stone, Content-Neutral Restrictions, 54 U. Chi. L. Rev. 46, 115 (1987). Despite this problematic application, the Court continues to apply the content-neutrality doctrine. See City of Los Angeles v. Alameda Books, Inc. 535 U.S. 425, 434, 441 (2002) (plurality opinion). Contra Wilson R. Huhn, Assessing the Constitutionality of Laws That Are Both Content-Based and Content-Neutral: The Emerging Constitutional Calculus, 79 Ind. L.J. 801, 803, 810–12, 846 (2004) (discussing a new “constitutional calculus” test based on Justice John Paul Stevens’s concurring opinion in City of Los Angeles v. Alameda Books, Inc.). There is growing discontent with the doctrine among the Justices, however. See Los Angeles, 535 U.S. at 444–45 (Kennedy, J., concurring). In 2002, in Los Angeles the Court upheld Los Angeles’s adult-entertainment zoning ordinance enacted in reliance on a twenty-year-old study. Id. at 430 (plurality opinion). Justice Anthony Kennedy, who was the fifth vote in a five-to-four decision, wrote a concurring opinion in which he disagreed with the majority’s contention that the zoning ordinance was content-neutral. Id. at 445–46 (Kennedy, J., concurring). Noting that “the designation is imprecise,” Justice Kennedy stated that the Court should acknowledge that the law was content-based, but still subject it to the intermediate scrutiny usually reserved for content-neutral laws. Id. at 444–45, 447 (Kennedy, J., concurring). Under this interpretation, content-based adult-entertainment zoning laws would be treated as an exception to the content-neutrality doctrine. See id. at 447 (Kennedy, J., concurring).

36 See Renton, 475 U.S. at 48.

37 See Calvert, supra note 35, at 74.

38 See Renton, 475 U.S. at 46.

39 See Calvert, supra note 35, at 76.
categorization of most laws is not.\textsuperscript{40} In theory, the controlling question for determining whether a law is content-neutral should be whether the application of the law turns on the message or content of the speech.\textsuperscript{41} The Supreme Court’s analysis, however, is often inconsistent with this approach.\textsuperscript{42} Instead of analyzing the law on its face to determine whether it singles out certain speech, the Court often considers the intent or purpose of the legislation.\textsuperscript{43} In these instances, a content-based law that is motivated by an apparent content-neutral purpose—such as the regulation of only the time, place, and manner of speech—is considered content-neutral, even if the law is facially content-based.\textsuperscript{44}

For instance, a law that identifies particular areas of a city where adult businesses may locate is content-based because, on the face of the law, adult entertainment as a form of speech is singled out for differential treatment.\textsuperscript{45} If that law, however, were motivated by a desire to limit the negative effects of adult entertainment on surrounding communities, but not to eliminate the speech altogether, a court may find the law content-neutral.\textsuperscript{46} In finding as much, the court would be ignoring facial evidence to the contrary.\textsuperscript{47}

As a result of this arguably inconsistent approach to content neutrality, some scholars have advocated abandoning the doctrine.\textsuperscript{48} They argue that most laws have both content-based and content-neutral elements, making categorization arbitrary.\textsuperscript{49} Many scholars nevertheless see merit in the distinction, noting that the problem with the content-neutrality doctrine is really one of application, not theory.\textsuperscript{50}

\textsuperscript{40} See Huhn, supra note 35, at 803.
\textsuperscript{41} See Chemerinsky, supra note 35, at 51.
\textsuperscript{42} See Calvert, supra note 35, at 103; Chemerinsky, supra note 35, at 59–60.
\textsuperscript{44} See Chemerinsky, supra note 35, at 59–60.
\textsuperscript{45} See id. at 60.
\textsuperscript{46} See, e.g., Renton, 475 U.S. at 48.
\textsuperscript{47} See Chemerinsky, supra note 35, at 60.
\textsuperscript{49} See, e.g., Huhn, supra note 35, at 826.
\textsuperscript{50} See Calvert, supra note 35, at 110.
rationale, the Court has complicated the issue by considering legislative intent when it should be looking at the law on its face.\textsuperscript{51}

According to these commentators, a consistent application of the content-based/content-neutral distinction permits the Court to focus its strictest scrutiny on content-based laws, which suppress speech most severely, and to apply a more deferential level of scrutiny to less-threatening content-neutral laws.\textsuperscript{52} Whereas content-based laws presumptively violate the First Amendment,\textsuperscript{53} content-neutral laws are upheld so long as they satisfy the two-pronged test outlined in \textit{City of Renton v. Playtime Theatres, Inc.}\textsuperscript{54} First, the content-neutral law must serve a substantial governmental interest.\textsuperscript{55} This is commonly satisfied by the municipality showing it regulates only the negative secondary effects of speech, such as crime or diminished property values, by restricting the locations of adult-entertainment businesses rather than the content of adult entertainment itself.\textsuperscript{56}

Second, the content-neutral law must leave open adequate alternative avenues of communication.\textsuperscript{57} This alternative avenues requirement is included because the First Amendment guarantees citizens the right to share their message with those interested.\textsuperscript{58} As a result, in the adult entertainment context, a content-neutral law must ensure adult businesses are afforded space to operate.\textsuperscript{59}

Three Supreme Court cases discuss municipalities’ obligations to provide sufficient alternative avenues of communication when enacting adult-entertainment zoning.\textsuperscript{60} Each has significantly influenced lower court decisions regarding adult-entertainment zoning in residential and rural communities.\textsuperscript{61}

\begin{thebibliography}{61}
\bibitem{51} See \textit{id.} at 108–09.
\bibitem{52} See \textit{id.} at 74–75; \textit{supra} note 35, at 54.
\bibitem{54} See \textit{Renton}, 475 U.S. at 46–47.
\bibitem{55} See \textit{id.} at 47.
\bibitem{56} See \textit{id.} at 50.
\bibitem{57} See \textit{id.}
\bibitem{58} See \textit{Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.}, 452 U.S. 640, 654 (1981) (holding unconstitutional a Minnesota state fair rule prohibiting the sale or distribution of printed or written material except from fixed locations).
\bibitem{59} See \textit{Renton}, 475 U.S. at 54.
\bibitem{61} See, \textit{e.g.}, \textit{Keego Harbor Co. v. City of Keego Harbor}, 657 F.2d 94, 96–97 (6th Cir. 1981); \textit{Township of Saddle Brook v. A.B. Family Ctr., Inc.}, 722 A.2d 530, 533–34 (N.J. 1999). Two other frequently cited Supreme Court cases considering restrictions on adult
B. The U.S. Supreme Court Upholds a Zoning Ordinance Dispersing Adult Businesses: Young v. American Mini Theatres, Inc.

In 1976, in *Young v. American Mini Theatres, Inc.*, the U.S. Supreme Court upheld a Detroit, Michigan, zoning ordinance that required dispersal of adult-entertainment businesses.\(^{62}\) As the first Supreme Court adult-entertainment zoning case, *Young* established the authority of cities to restrict the locations in which adult businesses may operate.\(^{63}\) At issue were amendments to an “Anti-Skid Row Ordinance” aimed at preventing the concentration of adult-entertainment businesses in Detroit.\(^{64}\) The ordinance placed two primary restrictions on adult businesses.\(^{65}\) First, it prohibited adult theaters from being located within 1000 feet of any two other “regulated uses.”\(^{66}\) In addition to adult theaters, “regulated uses” included adult bookstores, cabarets, bars, dance halls, and hotels.\(^{67}\) Second, the ordinance prohibited adult theaters from locating within 500 feet of a residential area.\(^{68}\) Combined, these restrictions had the effect of dispersing adult businesses.\(^{69}\)

In *Young*, operators of two adult theaters in Detroit filed suit against Detroit city officials, contending the ordinances were unconstitutional.\(^{70}\) The United States District Court found for the city and the U.S. Court of Appeals for the Sixth Circuit reversed.\(^{71}\) The adult theater operators made three primary arguments before the U.S. Supreme Court.\(^{72}\) First, they contended that the definition of adult theaters was unconstitutionally vague.\(^{73}\) Second, they argued the restric-
tions were unconstitutional as prior restraints on free speech.\(^{74}\) Finally, they questioned the content neutrality of the law and its suppression of protected First Amendment speech.\(^{75}\)

The plurality opinion by Justice John Paul Stevens quickly dispensed with the adult theater operators’ first two arguments.\(^{76}\) Stevens stated that there was no question that adult theaters were within the scope of the supposedly vague definition.\(^{77}\) A claim of vagueness was, in reality, a hypothetical issue, with no real bearing on the interested parties’ situation.\(^{78}\) As a result, the first argument was rejected.\(^{79}\) In response to the second argument, Justice Stevens noted that the operators had not contended that the ordinance placed a limit on the total number of theaters, denied exhibitors access to the market, or prevented the demand of the “viewing public” from being met.\(^{80}\) Consequently, the market for adult entertainment was “essentially unrestrained,”\(^{81}\) and a restriction on the location where adult films could be shown did not violate the First Amendment.\(^{82}\)

In response to the claim that the law was content-based, the Court first acknowledged the fundamental importance of content neutrality to the Court’s jurisprudence, noting that content-based restrictions on expression would undermine the importance of a national forum and public debate.\(^{83}\) Nevertheless, Justice Stevens held adult-entertainment zoning was an instance where the value of free speech and public debate had to be balanced against at least two competing interests.\(^{84}\)

First, some laws can protect the “government’s paramount obligation of neutrality,” and therefore remain constitutional, so long as they are viewpoint-neutral, even if they are content-based.\(^{85}\) Laws falling into this category include adult-entertainment zoning ordinances because they identify only the locations where such speech may occur but do not express an opinion of endorsement or disapproval about

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\(^{74}\) See id. at 62 (plurality opinion).

\(^{75}\) See id. at 63–66 (plurality opinion).

\(^{76}\) See id. at 58–63 (plurality opinion).

\(^{77}\) See Young, 427 U.S. at 61 (plurality opinion).

\(^{78}\) See id. (plurality opinion)

\(^{79}\) See id. (plurality opinion)

\(^{80}\) See id. at 62 (plurality opinion).

\(^{81}\) Id. (plurality opinion)

\(^{82}\) See Young, 427 U.S. at 62 (plurality opinion).

\(^{83}\) Id. at 65–66 (plurality opinion).

\(^{84}\) See id. at 70 (plurality opinion).

\(^{85}\) See id. (plurality opinion)
the speech itself. Davidson, 474 U.S. at 380–81 (plurality opinion). Second, society has a lesser interest in protecting commercial material, such as borderline pornography, than in protecting important political or philosophical debate. As Justice Stevens famously noted, “few of us would march our sons and daughters off to war to preserve the citizen’s right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.”

In short, these opposing concerns reflect a city’s valid interest in preserving “the quality of urban life.” Given Detroit’s countervailing interests, the Court held the city was justified in restricting the location of adult businesses because it intended only to limit the secondary effects of such businesses. The Court did not clarify, however, whether other communities, including rural and residential ones, possess a similar interest in maintaining the quality of urban life, given that urban life is not a fundamental attribute of those communities.

C. The U.S. Supreme Court Strikes Down a Ban on Live Entertainment: Schad v. Borough of Mount Ephraim

In 1981, in Schad v. Borough of Mount Ephraim, the Supreme Court struck down Mount Ephraim, New Jersey’s zoning ordinance prohibiting any live entertainment, adult or otherwise. Whereas Young had considered a large city’s interest in maintaining the quality of urban life, Schad considered a small, primarily residential community’s interest in maintaining the character of its community. Mount Ephraim’s zoning ordinance identified various permitted uses in commercial zones and further noted that any uses not expressly permitted were prohibited. Live entertainment, nude or otherwise, was implicitly among the prohibited uses. The appellants in Schad operated an adult bookstore that, in 1976, violated the ordinance by adding a coin-

86 See id. (plurality opinion).
87 See Young, 427 U.S. at 70 (plurality opinion).
88 See id. (plurality opinion).
89 Id. (plurality opinion).
90 See id. at 71 (plurality opinion).
91 Id. at 71–72 (plurality opinion).
92 See 427 U.S. at 71–72 (plurality opinion).
93 See 452 U.S. at 72 (plurality opinion).
94 See Schad, 452 U.S. at 72; Young, 427 U.S. at 71 (plurality opinion).
95 Schad, 452 U.S. at 63–64.
96 See id.
operated peep show where a customer could watch a live nude dancer performing. They were found criminally guilty of violating the ordinance, a decision which they appealed to the U.S. Supreme Court.

The Schad Court delivered five opinions. The majority opinion written by Justice Byron White represented six Justices, including himself, William Brennan, Potter Stewart, Thurgood Marshall, Harry Blackmun, and Lewis Powell. Justices Blackmun, Powell and Stevens each wrote concurring opinions, with Justice Stewart joining in Justice Powell's opinion. Chief Justice Warren Burger and Justice William Rehnquist were the only dissenters.

Justice White's majority opinion contained two primary holdings. First, the Court held the appellants could challenge the ordinance as being overly broad. As Justice White noted, the ordinance in question implicitly prohibited not only nude dancing, but also all live entertainment in the city. Although he acknowledged that nude dancing does possess some form of First Amendment protection, Justice White focused instead on the fact that the ordinance on its face also prohibited other activities protected by the First Amendment, such as commercial theater, musical concerts, and other performances. Such a broad ordinance accordingly required equally expansive justification.

Second, Mount Ephraim did not sufficiently justify the breadth of its ordinance, and thus failed to identify a substantial governmental

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97 Id. at 62.
98 Id. at 64–65.
99 Id. at 62–77; id. at 77–79 (Blackmun, J., concurring); id. at 79 (Powell, J., concurring); id. at 79–85 (Stevens, J., concurring); id. at 85–88 (Burger, C.J., dissenting).
100 See Schad, 452 U.S. at 62–79. Professor Jules B. Gerard concludes otherwise, claiming that White's opinion represented only three Justices (Justices White, Brennan, and Marshall) because Justices Blackmun, Powell, and Stevens wrote separate concurring opinions. Jules B. Gerard, Local Regulation of Adult Businesses 209 (2004 ed.). This argument ignores the fact that both Justice Blackmun's and Justice Powell's opinions explicitly note that they "join the Court's opinion." Schad, 452 U.S. at 77 (Blackmun, J., concurring); id. at 79 (Powell, J., concurring). As a result, Justice Stevens is the only concurring Justice not to join Justice White's opinion because he only concurs in the judgment, not the opinion. See id. at 79 (Stevens, J., concurring).
101 See id. at 77–79 (Blackmun, J., concurring); id. at 79 (Powell, J., concurring); id. at 79–85 (Stevens, J., concurring).
102 Id. at 85 (Burger, J., dissenting).
103 Id. at 65–67.
104 Id. at 66.
105 Schad, 452 U.S. at 65.
106 Id.
107 See id. at 67.
interest, which was required to uphold the content-neutral law as constitutional.\textsuperscript{108} This was evident from the fact that the ordinance on its face failed to offer anything in the way of a justification.\textsuperscript{109} Because the ordinance only implicitly prohibited live entertainment, it was impossible to glean anything about the motives underlying the prohibition.\textsuperscript{110}

The majority further reasoned that \textit{Young} did not control the facts of \textit{Schad}.\textsuperscript{111} In \textit{Young}, Detroit had implemented only a zoning scheme to disperse adult entertainment, whereas Mount Ephraim in \textit{Schad} attempted to ban it altogether.\textsuperscript{112} Moreover, Detroit had provided clear justification for its dispersal ordinance and had identified clear negative secondary effects deriving from a concentration of adult businesses.\textsuperscript{113} In this sense, Mount Ephraim had learned none of the lessons of \textit{Young}—the town offered no justifications and no evidence for the claim that live entertainment, much less live adult entertainment, created any negative secondary effects.\textsuperscript{114} As a result, Mount Ephraim could not claim its ordinance was a valid restriction on time, place, or manner of communication.\textsuperscript{115}

Although this holding alone was sufficient to strike down the ordinance and reverse appellants’ conviction, Justice White’s majority opinion further discussed the alternative avenues requirement of the content-neutrality doctrine.\textsuperscript{116} The Court held that Mount Ephraim’s ordinance ensured no alternative avenues of communication could exist because the ordinance was an outright ban on live entertainment in the commercial zone of the Borough.\textsuperscript{117} \textit{Young} permitted only the restrictive zoning of adult businesses in such a way that the market was left “essentially unrestrained.”\textsuperscript{118} In contrast, Mount Ephraim attempted to prohibit the operation of adult businesses alto-

\textsuperscript{108} See id.
\textsuperscript{109} See id.
\textsuperscript{110} See \textit{Schad}, 452 U.S. at 67.
\textsuperscript{111} \textit{Id.} at 71–72; see \textit{Young}, 427 U.S. at 72–73 (plurality opinion).
\textsuperscript{112} \textit{Schad}, 452 U.S. at 71; \textit{Young}, 427 U.S. at 72–73 (plurality opinion).
\textsuperscript{113} See \textit{Young}, 427 U.S. at 71 (plurality opinion).
\textsuperscript{114} See \textit{Schad}, 452 U.S. at 73.
\textsuperscript{115} See \textit{id.} at 75. More recently, the Supreme Court has expanded on what evidence is sufficient to justify a time, place, and manner restriction on adult entertainment. See \textit{Los Angeles}, 535 U.S. at 430 (plurality opinion). In \textit{Los Angeles}, the Court held that Los Angeles could rely on a twenty-year-old study showing the negative secondary effects of adult business to justify its ordinance as a valid content-neutral adult-entertainment zoning ordinance. \textit{Id.}
\textsuperscript{116} See \textit{Schad}, 452 U.S. at 75–76.
\textsuperscript{117} See \textit{id.} at 76.
\textsuperscript{118} 427 U.S. at 62 (plurality opinion).
gether, entirely foreclosing the market for adult entertainment.\textsuperscript{119} This reasoning alone was enough to strike down the law.\textsuperscript{120}

Nevertheless, the Court offered some support for residential communities attempting to justify a total prohibition on adult entertainment.\textsuperscript{121} In response to Mount Ephraim’s claim that nearby municipalities offered live adult entertainment, and that this availability should satisfy the alternative avenues requirement, Justice White offered the following analysis:

[Mount Ephraim’s] position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities, such as the Borough of Mount Ephraim. This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning in Camden County, and Mount Ephraim is free under state law to impose its own zoning restrictions, within constitutional limits.\textsuperscript{122}

Justice White thus seems to suggest that there may be instances in which primarily residential communities may be able to rely on the existence of adult entertainment in other locales as evidence that alternative avenues for communication exist.\textsuperscript{123} The prerequisite of such an exception to the alternative avenues requirement, however, is countywide—or perhaps statewide—zoning.\textsuperscript{124}

Justices Blackmun, Powell, and Stevens each wrote concurring opinions in response to Justice White’s discussion of the alternative avenues requirement.\textsuperscript{125} Justice Blackmun reasoned that municipalities should not be able to sidestep their First Amendment obligations by

\textsuperscript{119} See Schad, 452 U.S. at 76. Justice White noted that “our decision today does not establish that every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which live entertainment is permitted.” Id. at 75 n.18.

\textsuperscript{120} See id. at 76–77.

\textsuperscript{121} See id. at 76.

\textsuperscript{122} Id. (emphasis added). Those cases that have evaluated countywide zoning ordinances restricting adult entertainment involve ordinances that apply only to unincorporated areas of a county. See, e.g., David Vincent, Inc. v. Broward County, 200 F.3d 1325, 1327, 1329 (11th Cir. 2000); Int’l Eateries of Am., Inc. v. Broward County, 941 F.2d 1157, 1165 (11th Cir. 1991).

\textsuperscript{123} See Schad, 452 U.S. at 76.

\textsuperscript{124} See id.

\textsuperscript{125} See id. at 77–79 (Blackmun, J., concurring); id. at 79 (Powell, J., concurring); id. at 79–85 (Stevens, J., concurring).
pointing to the actions of other cities, even in the same county.\textsuperscript{126} Justice Powell, with Justice Stewart joining, reasoned instead that some communities—those primarily residential in character—should be able to ban live adult entertainment altogether.\textsuperscript{127} Justice Stevens agreed, noting that at the very least Mount Ephraim could show that adult entertainment is available nearby, outside the limits of the Borough.\textsuperscript{128}

Likewise, Chief Justice Burger, joined by Justice Rehnquist, dissented primarily because of Justice White’s analysis of the alternative avenues requirement, arriving at the same conclusion as the concurring Justices.\textsuperscript{129} Chief Justice Burger asserted that small communities like Mount Ephraim should be able to justify their adult-entertainment zoning law by pointing to the availability of adult entertainment nearby.\textsuperscript{130} Such a justification could hardly be thought to chill protected speech in any given region because, as Chief Justice Burger stated, “‘[c]hilling’ this kind of show business in this tiny residential enclave can hardly be thought to show that the appellants’ ‘message’ will be prohibited in nearby—and more sophisticated—cities.”\textsuperscript{131} Unlike Justice White, Chief Justice Burger stopped short of requiring countywide zoning to permit this arrangement.\textsuperscript{132} Rather, Chief Justice Burger argued that the natural distinction between smaller residential communities and larger, “more sophisticated” cities permits a modified First Amendment analysis for smaller, less urban locales.\textsuperscript{133}

Read together, eight of nine Justices in \textit{Schad} suggest, either implicitly or explicitly, that residential and rural municipalities may possess more flexibility as to the alternative avenues requirement than do other municipalities.\textsuperscript{134} \textit{Schad} thus reveals that the Burger Court experienced some anxiety regarding the burdens the First Amendment placed on adult-entertainment zoning in rural and residential com-

\textsuperscript{126} See id. at 78 (Blackmun, J., concurring).
\textsuperscript{127} See id. at 79 (Powell, J., concurring).
\textsuperscript{128} See \textit{Schad}, 452 U.S. at 84 n.11 (Stevens, J., concurring).
\textsuperscript{129} See id. at 85 (Burger, C.J., dissenting).
\textsuperscript{130} See id. at 87 (Burger, C.J., dissenting).
\textsuperscript{131} Id. (Burger, C.J., dissenting).
\textsuperscript{132} See id. (Burger, C.J., dissenting).
\textsuperscript{133} See \textit{Schad}, 452 U.S. at 87 (Burger, C.J., dissenting).
\textsuperscript{134} See id. at 76; id. at 79 (Powell, J., concurring); id. at 84 n.11 (Stevens, J., concurring); id. at 87 (Burger, C.J., dissenting).
munities.135 What Schad did not do, however, was identify how later courts were to respond to these anxieties.136

D. The Supreme Court Upholds a Zoning Ordinance Concentrating Adult Businesses: Renton v. Playtime Theatres, Inc.

In upholding a zoning ordinance that concentrated adult businesses in certain areas of the city, Justice Rehnquist’s majority opinion in Renton offers the Court’s fullest discussion of the alternative avenues requirement to date.137 The Renton, Washington, ordinance in question was enacted in April 1981 and restricted the locations in which adult movie theaters could operate.138 Renton, a suburb southeast of Seattle with a population of approximately 32,000, had no adult-entertainment businesses at the time of the ordinance’s enactment.139 The city’s ordinance prohibited such theaters from locating less than 1000 feet from residential zones, single- or multiple-family dwellings, churches, or parks, and less than one mile from schools.140 These restrictions effectively left 520 acres, or 5% of the land area of Renton, available to such businesses.141

A Renton property owner who had plans to open two adult movie theaters in the prohibited areas filed suit, challenging the law as violative of the First and Fourteenth Amendments.142 In 1986, the U.S. Supreme Court upheld the ordinance.143 A key issue in the Court’s analysis of the Renton zoning ordinance was determining whether the law was content-neutral or content-based.144 The Court acknowledged that the ordinance did “not appear to fit neatly into either the ‘content-based’ or the ‘content-neutral’ category.”145 Nevertheless, as in Young, it held the law to be content-neutral because the City Council intended only to regulate the negative secondary effects of adult entertainment,

135 See id. at 76; id. at 79 (Powell, J., concurring); id. at 84 n.11 (Stevens, J., concurring); id. at 87 (Burger, C.J., dissenting).
136 See id. at 76; id. at 79 (Powell, J., concurring); id. at 84 n.11 (Stevens, J., concurring); id. at 87 (Burger, C.J., dissenting).
137 See 475 U.S. at 53–55.
138 Id. at 44.
139 Id.
140 Id. The ordinance was later amended to restrict such businesses to locations less than 1000 feet from schools instead of one mile. Id. at 45.
141 Id. at 53.
142 Renton, 475 U.S. at 45.
143 See id. at 54–55.
144 See id. at 47.
145 Id.
rather than the actual expression, by restricting the locations in which such businesses operated. In other words, the legislative intent, rather than the statutory language, contributed to the law’s content neutrality.

Having established that the ordinance was content-neutral, the Court then turned to the two-part test for content-neutral laws—whether the law was designed to serve a substantial government interest, and whether it permitted adequate alternative avenues of communication. It was clear to the Court that the ordinance served a substantial government interest because the Court emphasized, as it had in Young, that “a city’s ‘interest in attempting to preserve the quality of urban life is one that must be accorded high respect.’” The City of Renton claimed, and the Court accepted, that the experiences of nearby Seattle showed that widespread dispersion of adult-entertainment businesses led to negative secondary effects on community and neighborhood improvement efforts and contributed to blight. The fact that the experiences of Seattle, and its recommendation to concentrate adult business, conflicted directly with the experiences of Detroit, which dispersed them, was not problematic to the Court. Rather, the Court reasoned, cities must be accorded great flexibility in the regulation of such businesses and the “admittedly serious problems they engender,” especially with regard to their goals of preserving the quality of urban life. As a result, the Court held the Renton ordinance served a substantial governmental interest, thus satisfying the first prong of the First Amendment test for content-neutral ordinances.

The Court next considered whether the Renton ordinance ensured reasonable alternative avenues of communication for adult-entertainment businesses. The situation the Court faced in Renton, however, differed from that in Young and Schad. In Young, the law satisfied the alternative avenues requirement because the market was

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146 See id. at 48.
147 See Renton, 475 U.S. at 48; see also Chemerinsky, supra note 35, at 59–60.
148 See Renton, 475 U.S. at 50.
149 Id. (quoting Young, 427 U.S. at 71 (plurality opinion)).
150 See id. at 51.
151 See id. at 51–52; Young, 427 U.S. at 71 (plurality opinion).
152 Young, 427 U.S. at 71 (plurality opinion).
153 See Renton, 475 U.S. at 51.
154 See id. at 53.
155 See id. at 52–53; Schad, 452 U.S. at 76; Young, 427 U.S. at 62 (plurality opinion).
unrestrained. In *Schad*, the law failed the alternative avenues requirement because adult businesses were totally precluded from locating in Mount Ephraim. In *Renton*, however, the market was somewhat restrained by virtue of businesses’ concentration, but it was not totally eliminated.

The Court first analyzed the land-use scenario in Renton for adult businesses. Even with the ordinance in effect, the Court noted that there were 520 acres, greater than 5% of Renton’s total land area, where adult-entertainment businesses could legally locate. Justice Rehnquist further rejected respondents’ argument that most of this land either was not available or was commercially unviable. He reasoned that the commercial viability of the available land is irrelevant for a First Amendment analysis because this fact goes only to the issue of marketability of the business, not the business’s free expression. As a result, all 520 acres were considered available to adult-entertainment businesses wishing to locate in Renton.

The Court did not offer a clear explanation of the connection between the amount of available acreage, or even the percentage of land available, and the determination of whether alternative avenues of communication were adequate. It noted, however, that the city had made “some areas” open to adult-entertainment businesses wishing to engage in protected expression and that these areas provided a “reasonable opportunity” to operate such businesses. The Court therefore held that the City of Renton had satisfied the alternative avenues requirement of the test for content-neutral laws, and the ordinance therefore passed First Amendment muster.

Lower courts have struggled to apply *Renton*’s alternative avenues analysis to other situations, but they have generally employed two different tests. One test concludes that a city’s available land for adult-
entertainment businesses may be considered adequate by a court if it is a reasonable percentage of the city’s total land area.\textsuperscript{168} This approach relies heavily on \textit{Renton}’s analysis of the percentage of land available, and attempts to determine whether the 5% found there is constitutionally mandated.\textsuperscript{169} As interpreted by courts, the reasonableness of the percentage varies greatly depending on the size and urban qualities of the municipality.\textsuperscript{170} For example, courts have differed over whether the appropriate denominator in such an equation should be the city’s total land area—as used in \textit{Renton}—or only commercially zoned areas.\textsuperscript{171}

Alternatively, the second test concludes that a municipality’s available land for adult businesses may be considered adequate if the total number of sites meets the demand as measured by population size, the number of existing adult businesses, or the number of existing and potential adult-entertainment businesses.\textsuperscript{172} This approach is, at its base, a supply-and-demand analysis, in which the analysis itself only varies depending on how supply (the amount of land available) and demand

\begin{footnotesize}
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\item \textsuperscript{168} Compare Specialty Malls of Tampa v. City of Tampa, 916 F. Supp. 1222, 1231 (M.D. Fla. 1996) (holding an ordinance leaving 7.5% of the city of Tampa’s land available for adult entertainment was constitutional because it exceeded the 5% figure found constitutional in \textit{Renton}), aff’d, 109 F.3d 770 (11th Cir. 1997), with D.H.L. Assocs. v. O’Gorman, 199 F.3d 50, 59–60 (1st Cir. 1999) (holding an ordinance leaving 0.09687% of land available for adult businesses in Tyngsborough, Massachusetts, (population 9500) was constitutional because the percentage of acreage available is “relevant but not dispositive”), cert. denied, 529 U.S. 1110 (2000).
\item \textsuperscript{169} See Specialty Malls of Tampa, 916 F. Supp. at 1231.
\item \textsuperscript{170} Compare Specialty Malls of Tampa, 916 F. Supp. at 1231 (holding that leaving 7.5% of the city of Tampa’s land available for adult entertainment was constitutional because it exceeded the 5% figure found constitutional in \textit{Renton}), with O’Gorman, 199 F.3d at 59–60 (holding that leaving 0.09687% land available for adult businesses in Tyngsborough, Mass., (population 9500) was constitutional because the percentage of acreage available is “relevant but not dispositive”).
\item \textsuperscript{171} Compare \textit{Renton}, 475 U.S. at 54, with Ambassador Books & Video, Inc. v. City of Little Rock, 20 F.3d 858, 864–65 (8th Cir. 1994) (holding that 6.75% of zoned business acreage constituted sufficient alternative avenues).
\item \textsuperscript{172} See \textit{O’Gorman}, 199 F.3d at 60–61. Courts have held adequate avenues of communication existed where as few as two sites were available. \textit{See, e.g., Northlake Blvd. Corp. v. Vill. of N. Palm Beach, 753 So. 2d 754, 758 (Fla. Dist. Ct. App. 2000); see also Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992) (holding that “[a] matter of arithmetic,” a city has provided a sufficient number of sites if the current number of adult-entertainment businesses is less than the available sites); Alexander v. City of Minneapolis, 698 F.2d 936, 938–39 (8th Cir. 1983) (holding an ordinance unconstitutional when it created only twelve sites for thirty existing businesses); Centerfold Club, Inc. v. City of St. Petersburg, 969 F. Supp. 1288, 1305–06 (M.D. Fla. 1997) (holding that nineteen sites for a population of 238,726—or one business per 12,565 persons—constituted insufficient alternative avenues of communication).}
\end{itemize}
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(the number of persons wishing to open or visit adult businesses) are defined.\textsuperscript{173} Under either test, however, the constitutional sufficiency of a municipality’s adult-entertainment zoning will depend largely on how the test is framed and how the requirements are determined.\textsuperscript{174}

\textbf{E. Lower Courts and Rural or Residential Communities}

Lower courts, both state and federal, have struggled with how to apply the Supreme Court’s holdings in \textit{Young}, \textit{Schad}, and \textit{Renton} to rural and residential communities.\textsuperscript{175} Some cases in particular have interpreted these opinions and reached their own holdings as to rural and residential communities’ responsibilities in providing adequate alternative avenues of communication.\textsuperscript{176}

For example, in 1981, in \textit{Keego Harbor Co. v. City of Keego Harbor}, the U.S. Court of Appeals for the Sixth Circuit struck down Keego Harbor, Michigan’s prohibition on adult movie theaters.\textsuperscript{177} As the Sixth Circuit noted in its decision, Keego Harbor was “an unusual community” and a “largely recreational town” of about 3000 people.\textsuperscript{178} The United States District Court for the Eastern District of Michigan had upheld, in an

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  \item \textsuperscript{173} See O’Gorman, 199 F.3d at 60–61.
  \item \textsuperscript{174} See Renton, 475 U.S. at 54; see also Young v. City of Simi Valley, 216 F.3d 807, 822 (9th Cir. 2000) (“Data regarding the number of sites available for adult use is meaningless without a contextual basis for determining whether that number is sufficient for a particular locale.”).
  \item The author of a 2002 student comment offered a differing interpretation of the alternative avenues requirement. See Ashley C. Phillips, Comment, \textit{A Matter of Arithmetic: Using Supply and Demand to Determine the Constitutionality of Adult Entertainment Zoning Ordinances}, 51 Emory L.J. 319, 322 (2002). The author suggests there are actually three distinct tests employed by courts: a “population proportion” test, a “total acreage” test, and a “supply and demand” test. See id. The interpretation of the case law in this Note differs in that it collapses the author’s second and third tests into one, but makes further distinctions based on to what the total acreage is being compared. See id.; supra notes 167–173 and accompanying text.
  \item \textsuperscript{175} See, e.g., \textit{Keego Harbor Co.}, 657 F.2d at 98; \textit{Saddle Brook}, 722 A.2d at 534.
  \item \textsuperscript{176} See \textit{Keego Harbor Co.}, 657 F.2d at 98; \textit{Diamond v. City of Taft}, 29 F. Supp. 2d 633, 646 (E.D. Cal. 1998), aff’d, 215 F.3d 1052 (9th Cir. 2000), cert. denied, 531 U.S. 1072 (2001); \textit{Saddle Brook}, 722 A.2d at 535–36. In contrast to this case law discussing residential and rural municipalities, in 2001, the U.S. District Court for the Southern District of Florida in University Books & Video, Inc. v. Miami-Dade County discussed a larger geographical unit’s responsibilities as to adult-entertainment zoning in holding that 0.0092% of city acreage zoned for adult businesses was insufficient given Miami-Dade County’s status as a “large metropolitan area with a population of well over one million.” 132 F. Supp. 2d 1008, 1014 (S.D. Fla. 2001). The court noted that cities in major urban areas must provide more than “a few dozen acres” to ensure adequate avenues of communication for adult businesses. See id.
  \item \textsuperscript{177} 657 F.2d at 95. \textit{Keego Harbor Co.} was decided more than two months after the decision in \textit{Schad}. \textit{Schad}, 452 U.S. at 61; \textit{Keego Harbor Co.}, 657 F.2d at 94. The \textit{Keego Harbor Co.} court discusses \textit{Schad} in detail. See \textit{Keego Harbor Co.}, 657 F.2d at 97–98.
  \item \textsuperscript{178} \textit{Keego Harbor Co.}, 657 F.2d at 96.
oral opinion, Keego Harbor’s ordinance after evaluating it under the content-neutrality doctrine. After finding its purpose sufficiently justified by the city, the district court judge evaluated the alternative avenues requirement on a region-wide basis, finding that “the market [for adult entertainment] embraces most if not all of Oakland County. There is nothing in the law that should[,] nor should there be[,] that requires each and every hamlet, no matter how small, to provide a space for explicit sex films.”

On appeal, the Sixth Circuit reversed. Its holding, however, addressed only the first prong of the content-neutrality doctrine, concluding only that Keego Harbor had failed to justify the ordinance sufficiently. The holding left untouched the district court’s findings as to the alternative avenues requirement. Moreover, the court explicitly noted that it did not intend to reverse the district court as to these issues: “We do not hold that every unit of government, however small, must provide an area in which adult fare is allowed.” The Sixth Circuit thus explicitly declined to address, either positively or negatively, the district court’s holding as to alternative avenues, while it simultaneously preserved the district court’s analysis and emphasis on a regionalized approach to alternative avenues.

In 2000, in *Diamond v. City of Taft*, the U.S. Court of Appeals for the Ninth Circuit affirmed a finding by the Eastern District of California that the California city’s zoning ordinance provided a sufficient

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179 Id.
180 Id.
181 See id. at 95.
182 See id. at 98–99.
183 See *Keego Harbor Co.*, 657 F.2d at 99.
184 Id.
185 See *id*. In 1998, in *Wolfe v. Village of Brice*, the U.S. District Court for the Southern District of Ohio interpreted *Renton* as overruling the Sixth Circuit’s decision in *Keego Harbor Co.* See 997 F. Supp. 939, 944–45 (S.D. Ohio 1998). The court noted that *Keego Harbor Co.*’s interpretation of *Schad* “appears to have been closed by the *Renton* Court, when that Court held that the First Amendment requires that a city refrain from effectively denying citizens a reasonable opportunity to open and to operate an adult theater within the city.” *Id.* at 945. Although *Renton* does require most communities to permit adult businesses, it stops short of requiring all communities to do so. *See Renton*, 475 U.S. at 48–50. It further permits all communities to protect their quality of life against the negative secondary effects of such businesses. *See id.* at 50. As such, *Renton*’s holding leaves open the possibility that some small communities that are less sophisticated in nature may ban adult uses entirely under the First Amendment. *See id.* at 48–50. Chief Justice Burger endorsed this precise notion in his dissenting opinion in *Schad*, which Justice Rehnquist, author of the majority opinion in *Renton*, joined. *See Renton*, 475 U.S. at 43; *Schad*, 452 U.S. at 87 (Burger, C.J., dissenting).
number of alternative sites for adult entertainment when there were seven available sites for a town of 6800 people.\textsuperscript{186} What is significant about \textit{Diamond}, however, is the means by which the district court judge determined what sites were available to adult businesses in the area.\textsuperscript{187} After noting that Taft was a “rural town” and that it “is possible to travel from one end of the developed area of the city to the other in a matter of minutes,” the court analyzed in detail the sites the city identified as available to adult-entertainment businesses.\textsuperscript{188} Among those analyzed were five sites in a commercially zoned area located on state highways.\textsuperscript{189} As the court noted, the sites were outside Taft’s city limits but within Taft’s “Sphere of Influence.”\textsuperscript{190} Although unclear from the opinion, this comment presumably responds to an argument made by the City of Taft that sites outside city limits should qualify as part of the available market if they are perceived as part of the general city area.\textsuperscript{191}

The court ultimately found these five sites unavailable by virtue of their location within a required 1000-foot buffer of establishments frequented by minors.\textsuperscript{192} In so holding, however, the court did not decide whether sites within a city’s “Sphere of Influence,” but outside city limits, could be considered alternative avenues for such businesses.\textsuperscript{193} Although it sidestepped this issue, the court noted that smaller towns and communities deserve different treatment when it comes to the alternative avenues requirement.\textsuperscript{194} Its rationale for this premise was twofold.\textsuperscript{195} First, smaller communities possess smaller economic markets and correspondingly smaller demands for commercial First Amendment speech like adult entertainment.\textsuperscript{196} Second, rural communities typically have smaller commercial zones in comparison to residentially zoned land, and thus should be permitted to provide comparatively less space to adult businesses.\textsuperscript{197} Although the court’s ultimate decision as to these five lots was on separate grounds, the

\textsuperscript{186} 215 F.3d 1052, 1058 (9th Cir. 2000), \textit{cert. denied}, 531 U.S. 1072 (2001).
\textsuperscript{187} \textit{See Diamond}, 29 F. Supp. 2d at 638.
\textsuperscript{188} \textit{See id. at} 636–39.
\textsuperscript{189} \textit{See id. at} 638.
\textsuperscript{190} \textit{Id.}
\textsuperscript{191} \textit{See id.}
\textsuperscript{192} \textit{See Diamond}, 29 F. Supp. 2d at 642.
\textsuperscript{193} \textit{See id. at} 643 n.12.
\textsuperscript{194} \textit{See id. at} 646.
\textsuperscript{195} \textit{See id. at} 642, 646.
\textsuperscript{196} \textit{See id. at} 646.
\textsuperscript{197} \textit{See Diamond}, 29 F. Supp. 2d at 642.
court’s fundamental premise identifies a separate means of handling smaller communities when it comes to zoning for adult businesses.198

In 1999, in Township of Saddle Brook v. A.B. Family Center, the Supreme Court of New Jersey relied on similar justifications to hold that a region-wide analysis of the alternative avenues requirement is appropriate.199 The court reversed a trial court’s finding of unconstitutionality of a state statute requiring dispersal of adult businesses.200 The state law imposed a ban on adult businesses within 1000 feet of any place of worship, school, school bus stop, playground, or residential area.201 The effect of this statute was a prohibition on the operation of any adult bookstores in Saddle Brook, New Jersey.202 In upholding the statute, the court reasoned that the alternative avenues requirement can be evaluated on a region-wide, rather than municipality-wide, basis.203

Central to the court’s reasoning on this issue was the U.S. Supreme Court’s decision in Schad.204 The New Jersey court quoted at length Schad’s suggestion that a region-wide analysis of alternative avenues may be sufficient, and further justified this by pointing to later federal cases coming to a similar conclusion.205 This precedent thus led the court to decide that, when evaluating the alternative avenues available, the

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198 See id. at 646; see also City of Crystal v. Fantasy House, Inc., 569 N.W.2d 225, 230–31 (Minn. Ct. App. 1997) (holding that 0.9% of Crystal’s overall land and 15% of its industrial and commercial zones satisfied the alternative avenues requirement because of the city’s “overwhelmingly residential character and conservative planning practices”).
199 See 722 A.2d at 536.
200 Id. at 531–32.
201 Id. at 532.
202 Id. at 531. The state statute in question provides in pertinent part as follows:

Except as provided in a municipal zoning ordinance adopted pursuant to N.J.S.2C:34–2, no person shall operate a sexually oriented business within 1,000 feet of any existing sexually oriented business, or any church, synagogue, temple or other place of public worship, or any elementary or secondary school or any school bus stop, or any municipal or county playground or place of public resort and recreation, or any hospital or any child care center, or within 1,000 feet of any area zoned for residential use.

N.J. STAT. ANN. § 2C:34–7(a) (West 2004). New Jersey’s distancing statute is relatively unique for adult-entertainment zoning in the United States. See DeMasters, supra note 8, at 6. Nevertheless, as the court in Saddle Brook noted, the statute “is not a statewide zoning regulation for sexually oriented businesses, [but] it does constitute a statewide restriction on their location.” 722 A.2d at 535. The statute also authorizes municipalities to override the restriction by enacting their own more permissive ordinance. Id.

203 See Saddle Brook, 722 A.2d at 535.
204 See Schad, 452 U.S. at 76; Saddle Brook, 722 A.2d at 533–34.
205 See Saddle Brook, 722 A.2d at 533–34.
lower court should consider “areas located in other municipalities ‘within reasonable proximity to the Saddle Brook location.’”

The New Jersey Supreme Court’s holding in this case, however, was limited to the evaluation of state statutes, not local zoning ordinances. In this sense, the court advocated only a scope of analysis consistent with the scope of the law in question. It did not, however, advocate an analysis of the alternative avenues requirement that considered availability beyond the geographic coverage of the law itself, as would be the case when considering countywide availability to assess a municipal ordinance.

Keego Harbor Co., Diamond, and Saddle Brook illustrate the ways in which lower courts have interpreted the alternative avenues requirement for rural and residential communities. In each, there is a common question, first articulated by Chief Justice Burger in Schad: if the alternative avenues requirement truly considers only the availability of other opportunities for protected speech, why should nearby areas, beyond municipal boundaries, not qualify? Although this question is definitively answered only in Saddle Brook, all three cases indicate a particular sensitivity to the needs of rural and residential communities in relation to adult businesses.

II. PROBLEMS FACING RURAL AND RESIDENTIAL MUNICIPALITIES IN ZONING ADULT-ENTERTAINMENT BUSINESSES CONSISTENT WITH THE FIRST AMENDMENT

Courts have struggled to apply the Supreme Court’s adult-entertainment zoning jurisprudence to rural and residential municipalities. In 1981, in Keego Harbor Co. v. City of Keego Harbor, the U.S.

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206 See id. at 535 (quoting Township of Saddle Brook v. A.B. Family Ctr., Inc., 704 A.2d 81, 89 (N.J. Super. Ct. App. Div. 1998)). Reasonable proximity is to be determined by “evidence of regional marketing patterns, availability of public transportation and access by automobiles, geographical distribution of customers at comparable sexually oriented businesses, and other factors deemed relevant by the parties and the court.” Id. at 536.

207 Id. at 532–33.

208 See id.

209 See id.

210 See Keego Harbor Co., 657 F.2d at 99; Diamond, 29 F. Supp. 2d at 646; Saddle Brook, 722 A.2d at 535.

211 See Schad, 452 U.S. at 87 (Burger, C.J., dissenting); Keego Harbor Co., 657 F.2d at 99; Diamond, 29 F. Supp. 2d at 646; Saddle Brook, 722 A.2d at 535.

212 See Keego Harbor Co., 657 F.2d at 99; Diamond, 29 F. Supp. 2d at 646; Saddle Brook, 722 A.2d at 535.

Court of Appeals for the Sixth Circuit struck down Keego Harbor’s zoning ordinance while declining to hold that every municipality must provide alternative avenues of communication within their borders.\textsuperscript{214} Similarly, in 2000, in \textit{Diamond v. City of Taft}, the U.S. Court of Appeals for the Ninth Circuit affirmed a district court decision that declined to decide whether sites outside municipal boundaries but within a city’s “Sphere of Influence” could be considered under the alternative avenues requirement.\textsuperscript{215} In contrast, in 1999, in \textit{Township of Saddle Brook v. A.B. Family Center, Inc.}, the Supreme Court of New Jersey held constitutional a state statute that effectively banned adult businesses from a residential municipality so long as there were nearby alternative avenues of communication.\textsuperscript{216} Read together, these cases suggest the difficulties courts confront in applying the U.S. Supreme Court’s First Amendment case law on adult-entertainment zoning to rural and residential municipalities.\textsuperscript{217} In response to this case law, this Note suggests four distinct problems rural and residential municipalities face in zoning adult-entertainment businesses consistent with the First Amendment.\textsuperscript{218}

\textbf{A. Undetermined Constitutionality of a Total Ban}

The principal problem relative to adult-entertainment zoning cases is that it is unclear whether rural and residential municipalities may enact a total ban on adult entertainment.\textsuperscript{219} In 1986, in \textit{City of Renton v. Playtime Theatres, Inc.}, the U.S. Supreme Court held that the First Amendment required Renton, Washington—a city of 32,000 people—to refrain from denying adult businesses “a reasonable opportunity to

\textsuperscript{214} See 657 F.2d at 99.
\textsuperscript{215} 215 F.3d at 1058; \textit{Diamond}, 29 F. Supp. 2d at 638, 646.
\textsuperscript{216} 722 A.2d at 535–36.
\textsuperscript{218} See infra notes 219–264 and accompanying text.
\textsuperscript{219} See \textit{Gerard}, supra note 100, at 214–16.
open and operate.”220 A broad reading of Renton’s holding suggests that every municipality must provide space for adult businesses.221 Such a reading, moreover, is consistent with the Court’s interpretation of the First Amendment as prohibiting the suppression of speech in one locale merely because such speech is allowed elsewhere.222

Nevertheless, there are two primary reasons that a total ban may still be permissible in rural and residential communities.223 In 1981, in Schad v. Borough of Mount Ephraim, the U.S. Supreme Court struck down a city’s zoning ordinance prohibiting adult entertainment, but explicitly declined to hold that every municipality, no matter how small, must allow such entertainment.224 Furthermore, five of nine justices in Schad—including Justice Rehnquist, the author of the Renton majority opinion—believed that some small communities should be able to exclude adult entertainment completely when such entertainment is available nearby.225 As a result, there remains an unresolved conflict between Renton and Schad as to the particular obligations of smaller rural and residential communities in permitting adult businesses when space for such businesses is nearby but outside a town’s borders.226 Although larger cities clearly must provide alternative avenues of communication within their borders, it is still unclear whether rural and residential municipalities must do the same.227

B. Unclear Standards for Renton’s Alternative Avenues Requirement

The second problem is that, even assuming that rural and residential municipalities must provide alternative avenues of communi-

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220 475 U.S. at 54.
221 See id.
223 See Schad, 452 U.S. at 75 n.18.
224 Id. (“[O]ur decision today does not establish that every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which live entertainment is permitted.”).
225 See id. at 79 (Powell, J., concurring); id. at 84 n.11 (Stevens, J., concurring); id. at 87 (Burger, C.J., dissenting). Justices supporting such a ban were Justices Powell, Stewart, and Stevens in their concurring opinions and Chief Justice Burger and Justice Rehnquist in Chief Justice Burger’s dissenting opinion. Id. at 79 (Powell, J., concurring); id. at 79 (Stevens, J., concurring); id. at 85 (Burger, C.J., dissenting); see also Gerard, supra note 100, at 215. State court case law also supports this position. See e.g., Saddle Brook, 722 A.2d at 531. For instance, the immediate effect of the state statute upheld in Saddle Brook was a total ban on adult businesses within Saddle Brook. Id. The New Jersey Supreme Court impliedly upheld this statute on the understanding that space for adult-entertainment businesses was available in nearby municipalities. See id. at 535–36.
226 See Renton, 475 U.S. at 54; Schad, 452 U.S. at 75 n.18.
227 See Renton, 475 U.S. at 54; Schad, 452 U.S. at 75 n.18.
cation within their borders, there are few standards guiding them as to what constitutes sufficient alternative avenues of communication.\textsuperscript{228} This situation arises primarily as a result of \textit{Renton}.\textsuperscript{229} In \textit{Renton}, the Supreme Court upheld an ordinance allowing adult businesses on 5\% of Renton’s total land area, but did not hold that such a percentage was constitutionally mandated.\textsuperscript{230}

Subsequent lower court opinions have further complicated the issue by interpreting \textit{Renton} differently.\textsuperscript{231} Some appear to view the 5\% figure from \textit{Renton} as constitutionally mandated.\textsuperscript{232} For instance, in 1997, in \textit{Specialty Malls of Tampa, Inc. v. City of Tampa}, a Florida district court upheld a Tampa law making 7.5\% of the city’s land available to adult business because this percentage exceeded the 5\% found constitutional in \textit{Renton}.\textsuperscript{233} Consistent with this, in 2001, in \textit{University Books & Videos, Inc. v. Miami-Dade County}, another Florida district court held that 0.0092\% of Miami-Dade County acreage zoned for adult businesses was insufficient given the county’s status as a “large metropolitan area with a population of well over one million.”\textsuperscript{234}

Other courts, however, have upheld laws that make less than 5\% of a municipality’s land available to adult businesses on the theory that the size and character of a municipality should influence what constitutes an appropriate percentage.\textsuperscript{235} For instance, in 1999, in \textit{D.H.L. Associates v. O’Gorman}, the U.S. Court of Appeals for the First Circuit upheld an ordinance that left only 0.09687\% of the land in Tyngsborough, Massachusetts, (population 9500) available to adult businesses.\textsuperscript{236} In holding as much, the court noted that “an analysis [of the alternative avenues requirement in \textit{Renton}] should encompass a variety of factors,” one of which was Tyngsborough’s status as a rural town with very little commercially zoned land.\textsuperscript{237} Thus, disparate interpretations reveal the lack of guidance afforded to rural and resi-

\textsuperscript{228} See Phillips, supra note 174, at 321.
\textsuperscript{229} See id.; see also \textit{Renton}, 475 U.S. at 54.
\textsuperscript{230} See 475 U.S. at 53–54.
\textsuperscript{232} See, e.g., \textit{Specialty Malls of Tampa}, 916 F. Supp. at 1231.
\textsuperscript{233} See \textit{id}.
\textsuperscript{234} See 132 F. Supp. 2d at 1014.
\textsuperscript{235} See \textit{O’Gorman}, 199 F.3d at 59–60.
\textsuperscript{236} See \textit{id}. Five available sites were located within this available area. \textit{Id.} at 60.
\textsuperscript{237} \textit{Id}. 
dential municipalities as to what constitutes adequate alternative avenues of communication under *Renton*.

C. Inability to Enact Sufficient Distancing Requirements

The uncertainty with respect to what constitutes sufficient alternative avenues of communication is complicated by an additional drafting problem—namely, an inability to enact sufficient distancing requirements. In *Young v. American Mini Theatres, Inc.*, the U.S. Supreme Court upheld a zoning ordinance requiring dispersal of adult-entertainment businesses. Municipalities that choose to enact a distancing requirement must determine what constitutes an appropriate buffer zone between adult businesses and other adult businesses, places of worship, schools, or residential areas. Rural and residential municipalities that attempt to enact a buffer zone similar to that of larger cities, however, may often find that the buffer effectively precludes any adult businesses from operating within their borders or leaves too little space to be considered adequate alternative avenues of communication.

This scenario is aptly illustrated by a situation resulting from New Jersey’s statewide adult business location restriction, as upheld in *Saddle Brook*. The law required a 1000-foot buffer between any adult business and places of worship, school and school bus stops, municipal or county playgrounds, and residential areas. A buffer of this size is consistent with those employed by cities whose ordinances the Supreme Court has reviewed and upheld. In a town the size of Saddle Brook, however, a buffer zone of 1000 feet effectively banned any adult businesses from legally operating within city limits, even though the ban was no more restrictive than adult-entertainment zoning laws.

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238 See *Renton*, 475 U.S. at 54; GERARD, supra note 100, at 214–16.
239 See *Crystal*, 569 N.W.2d at 227.
241 See id. (plurality opinion)
242 See *Crystal*, 569 N.W.2d at 227.
243 See *Saddle Brook*, 722 A.2d at 531; DeMasters, supra note 8, at 6.
244 See *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 430 (2002) (plurality opinion); *Renton*, 475 U.S. at 43. The law in *Renton*, for instance, placed a 1000-foot buffer between adult businesses and churches, parks, schools, or residential areas. See *Renton*, 475 U.S. at 43; see also *Los Angeles*, 535 U.S. at 430 (plurality opinion) (holding constitutional an ordinance that placed a 1000-foot buffer between adult businesses and a 500-foot buffer between such businesses and churches, schools, and parks).
upheld by the Supreme Court.\textsuperscript{246} Thus, a buffer zone or distancing requirement that is acceptable in larger cities may fail to provide any space for adult-entertainment businesses in rural and residential municipalities—a result problematic under \textit{Renton}’s alternative avenues requirement.\textsuperscript{247}

For rural and residential municipalities that lack statewide zoning of adult businesses,\textsuperscript{248} this may mean that they are forced to enact adult-entertainment zoning laws with smaller distancing requirements to ensure available space for adult-entertainment businesses.\textsuperscript{249} Smaller buffer zones, however, are less restrictive of the location of adult businesses, and consequently less protective of residential areas.\textsuperscript{250}

This was the situation that faced Crystal, Minnesota, a largely residential municipality, which was forced to enact a less restrictive distancing requirement because of its small size.\textsuperscript{251} In 1997, in \textit{City of Crystal v. Fantasy House, Inc.}, the Court of Appeals of Minnesota upheld an ordinance requiring a 250-foot buffer zone between prohibited businesses and residential areas, daycares, libraries, parks, places of worship, and playgrounds.\textsuperscript{252} Crystal had enacted this requirement only after realizing that a 1000-foot buffer zone effectively precluded all adult businesses from operating in the municipality.\textsuperscript{253} Crystal’s decision to reduce its adult business buffer zone is indicative of the problem rural

\textsuperscript{246} See Saddle Brook, 722 A.2d at 532; see also Los Angeles, 535 U.S. at 430 (plurality opinion); Renton, 475 U.S. at 43; Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 52 (1976) (plurality opinion).

\textsuperscript{247} See Saddle Brook, 722 A.2d at 532.

\textsuperscript{248} All states but New Jersey lack a statewide restriction on the location of adult entertainment. N.J. STAT. ANN. § 2C:34–7(a) (West 2004); DeMasters, supra note 8, at 6.

\textsuperscript{249} See Crystal, 569 N.W.2d at 227.

\textsuperscript{250} See id.; MINN. ATTORNEY GENERAL, supra note 5, at 529–30. This approach is consistent with the prevailing view that the concentration of adult businesses produces harmful secondary effects to the surrounding areas, including prostitution, theft, and other violent and nonviolent crime. See, e.g., Los Angeles, 535 U.S. at 430 (plurality opinion); Renton, 475 U.S. at 51. Contra Bryant Paul et al., Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 COMM. L. & POL’Y 355, 391 (2001).

\textsuperscript{251} See Crystal, 569 N.W.2d at 227.

\textsuperscript{252} Id.

\textsuperscript{253} See id. Crystal realized this through the enactment of an ordinance referred to in Crystal as the “interim ordinance.” See id. It is unclear from the opinion if the ordinance was intended as interim when it was enacted, or only later when it was discovered to have created a total ban on adult businesses. See id. The interim ordinance was upheld by the Court of Appeals of Minnesota because it was considered a valid moratorium on zoning while studies were conducted and permanent zoning was adopted. Id. at 231.
and residential municipalities face. Such municipalities must enact smaller buffer zones than larger cities to satisfy the alternative avenues requirement, even if they are more susceptible than larger cities to the negative secondary effects of adult-entertainment businesses.

D. Lack of Regional Zoning of Adult Businesses

The inequity and inconsistency created by buffer zones of varying sizes is evident in the fourth and final problem facing rural and residential municipalities: a general, though not universal, lack of regional zoning of adult businesses. When no regional zoning restriction on adult businesses exists, courts limit themselves to examining the alternative avenues of communication available within the municipality. In doing so, they may ignore significant nearby opportunities for adult entertainment that would satisfy the alternative avenues requirement of Renton and lessen a rural or residential municipality’s burden to provide space for adult businesses.

The value of regional zoning is evident in the New Jersey Supreme Court’s decision in Saddle Brook. In Saddle Brook, the court evaluated a statewide, rather than municipal, restriction on the location of adult businesses. Because it was evaluating a statewide zoning statute rather a municipal ordinance, the court’s analysis of potential alternative avenues of communication was not restricted to municipal boundaries, but rather included available alternative locations in the surrounding region. Although the court in Saddle Brook limited its holding to statewide statutes, the fundamental premise of the case arguably applies to countywide or region-wide zoning restrictions as well. In contrast to Saddle Brook, residential and rural municipalities that lack countywide or statewide zoning are left to their own devices to identify alternative locations within their boundaries.

254 See id.
255 See id.; Minn. Attorney General, supra note 5, at 529–30.
256 See DeMasters, supra note 8, at 6; see also Saddle Brook, 722 A.2d at 532. New Jersey, as discussed in Saddle Brook, is a notable exception. See Saddle Brook, 722 A.2d at 532.
257 See Schad, 452 U.S. at 76. Contra Diamond, 29 F. Supp. 2d at 638 (suggesting that areas outside of Taft’s city limits were within the city’s “Sphere of Influence”).
258 See Renton, 475 U.S. at 53–54; Schad, 452 U.S. at 76; Diamond, 29 F. Supp. 2d at 638.
259 See 722 A.2d at 531.
260 See id. at 532–33.
261 See id. at 532.
262 See id. at 532–33; see also Schad, 452 U.S. at 76 (holding that Mount Ephraim cannot point to sites beyond city boundaries as alternative avenues of communication because “[t]here is no countywide zoning in Camden County”).
even if such sites already exist in nearby locations.\textsuperscript{263} Given the already identified complications such municipalities face in zoning adult businesses, the lack of a broader regional approach is only an additional hindrance.\textsuperscript{264}

III. \textbf{Zoning Adult-Entertainment Businesses Consistent with the First Amendment: Solutions for Rural and Residential Municipalities}

Short of a new U.S. Supreme Court opinion clarifying some of the issues within the alternative avenues requirement as applied to adult-entertainment businesses, regional and rural municipalities face difficult problems when zoning adult entertainment.\textsuperscript{265} This Note has identified four problems with the Supreme Court’s First Amendment jurisprudence as applied to adult-entertainment zoning creates for such municipalities.\textsuperscript{266} First, the Court’s adult-entertainment zoning case law leaves unclear whether some municipalities may enact a total ban on adult entertainment.\textsuperscript{267} Second, there is contradicting precedent as to what constitutes sufficient alternative avenues of communication.\textsuperscript{268} Third, rural and residential municipalities are often forced to enact less restrictive distancing requirements than larger cities, arguably increasing the risk to security and quality of life in the municipality.\textsuperscript{269} Finally, rural and residential municipalities are disadvantaged by a general lack of countywide or statewide zoning of adult-entertainment businesses.\textsuperscript{270} This Note now proposes three solutions which, when combined or adopted independently, will address these problems.\textsuperscript{271}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{263} See Diamond, 29 F. Supp. 2d at 638, 646.
\item \textsuperscript{264} See id.; Crystal, 569 N.W.2d at 227.
\item \textsuperscript{266} See supra notes 219–264 and accompanying text.
\item \textsuperscript{267} See Schad v. Borough of Mount Ephraim, 452 U.S. 61, 75 n.18 (1981).
\item \textsuperscript{268} See Phillips, supra note 174, at 321; see also Renton, 475 U.S. at 54; D.H.L. Assocs. v. O’Gorman, 199 F.3d 50, 59–60 (1st Cir. 1999).
\item \textsuperscript{269} See Crystal, 569 N.W.2d at 227.
\item \textsuperscript{270} See Diamond, 29 F. Supp. 2d at 638.
\item \textsuperscript{271} See infra notes 272–305 and accompanying text.
\end{itemize}
\end{footnotesize}
A. Adopt Countywide or Statewide Location Restrictions on Adult Businesses

State and county legislatures should consider regionalized approaches to restrictions on the location of adult-entertainment businesses.\footnote{272} New Jersey’s statewide statute requiring the distancing of adult businesses from each other and from places of public worship, schools, playgrounds, and residential areas is an example of this.\footnote{273} As discussed earlier, this statute requires a 1000-foot buffer zone between such businesses unless the municipality in question chooses to “override the statutory limitation by [enacting] a local zoning ordinance more permissive than the state statute.”\footnote{274}

Assuming the municipality in question chooses not to enact a more permissive restriction, the benefits of a state statute restricting the location of adult-entertainment businesses are clear in light of the Supreme Court’s case law.\footnote{275} In \textit{Schad v. Borough of Mount Ephraim}, the Court struck down a city’s ordinance prohibiting adult entertainment.\footnote{276} In so holding, the Court rejected the argument that a regionalized approach to the alternative avenues requirement is justified when there is no countywide zoning in the area.\footnote{277} The implication of \textit{Schad}’s reasoning is that the presence of a countywide or statewide zoning restriction, instead of a municipal restriction, should permit a more regionalized analysis of the area’s alternative avenues of communication.\footnote{278} A regionalized approach to adult-entertainment businesses ensures that the community as a whole bears the burden of secondary effects equally, while still permitting some municipalities to increase their burden through a local ordinance if they foresee potential benefits from adult businesses.\footnote{279}

B. Employ a Regional Analysis of the Alternative Avenues Requirement

Absent countywide or statewide zoning restrictions on adult businesses, courts should apply a broader analysis of the alternative avenues requirement.\footnote{280} In \textit{City of Renton v. Playtime Theatres, Inc.}, the U.S.

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\item \textit{See Township of Saddle Brook v. A.B. Family Ctr., Inc.}, 722 A.2d 530, 532 (N.J. 1999).
\item \textit{N.J. STAT. ANN. § 2C:34–7(a) (West 2004); see also Saddle Brook, 722 A.2d at 532.}
\item \textit{Saddle Brook, 722 A.2d at 535; see N.J. STAT. ANN. § 2C:34–7(a).}
\item \textit{See id. at 535–36; see also Schad, 452 U.S. at 76–77.}
\item \textit{See Schad, 452 U.S. at 76–77.}
\item \textit{See id.}
\item \textit{See id.; see also Saddle Brook, 722 A.2d at 532–33.}
\item \textit{See Saddle Brook, 722 A.2d at 535–36.}
\item \textit{See Schad, 452 U.S. at 79 (Powell, J., concurring); id. at 85 n.11 (Stevens, J., concurring); id. at 87 (Burger, C.J., dissenting).}
\end{itemize}
Supreme Court held that an adult-entertainment zoning ordinance is constitutional if it (1) is intended to serve a substantial governmental interest and (2) permits reasonable alternative avenues of communication. As *Renton* made clear, the alternative avenues requirement is crucial because the First Amendment guarantees a citizen’s right to share his or her message with others—a right, moreover, that cannot be suppressed merely on the grounds that it can be exercised elsewhere. Accordingly, adult businesses must be guaranteed space to operate where patrons may visit if they choose. Arguably, whether or not that space is within the municipal city limits of a rural or residential community or directly outside seems less significant so long as adult businesses continue to retain reasonable—and therefore nearby—opportunities to open and operate.

This regionalized approach to the alternative avenues requirement, moreover, is arguably permissible under *Schad* so long as the municipality can demonstrate the locations and proximity of these nearby alternative avenues. In *Schad*, the U.S. Supreme Court rejected the city’s argument for a region-wide analysis of the alternative avenues requirement largely because the record failed to show any evidence of availability in nearby areas. This rationale thus leaves open the possibility that a record providing evidence of nearby locations for adult businesses could satisfy the alternative avenues requirement. Accordingly, *Schad* should be viewed not as foreclosing the opportunity for a regional analysis of the alternative avenues requirement, but rather, only as setting a high standard for its use.

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281 See 475 U.S. at 50.
283 See *Renton*, 475 U.S. at 53–54.
284 See *Renton*, 475 U.S. at 53–54; *Schad*, 452 U.S. at 79 (Powell, J., concurring); *id.* at 85 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting). But see *Schad*, 452 U.S. at 78 (Blackmun, J., concurring) (“Were I a resident of Mount Ephraim, I would not expect my right to attend the theater or to purchase a novel to be contingent upon the availability of such opportunities in ‘nearby’ Philadelphia, a community in whose decisions I would have no political voice.”).
285 See 432 U.S. at 76, 79 (Powell, J., concurring); *id.* at 85 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).
286 See *id.* at 76 (“[T]here is no evidence in [the] record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas.”).
287 See *id.*
288 See *id.* at 76; *id.* at 79 (Powell, J., concurring); *id.* at 85 n.11 (Stevens, J., concurring); *id.* at 87 (Burger, C.J., dissenting).
Furthermore, to address Schad’s concern that cities not shirk their obligation to ensure alternative avenues of communication for adult businesses, courts should place the burden of proof for the alternative avenues requirement on the municipality.\textsuperscript{289} Municipalities will then retain responsibility for ensuring nearby, available, and sufficient alternative avenues of communication, regardless of whether those avenues are located within or outside the municipality.\textsuperscript{290} With this safeguard in place, courts could employ a broader analysis of the alternative avenues requirement without forgoing any of the accountability provided by a citywide analysis.\textsuperscript{291}

C. Adopt a Supply-and-Demand Analysis of the Alternative Avenues Requirement

A third and final solution to the problems rural and residential municipalities face likewise involves the analysis a court may use when considering the alternative avenues requirement.\textsuperscript{292} Courts should apply a supply-and-demand analysis when determining whether a municipality has provided adequate alternative avenues of communication.\textsuperscript{293} A supply-and-demand approach would stipulate that a restriction on adult-entertainment business provides alternative avenues of communication if the available number of sites exceeds the demand for those sites coming from current and prospective adult-entertainment businesses.\textsuperscript{294} This approach thus would ensure that municipal ordinances do not prevent adult-entertainment businesses from identifying legitimate locations in which to operate.\textsuperscript{295} This is in contrast to methods of analysis that look purely at the percentage of land available or the number of sites available without regard to demand.\textsuperscript{296}

\textsuperscript{289} See id. at 76–77; Saddle Brook, 722 A.2d at 536 (“[W]e believe it to be consistent with First Amendment decisional law that recognizes the fairness of imposing on the public body that elects to restrict protected speech the obligation of demonstrating that its restrictions are reasonably tailored to achieve its objectives . . . and provide adequate available alternative avenues of communication.”).

\textsuperscript{290} See Schad, 452 U.S. at 76–77; Saddle Brook, 722 A.2d at 536.

\textsuperscript{291} See Saddle Brook, 722 A.2d at 536.

\textsuperscript{292} See Phillips, supra note 174, at 322–23.

\textsuperscript{293} See id.

\textsuperscript{294} See Lakeland Lounge of Jackson, Inc. v. City of Jackson, 973 F.2d 1255, 1260 (5th Cir. 1992).

\textsuperscript{295} See Phillips, supra note 174, at 341.

\textsuperscript{296} See Renton, 475 U.S. at 53–54; O’Gorman, 199 F.3d at 60.
The simplicity of the supply-and-demand approach is appealing. All that must be known to analyze the alternative avenues requirement is the number of existing sites and the demand by adult businesses for sites in the municipality. Moreover, this method ensures that residential and rural communities are not forced to provide more space than the market requires.

Problems with the supply-and-demand approach are minimal. Demand for available sites by current and prospective adult businesses arguably can be determined in a number of ways, and some of this uncertainty undoubtedly leads to some indeterminacy in the analysis. Additionally, the demand for sites coming from adult businesses likely changes in a community over time, making the supply-and-demand method a less than ideal long-term approach. As a result, adult-entertainment zoning restrictions would still need to be revisited over time. Nevertheless, the supply-and-demand approach ensures that rural and residential communities are required to offer alternative avenues of communication only to actual and prospective adult businesses. Given the inherently changing role of adult businesses in any community, this flexibility is desirable.

**Conclusion**

Every community faces the difficult problem of restricting, but nevertheless allowing, adult-entertainment businesses. Given the varied concerns about the secondary effects of such businesses, municipalities both large and small have struggled over the years to deter-

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297 See Diamond, 29 F. Supp. 2d at 646 (“Without considering both producer supply and consumer demand, there can be no meaningful determination of whether the First Amendment’s purposes in guaranteeing reasonable alternative avenues of communication are satisfied.”); Phillips, supra note 174, at 340–42.

298 See Lakeland Lounge, 973 F.2d at 1260.

299 See Woodall v. City of El Paso, 49 F.3d 1120, 1127 (5th Cir. 1995).

300 See Phillips, supra note 174, at 340–42.

301 See Lim v. City of Long Beach, 12 F. Supp. 2d 1050, 1066 (C.D. Cal. 1998) (determining that courts compare the number of available sites to (1) the municipality’s population, (2) the existing number of adult businesses, or (3) the number of businesses wishing to offer adult entertainment); see also N. Ave. Novelties, Inc. v. City of Chicago, 88 F.3d 441, 445 (7th Cir. 1996) (determining the number of businesses wishing to offer adult entertainment by the number of inquiries Chicago’s zoning department received in a year regarding potential adult businesses).

302 See Phillips, supra note 174, at 351 (“[O]ver time, a community’s demand for adult entertainment may change.”).

303 See id.

304 See id. at 340.

305 See id. at 352–53.
mine how best to allow them while minimizing their potential negative impacts to neighborhoods and community institutions. In these respects, rural and residential communities are no different than larger cities like Detroit, New York, and Boston, and suburban cities like Renton. Rural and residential communities, however, do face a unique burden in determining what will satisfy their constitutional obligations as to alternative avenues of communication. Courts should be sensitive to these burdens, and should seek out new approaches—within the scope of the U.S. Supreme Court’s precedent—to evaluate rural and residential communities’ First Amendment obligations. Short of such changes, some communities will continue to be burdened unfairly by a constitutional analysis primarily developed in consideration of larger and more commercial cities.

Matthew L. McGinnis
GPS TRACKING TECHNOLOGY: THE CASE FOR REVISITING KNOTTS AND SHIFTING THE SUPREME COURT’S THEORY OF THE PUBLIC SPACE UNDER THE FOURTH AMENDMENT

Abstract: The Fourth Amendment to the U.S. Constitution guarantees freedom from government intrusion into individual privacy. More than two hundred years after the time of the Framers, however, the government possesses technologies, like GPS tracking, that allow law enforcement to obtain ever-greater amounts of detail about individuals without ever setting foot inside the home—the area where Fourth Amendment protections are highest. Despite the dangers GPS tracking and other technologies present to individual privacy, the U.S. Supreme Court’s Fourth Amendment jurisprudence frequently fails to acknowledge any semblance of privacy in the public sphere. This Note argues that rather than defining Fourth Amendment privacy based on purely physical boundaries, a proper analysis would protect those features of society that provide privacy. By recognizing that features other than physical boundaries can generate privacy, this analysis would ensure the Fourth Amendment continues to preserve individual privacy even in the face of sophisticated new technologies.

Introduction

Generations before the dawn of the twenty-first century, many predicted the technological age would diminish the ability of ordinary citizens to take refuge in their privacy—to remain secure from unwarranted government intrusion.¹ Technological advances that allowed police to “bug” phone lines and record conversations, for instance, caused some to assert that George Orwell was on target in 1984 when

¹ See, e.g., Osborn v. United States, 385 U.S. 323, 341 (1966) (Douglas, J., dissenting) (expressing concern that “[w]e are rapidly entering the age of no privacy, where everyone is open to surveillance at all times”); Olmstead v. United States, 277 U.S. 438, 473–74 (1928) (Brandeis, J., dissenting) (arguing that modern advancements meant “[s]ubtler and more far-reaching means of invading privacy” than physical intrusion were available).
he described Oceania, a totalitarian society where Big Brother was always watching and listening.\textsuperscript{2}

When Orwell published his novel in 1949, the world lacked the technological skill to effectuate much of his ominous vision.\textsuperscript{3} Orwell’s Telescreen, which enabled the Thought Police to monitor movements and listen to conversations, likely seemed far-fetched in the 1950s.\textsuperscript{4}

What made Oceania alarming from a technological viewpoint, then, was the suggestion that the government could possess the ability to watch and record people’s movements, words, and thoughts.\textsuperscript{5} In that kind of world, privacy was nonexistent, and one constantly censored one’s behavior to align with accepted norms.\textsuperscript{6}

Orwell wrote in a time long before the Internet enabled the widespread collection of data, before closed-circuit cameras were regularly installed in public places, before computer databases provided for the seemingly endless cataloguing of data, and before the Global Positioning System (the “GPS”) permitted the continuous, precise tracking of one’s movements.\textsuperscript{7} Such technological develop-


\textsuperscript{4} See Orwell, supra note 2, at 4; Cooper, supra note 3, at 5; Shenk, supra note 3, at 2; Zorn, supra note 3, at Cl.

\textsuperscript{5} See Cooper, supra note 3, at 5; Shenk, supra note 3, at 2.

\textsuperscript{6} See Cooper, supra note 3, at 5; Shenk, supra note 3, at 2.

ments have made it entirely possible, it seems, for many aspects of people’s lives to be monitored and recorded.\textsuperscript{8} One might wonder, then, how much room is left for personal privacy—and the liberty privacy affords.\textsuperscript{9}

The Fourth Amendment to the U.S. Constitution was drafted by the Framers to protect one aspect of personal privacy fundamental to individual liberty: the freedom from unwarranted intrusion by the government.\textsuperscript{10} Without probable cause and a warrant, the government cannot enter and search a home or seize personal property.\textsuperscript{11} But technology has made it easier for the government to acquire just as much information about a person without ever setting foot inside a home.\textsuperscript{12} Thus, the question becomes whether technology has eroded the protections provided by the Fourth Amendment, as interpreted by the U.S. Supreme Court.\textsuperscript{13} So far, the answer seems to be yes, because the Court continues to focus less on safeguarding the features that enable people to maintain privacy, and more on the traditional physical boundaries that separate private from public.\textsuperscript{14}

GPS tracking is one technology that has raised privacy concerns and the fear that the Fourth Amendment would fail to provide protection from indiscriminate police use.\textsuperscript{15} Because GPS tracking devices collect continuous, real-time location information, they offer detailed descriptions of one’s movements over time.\textsuperscript{16} Although one’s movements generally occur within the public space, the resulting catalogue of location data reveals a great deal about one’s preferences, friends, associations, and habits—and GPS tracking enables data collection of a magnitude not feasible through mere visual surveillance.\textsuperscript{17} Under the Supreme Court’s current analysis, however, the Fourth Amendment generally does not apply to activities occurring in

\textsuperscript{8} See generally Helms, supra note 7; Shattuck, supra note 7; Slobogin, supra note 7; Karim, supra note 7.

\textsuperscript{9} See generally Helms, supra note 7; Shattuck, supra note 7; Slobogin, supra note 7; Karim, supra note 7.

\textsuperscript{10} See Katz v. United States, 389 U.S. 347, 350 (1967); see also U.S. Const. amend. IV; Olmstead, 277 U.S. at 478–79 (Brandeis, J., dissenting); Samuel D. Warren & Louis D. Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193, 205 (1890) (describing overall right to privacy, not just that found in the Fourth Amendment, as a general “right to be let alone”).

\textsuperscript{11} See infra notes 67–73 and accompanying text.

\textsuperscript{12} See infra note 263 and accompanying text.

\textsuperscript{13} See infra notes 87, 212–214, 263 and accompanying text.

\textsuperscript{14} See infra notes 162–202 and accompanying text.

\textsuperscript{15} See infra notes 42–66 and accompanying text.

\textsuperscript{16} See infra notes 30–46, 254–256 and accompanying text.

\textsuperscript{17} See infra notes 146–156, 247–256 and accompanying text.
the public space.\textsuperscript{18} Thus, GPS tracking provides a case for shifting the Supreme Court’s definition of public and private to an analysis that recognizes not only that technology has broken down traditional boundaries between public and private, but also that it is possible to maintain some privacy within the public space.\textsuperscript{19}

Part I of this Note introduces GPS tracking technology and describes the various privacy concerns and potential law enforcement uses of GPS devices.\textsuperscript{20} Part II outlines the framework of the Fourth Amendment, highlighting the Supreme Court’s reasonable expectation of privacy doctrine.\textsuperscript{21} Part III begins to evaluate GPS tracking devices under the Fourth Amendment and focuses on two Supreme Court cases addressing the constitutionality of the use of beepers, a more primitive tracking device.\textsuperscript{22} Part IV discusses how the Supreme Court has addressed the idea of privacy within the public space and provides the basic criticisms privacy advocates have leveled against the Court’s Fourth Amendment jurisprudence, including criticism that the Court’s analysis has not kept pace with technological advances.\textsuperscript{23}

Part V then offers an argument for why GPS tracking should be considered a search under the Fourth Amendment.\textsuperscript{24} Part V.A distinguishes GPS devices from beepers.\textsuperscript{25} Part V.B proposes a shift in the Court’s Fourth Amendment jurisprudence to reflect better the idea that privacy can exist within the public space.\textsuperscript{26} This argument, based in part on language in the Supreme Court’s most recent Fourth Amendment case, suggests that the Fourth Amendment should protect not only the physical areas people expect to be kept private, but also those features of society that make possible the level of privacy society expects.\textsuperscript{27} Such an analysis would better prevent technological advances from further impinging on the freedom from government intrusion guaranteed by the Fourth Amendment.\textsuperscript{28} Finally, Part V.C

\begin{itemize}
\item \textsuperscript{18} See infra notes 162–202 and accompanying text.
\item \textsuperscript{19} See infra notes 226–279 and accompanying text.
\item \textsuperscript{20} See infra notes 30–66 and accompanying text.
\item \textsuperscript{21} See infra notes 67–87 and accompanying text.
\item \textsuperscript{22} See infra notes 88–156 and accompanying text.
\item \textsuperscript{23} See infra notes 157–225 and accompanying text.
\item \textsuperscript{24} See infra notes 226–287 and accompanying text.
\item \textsuperscript{25} See infra notes 233–253 and accompanying text.
\item \textsuperscript{26} See infra notes 254–279 and accompanying text.
\item \textsuperscript{27} See infra notes 254–262 and accompanying text.
\item \textsuperscript{28} See infra notes 263–270 and accompanying text.
\end{itemize}
develops, as an alternative to Fourth Amendment protection, a statutory framework for regulating police use of GPS technology.29

I. THE NATURE OF GPS TRACKING TECHNOLOGY

A. How GPS Works

Originally designed by the Department of Defense for use by the U.S. military, the GPS provides continuous, highly accurate, and reliable positioning and timing information to users.30 The system functions through at least twenty-four satellites that broadcast precise time signals while orbiting the earth.31 A GPS receiver processes the signals of at least four satellites at any given time to determine mathematically the receiver’s location, velocity, and time—anywhere in the world, under any weather conditions.32

Although the most accurate positioning information initially was reserved for military uses such as guiding missiles, the U.S. government in 2000 granted civilian access to this capability, which pinpoints latitude and longitude with an accuracy of between forty-eight and sixty feet.33 Using a common process called differential GPS, which incorporates additional correction signals to account for problems like atmospheric interference, many GPS receivers have an accuracy of between one and three meters.34 Satellite improvements expected in 2005 and again in 2012 eventually could make differential GPS accurate to within thirty to fifty centimeters.35

29 See infra notes 280–287 and accompanying text.
32 El-Rabbany, supra note 30, at 1–2, 8–9.
34 Grossman & Hift, supra note 33, at 24; Washington, supra note 33, at 1C. Some GPS receivers have limited capability inside buildings or in dense urban environments dotted by skyscrapers, however, because the receivers have difficulty connecting to the satellites. Thomas J. Fitzgerald, Cart 54, Where Are You? The Tracking System Knows, N.Y. TIMES, Oct. 30, 2003, at G7. To circumvent this problem, some systems use technologies other than or in combination with GPS, such as Wi-Fi, infrared, or radio frequency technologies to pinpoint locations in these areas. Id.
Since President Ronald Reagan first granted civilian access to GPS in 1983, civilian uses for the technology have exploded.\(^{36}\) A primary initial civilian use was land surveying, but other applications quickly followed in land, marine, and air navigation.\(^{37}\) Most relevant to privacy concerns, civilian inventors developed technology that can track the location of individuals, vehicles, and objects.\(^{38}\)

The market for GPS services is growing rapidly; more than 5 million consumer GPS units were shipped in 2003, up from 3.2 million units in 2002.\(^{39}\) In fact, the global consumer GPS market now is expected to surpass \$22 billion by 2008.\(^{40}\) At least 42 million Americans are expected to use some kind of “location-aware” technology in 2005.\(^{41}\)

B. GPS Tracking and Privacy

The pervasiveness and wide variety of uses of GPS-based tracking devices has prompted concern from privacy advocates.\(^{42}\) Even though the technology has many beneficial uses, such as allowing emergency services to locate those in need of assistance or family members to monitor the whereabouts of relatives suffering from Alzheimer’s disease, privacy advocates question the full extent of the technology’s capabilities.\(^{43}\) Parents wanting to keep track of their children can give

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36 Pace et al., supra note 31, at 2. The military continues to use the system through encrypted satellite signals reserved exclusively for the government. Seth Schiesel, On the Ground in Iraq, the Best Compass Is the Sky, N.Y. Times, Apr. 17, 2003, at G1.

37 El-Rabbany, supra note 30, at 10; Pace et al., supra note 31, at 2.

38 See El-Rabbany, supra note 30, at 10; Pace et al., supra note 31, at 2.

39 Wirbel, supra note 35, at 51.


43 See, e.g., Harmon, supra note 41, at A1; Richard Willing, Surveillance Gets a Satellite Assist, USA Today, June 10, 2004, at 3A.
them GPS-enabled cellular phones and use software to track their locations, relying on the services to track them as long as the cell phone is on—but some are concerned that others with more dangerous intentions could obtain this information.\textsuperscript{44} Employers can give GPS-equipped cell phones to their employees to determine if employee on-site hours are accurate—but employees lament the lack of trust.\textsuperscript{45} Drivers can use GPS vehicle navigation systems to plot directions—but a domestic abuser could attach a covert GPS device to his target’s vehicle and use it to terrorize her with how well he knows her location.\textsuperscript{46}

One area of concern for privacy advocates regarding this technology is its covert surveillance potential on behalf of law enforcement.\textsuperscript{47} For instance, police could approach a suspect’s vehicle, magnetically attach a GPS tracking device to the vehicle’s undercarriage, and view data from the device over an Internet website—all unknownst to the suspect.\textsuperscript{48} Because such systems can last for weeks at a

\textsuperscript{44} Harmon, supra note 41, at A1. Because such systems typically provide access to location information through the Internet, the data may be susceptible to hacking. See id.


\textsuperscript{46} John Schwartz, This Car Can Talk. What It Says May Cause Concern, N.Y. Times, Dec. 29, 2003, at C1. For instance, a defendant was convicted in Kenosha, Wisconsin, in June 2003 for stalking his ex-girlfriend; he used a tracking device to obtain accurate location information. Id. The police report indicated the woman “could not understand how the defendant always knew where she was in her vehicle at all times.” Id. Upon inspection of her vehicle, police found a small black box near the radiator; the defendant had accessed her location data by logging onto the Internet. Id. A similar stalking case occurred in Colorado. See People v. Sullivan, 53 P.3d 1181, 1183–84 (Colo. App. 2002) (affirming conviction for stalking by concluding the defendant’s monitoring of a GPS device attached to the victim’s vehicle constituted placing the victim “under surveillance” within the meaning of the state’s stalking statute, although the defendant did not physically follow the victim).


\textsuperscript{48} See, e.g., Elliott, supra note 45, at C6 (indicating that because of the nature of some GPS devices, rental car customers often have no way to determine physically whether their rented vehicle is equipped with such a device). Companies manufacturing GPS tracking devices often tout their small size and covert nature as part of their marketing schemes. E.g., COUNTER INTELLIGENCE TECHS., INC., GPS SATELLITE TRACKING/LOCATION SYSTEMS, at http://www.spooktech.com/trackingeqmt/datalogger.shtml (last modified July 22, 2004) (describing Datalogger II: The Scout, a covert GPS vehicle tracker that can operate for eighteen days on four AA batteries, is 3” by 5” by 1.5”, attaches magnetically to a vehicle undercarriage, and provides location data every ten seconds to an Internet website); COVERT GPS VEHICLE TRACKING SYS., INC., GPS-WEB VEHICLE TRACKING SYSTEMS, at http://www.covert-gps-vehicle-tracking-systems.com (last updated Apr. 6, 2005) (describing the GPS-Web system, equipped with a GPS-Stealth antenna that can be placed deep under a vehicle because it
time, depending on the type of battery used, police could acquire constant, real-time, precise location information about that vehicle for much longer than they practically might be able to maintain round-the-clock visual surveillance.49

Another kind of GPS device available to law enforcement is the personal tracking device, which is designed and priced for the average citizen and often marketed as a way to quickly locate a person in an emergency or to monitor young children.50 Individuals wear the device like a wristwatch; location information can be accessed through the Internet.51 The cellular phone also is a personal locator and one of the fastest-growing markets for GPS and other location-based technologies.52 The growth is spurred in part by the federal government’s requirement that cell phone service providers equip the cell phones on their networks with technology that can locate 911 callers within fifty to one hundred meters.53

C. Law Enforcement Uses of GPS

Law enforcement officials have been loathe to discuss the frequency with which their agencies use GPS tracking devices and the purposes such devices are serving, although specific cases have come to light.54 Perhaps the most highly publicized instance of GPS track-functions without maintaining a line of sight to satellites, and boasting a thirty-second magnetic installation and a fourteen-month battery life).

49 See State v. Jackson, 76 P.3d 217, 223 (Wash. 2003) (en banc) (arguing it was improbable that law enforcement could have engaged in uninterrupted, twenty-four-hour visual surveillance of the defendant); COUNTER INTELLIGENCE TECHS., INC., supra note 48; COVERT GPS VEHICLE TRACKING SYS., INC., supra note 48.

50 Karim, supra note 7, at 486, 488–92.

51 Id. at 489–90 (detailing information about Wherify Wireless, Inc.’s Personal Locator devices and Digital Angel Corp.’s Digital Angel tracking device); Will Wade, Keeping Tabs: A Two-Way Street, N.Y. TIMES, Jan. 16, 2003, at G1 (describing personal locator options).

52 Selingo, supra note 41, at G7.


There is some indication, however, that GPS technology is readily available to law enforcement agencies from the federal government if local law enforcement intends to use the technology in drug investigations. See U.S. WHITE HOUSE OFFICE OF NAT’L DRUG CON-
ing occurred in connection with the Laci Peterson slaying case in California.\textsuperscript{55} During the criminal investigation of that case, police attached GPS tracking devices between January and April 2003 to several vehicles used by Scott Peterson, the primary suspect in the case.\textsuperscript{56} The devices captured Peterson’s movements as he traveled around California, including to a marina near where his wife Laci’s body later washed ashore.\textsuperscript{57} At trial, prosecutors argued that this fact suggested, circumstantially, that Peterson was connected to her death.\textsuperscript{58} In another prominent case, police in Spokane, Washington, used GPS devices to track a murder suspect’s movements in his vehicle for eighteen days.\textsuperscript{59} Information from the devices revealed the suspect’s travels to a location fifty miles away, where police found the body of the nine-year-old girl the suspect later would be convicted of killing.\textsuperscript{60} Moreover, police have used GPS devices to track the location of “bait” cars, which police set up to attract car thieves and catch them in the act.\textsuperscript{61} The GPS devices in the “bait” cars can be rigged to alert police when a


\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Id. At Peterson’s trial for the murder of his wife and unborn child, the defense attempted to block admission into evidence of the GPS tracking information, arguing it was too unreliable to be admitted. \textit{Id.} The tracking information revealed at least three glitches during the time GPS devices were placed on Peterson’s vehicles, amounting to eleven minutes of faulty information in hours of location data. \textit{Id.} After a hearing, the trial judge decided to admit the evidence—the first time, according to analysts, that GPS tracking device evidence was used in a criminal trial in California. Stacy Finz et al., \textit{Groundbreaking Rule in Peterson Trial; Tracking Device Evidence Can Be Presented}, \textit{San Fran. Chron.}, Feb. 18, 2004, at A11, 2004 WLNR 7622924. A jury later convicted Peterson of the two murders and sentenced him to death for the crimes. Dean Murphy, \textit{Jury Says Scott Peterson Deserves to Die for Murder}, \textit{N.Y. Times}, Dec. 14, 2004, at A20.

\textsuperscript{59} Finz \& Taylor, \textit{supra} note 55, at A17.

\textsuperscript{60} Id.

\textsuperscript{61} E.g., Heather Ratcliffe, \textit{Police Sting Targets Cold-Weather Car Thieves}, St. Louis Post-Dispatch, Jan. 15, 2005, at 7 (describing St. Louis, Missouri’s program), 2005 WLNR 609624.
door is opened or the car moves. Finally, law enforcement and corrections officers use GPS tracking devices to monitor the location of nonviolent offenders released on parole or defendants released pending trial; they can engineer the devices to warn themselves when an individual travels to prohibited locations.

Thus, law enforcement may find GPS technology useful in a variety of contexts and for a variety of purposes, but what concerns privacy advocates is the tracking of suspects and those who have not yet been convicted of any crime. Privacy advocates draw parallels between such GPS tracking and the Orwellian state—one where the average citizen must live and move about while knowing the government may be watching and scrutinizing the individual’s every movement. If law enforcement discretion in using GPS devices can be checked by the U.S. Constitution, such a safeguard must derive from the Fourth Amendment, which, according to Justice Louis Brandeis in his famous description of privacy, protects “the right to be let alone” from government intrusion—“the most comprehensive of rights and the right most valued by civilized men.”

II. The Framework of the Fourth Amendment

The Fourth Amendment to the U.S. Constitution grants people the right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The threshold inquiry under the Fourth Amendment is whether police activities constituted

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62 Id.
64 See Wade, supra note 51, at G1 (outlining variety of uses of GPS technology).
66 See Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting); see also U.S. CONST. amend. IV; Warren & Brandeis, supra note 10, at 205 (describing overall right to privacy, not just that found in the Fourth Amendment, as a general “right to be let alone”).
67 The Fourth Amendment provides the following:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.
a search or seizure.\textsuperscript{68} If no search or seizure occurred, the Fourth Amendment does not apply.\textsuperscript{69} If the activity was a search or seizure, then it must have been reasonable in order to comply with the Fourth Amendment.\textsuperscript{70} In most cases, a search of private property is reasonable if it occurred pursuant to a warrant, based on probable cause and issued by a neutral and detached magistrate.\textsuperscript{71} If, however, a search occurred absent a valid warrant, its evidence must be excluded at the defendant’s subsequent criminal trial.\textsuperscript{72} Therefore, whether police action constitutes a search yields significant implications for police investigative techniques and procedure, as well as the conduct of any resulting criminal trial.\textsuperscript{73}

Until the late 1960s, the U.S. Supreme Court repeatedly interpreted the Fourth Amendment to provide only the right to be free from physical governmental trespass onto one’s person or property.\textsuperscript{74}


\textsuperscript{71} See, e.g., Groh v. Ramirez, 540 U.S. 551, 558–60 (2004); Kyllo, 533 U.S. at 31; Illinois v. Rodriguez, 497 U.S. 177, 181 (1990); Katz, 389 U.S. at 356–57; Johnson v. United States, 333 U.S. 10, 13–14 (1948). Although the Supreme Court generally maintains its position that searches conducted without a warrant are presumptively unreasonable, the Court has recognized numerous exceptions to the warrant requirement, where a search will be reasonable even without a warrant. See, e.g., Groh, 540 U.S. at 572 (Thomas, J., dissenting) (discussing exceptions to the warrant requirement). For instance, the Court has recognized that both an individual’s lesser expectation of privacy in his automobile and the mobility of the vehicle make it impracticable to require a warrant to search an automobile; thus, a search of a vehicle can be reasonable without a warrant, so long as officers had probable cause to believe the vehicle contained contraband. United States v. Ross, 456 U.S. 798, 800 (1982); Carroll v. United States, 267 U.S. 132, 151–53 (1925). Moreover, searches conducted in officers’ good faith that a valid warrant exists, even when the warrant is deficient, also are constitutional. United States v. Leon, 468 U.S. 897, 907–09 (1984). Finally, the Court has dispensed with the warrant requirement for limited, brief searches and seizures of a person, when officers have reasonable suspicion the individual is armed. Terry, 392 U.S. at 24–27.

\textsuperscript{72} Mapp v. Ohio, 367 U.S. 643, 655 (1961) (applying exclusionary rule to state criminal prosecutions); Weeks v. United States, 232 U.S. 383, 393–94 (1914) (crafting exclusionary rule and applying it to federal criminal prosecutions).

\textsuperscript{73} See Mapp, 367 U.S. at 655; Weeks, 232 U.S. at 393–94.

\textsuperscript{74} See, e.g., Silverman, 365 U.S. at 509–10 (holding the Fourth Amendment was violated where police officers’ eavesdropping techniques involved a physical penetration into the defendants’ premises); Olmstead v. United States, 277 U.S. 438, 465–66 (1928) (holding no Fourth Amendment violation occurred where officers intercepted the defendants’ wire telephone calls by tapping wires located outside of the defendants’ home).
Regarding searches, the Court simply determined the location of law enforcement officers at the time they acquired information about the defendant; if officers had not committed a physical trespass into persons, houses, papers, or effects, their actions were not considered a search and thus did not violate the Fourth Amendment.\(^75\)

This reliance on physical trespass shifted in 1967 with the seminal Supreme Court case *Katz v. United States*, where the Court held for the first time that the Fourth Amendment “protects people, not places.”\(^76\) Even though the language of the Fourth Amendment contains no explicit reference to privacy, the Court indicated that the heart of the Fourth Amendment protects an individual’s reasonable expectation of privacy from government intrusion.\(^77\) Under the Court’s analysis, sharpened by Justice John M. Harlan’s concurring opinion, there were two requirements to find an individual had a reasonable expectation of privacy worthy of protection.\(^78\) First, a person must have exhibited a subjective expectation of privacy, and second, the expectation must be one that society is prepared to recognize as reasonable.\(^79\)

By this logic, the *Katz* majority attempted to make Fourth Amendment jurisprudence reflect societal notions of privacy.\(^80\) The context of the case suggests the Justices were mindful of the effect of technological advances, which gave police access to information with no physical intrusion required.\(^81\) In *Katz*, FBI agents installed an electronic listening and recording device on the outer wall of the phone booth in which the defendant had made a telephone call.\(^82\) The Court held that by entering the phone booth and closing the door,

\(^75\) See, e.g., *Silverman*, 365 U.S. at 509–10 (holding that physical penetration into the defendants’ home constituted a Fourth Amendment violation); *Goldman v. United States*, 316 U.S. 129, 134–36 (1942) (holding no Fourth Amendment violation occurred where officers did not physically enter the defendant’s office); *Olmstead*, 277 U.S. at 456–66 (holding no Fourth Amendment violation occurred when officers did not penetrate the defendants’ home); *Hester v. United States*, 265 U.S. 57, 58–59 (1924) (holding no Fourth Amendment violation occurred when officers trespassed onto the defendant’s land but did not trespass into his home).

\(^76\) 389 U.S. at 351.

\(^77\) See id. at 351–53; see also id. at 361 (Harlan, J., concurring).

\(^78\) See id. at 351–53; id. at 361 (Harlan, J., concurring).

\(^79\) See id. at 351–53; id. at 361 (Harlan, J., concurring).

\(^80\) See id. at 351–53, 359; see also id. at 360 (Harlan, J., concurring). In articulating the contours of privacy protected by the Fourth Amendment, the Court distinguished Fourth Amendment privacy from a general societal right to privacy. Id. at 350–51. The Fourth Amendment protects an individual only against certain kinds of governmental intrusions, whereas state law protects a person’s general “right to be let alone by other people.” *Id.*

\(^81\) *See Katz*, 389 U.S. at 352–53.

\(^82\) *Id.* at 348.
the defendant sought to exclude others, and his actions allowed him to presume his conversations would not be “broadcast to the world.”

The government’s conduct in recording that conversation, then, violated his justifiable expectation of privacy—even absent physical intrusion into the phone booth. By Justice Harlan’s more precise articulation, not only did the defendant’s actions show he had a subjective expectation of privacy regarding his phone booth conversation, but his expectation was one society was prepared to recognize as reasonable.

The Court has followed this standard in subsequent cases by recognizing that physical intrusion does not completely control the Fourth Amendment analysis. Nevertheless, in its attempt to define what constitutes a reasonable expectation of privacy, the Court often has turned to definitions of place and physical intrusion, particularly when grappling with the challenging privacy issues raised by the constant march of technology.

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83 Id. at 352.
84 See id. at 353.
85 Id. at 361 (Harlan, J., concurring). Neither the Court nor Justice Harlan elaborated further on why the defendant’s expectation of privacy in the phone booth was reasonable. See id. at 352; id. at 361 (Harlan, J., concurring). Indeed, the fact that Katz failed to provide further guidance on what makes an expectation of privacy “reasonable” lies at the heart of the debate about the applicability of the Fourth Amendment. See, e.g., Orin S. Kerr, The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution, 102 Mich. L. Rev. 801, 808 (2004); David A. Sklansky, Back to the Future: Kyllo, Katz, and Common Law, 72 Miss. L.J. 143, 157–60 (2002).
86 See, e.g., Kyllo, 533 U.S. at 34 (finding that a Fourth Amendment search occurred, even absent physical intrusion into the defendant’s home); Rakas v. Illinois, 439 U.S. 128, 143 (1978) (noting that Fourth Amendment analyses are not tied to invasions of property interests recognized at common law); Cardwell v. Lewis, 417 U.S. 583, 589–92 (1974) (holding that taking paint scrapings from tires of car parked in public parking lot did not amount to a search, despite police physical manipulation of tires).
87 See, e.g., Kyllo, 533 U.S. at 29–30 (holding the use of a thermal imager directed at the defendant’s home was a search, despite a lack of a physical intrusion, because the technology allowed access to information otherwise unobtainable without a physical intrusion); Florida v. Riley, 488 U.S. 445, 448–52 (1989) (holding the aerial observation of curtilage by officers on a helicopter flying four hundred feet above the area was not a search because no physical intrusion occurred); California v. Greenwood, 486 U.S. 35, 40–41 (1988) (holding no search occurred, despite the physical intrusion into trash bags left at the curb outside a home); Dow Chem., 476 U.S. at 235–39 (1986) (holding the aerial observation of the area surrounding a factory was not a search because no physical intrusion occurred); Ciraolo, 476 U.S. at 213–15 (holding the aerial observation of the curtilage of a home was not a search because it occurred in a “physically nonintrusive manner” from an airplane flying at an altitude of one thousand feet); United States v. Karo, 468 U.S. 705, 715–16 (1984) (holding the monitoring of a beeper tracking device while the beeper was inside a home constituted a search, even absent the physical intrusion into the home); see also Sherry F. Colb, What Is a Search? Two Conceptual Flaws in Fourth Amendment Doctrine and Some
III. GPS Tracking Under the Fourth Amendment

The U.S. Supreme Court has not yet evaluated the installation or monitoring of GPS tracking devices under the Fourth Amendment. The Court has, however, analyzed “beepers,” an earlier, simpler form of tracking device. The Court’s cases involving several other technologies used in law enforcement also could influence a constitutional analysis of GPS tracking.

The use of a GPS tracking device in the criminal investigation of a suspect requires two steps on the part of police. First, police must install the device on the suspect’s vehicle or on an item belonging to the suspect, and second, police must monitor the functioning of the device or otherwise access the location information the GPS device collects. If the installation of the device constitutes a search or seizure implicating the Fourth Amendment, a court would not reach the monitoring issue because a search warrant is required for the installa-

Hints of a Remedy, 55 Stan. L. Rev. 119, 120–24 (2002) (arguing that the Supreme Court has struggled to develop a consistent analysis in light of technology); Lewis R. Katz, In Search of a Fourth Amendment for the Twenty-First Century, 65 Ind. L.J. 549, 562–65 (1990) (arguing that the Court’s subsequent application of the Katz test has failed to fulfill the original goals of that decision); Ric Simmons, From Katz to Kyllo: Adapting the Fourth Amendment to Twenty-First Century Technology, 53 Hastings L.J. 1303, 1312–21 (2002) (suggesting that Supreme Court cases post-Katz have improperly focused on the methods and location of the search, rather than its results, as the Katz decision suggested); Christopher Slobogin, Peeping Techno-Toms and the Fourth Amendment: Seeing Through Kyllo’s Rules Governing Technological Surveillance, 86 Minn. L. Rev. 1393, 1406–07 (2002) (discussing Supreme Court cases highlighting the importance of the place observed by law enforcement); Daniel McKenzie, Note, What Were They Smoking?: The Supreme Court’s Latest Step in the Long, Strange Trip Through the Fourth Amendment, 93 J. Crim. L. & Criminology 153, 183–87 (2003) (noting the difficulties with the application of the Katz test); Paul St. Lawrence, Note, Kyllo: As Libertarian Defense Against Orwellian Enforcement, 1 Geo. J.L. & Pub. Pol’y 155, 159–62 (2002) (same).


92 See Karo, 468 U.S. at 713; Knotts, 460 U.S. at 279 & n.**; Note, supra note 91, at 299–300.
tion. If the installation does not constitute a search, or if police attempt to obtain information from a tracking device pre-installed on a vehicle or item, then a court would reach the monitoring issue. This Note focuses on whether the monitoring of a GPS tracking device is a search under the Fourth Amendment.

A. U.S. Supreme Court Case Law: Beepers and the Fourth Amendment

In 1983, in United States v. Knotts, the U.S. Supreme Court addressed for the first time whether the monitoring of a tracking device constitutes a search. In that case, police used a beeper tracking device to track contraband possessed by suspects. The Knotts beeper was a battery-operated radio transmitter that issued an intermittent signal which police could pick up with a radio receiver. To receive the signal and thereby determine the beeper’s location, police used a receiver within the physical range of the beeper; absent police presence in the vicinity, the tracking device provided no location data. GPS tracking devices, alternatively, generally do not require police to remain nearby to monitor a receiver because location information gathered by GPS tracking devices usually can be accessed simply by visiting an Internet web site.

In Knotts, the respondent’s codefendant purchased a drum of chloroform, into which officers had installed a beeper, and placed it into his car. Police officers then followed the car, using a combination of visual surveillance and a monitor in their vehicle that received the signals emitted by the beeper. After the drum was transferred to the vehicle of another codefendant and that codefendant made evasive maneuvers, police lost visual contact with the car. They re-

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93 See Karo, 468 U.S. at 713; Knotts, 460 U.S. at 279 & n.**; Note, supra note 91, at 299–300.
94 See Karo, 468 U.S. at 713; Knotts, 460 U.S. at 279 & n.**; Note, supra note 91, at 299–300.
95 See infra notes 96–156 and accompanying text.
96 460 U.S. at 277.
97 Id.
98 Id.
99 See id. at 277–78 (describing how police monitored the beeper to acquire location information).
100 See, e.g., COUNTER INTELLIGENCE TECHS., INC., supra note 48; COVERT GPS VEHICLE TRACKING SYS., INC., supra note 48.
101 Knotts, 460 U.S. at 278. The respondent did not challenge the warrantless installation of the beeper into a five-gallon drum of chloroform. Id. at 279 & n.**. Before installing the device, police obtained the consent of the chloroform producer; the respondent’s codefendants purchased the beeper-laden drum from the company. Id. at 278.
102 Id.
103 Id.
gained contact later, after a monitoring device in a helicopter picked up the signal.\textsuperscript{104} The signal revealed the beeper was stationary, indicating the drum was located in the vicinity of a cabin.\textsuperscript{105} At this point, police stopped monitoring the beeper.\textsuperscript{106} Relying on the location information acquired by the beeper and additional visual surveillance of the cabin, police obtained a warrant to search the cabin, which revealed an illicit drug laboratory.\textsuperscript{107}

To determine whether the monitoring of the beeper violated the Fourth Amendment, the Court employed the \textit{Katz v. United States} test.\textsuperscript{108} The Court concluded that although the respondent may have had a subjective expectation of privacy in his movements, demonstrated by his evasive maneuvers, this was not an expectation society would recognize as reasonable.\textsuperscript{109} Reasoning that monitoring the beeper was analogous to following the vehicle on public streets and highways, the Court held the codefendant “voluntarily conveyed to anyone who wanted to look” both his movements and the nature of the stops he made.\textsuperscript{110}

In essence, the Court equated the use of a tracking device with the mere physical observation of the vehicle to hold there was no reasonable expectation of privacy in one’s movements in public.\textsuperscript{111} Although the tracking device allowed police to continue surveillance even when they lost visual contact, the Court said this fact did not change the analysis because the Fourth Amendment does not prohibit the police from enhancing the capabilities of their senses with new technology.\textsuperscript{112}

The respondent had argued that such a holding would allow police to conduct, outside of judicial knowledge, twenty-four-hour surveillance of anyone, but the Court was unconvinced of the possibility absent specific examples of police abuse.\textsuperscript{113} The Court stated, however, that if such “dragnet-type law enforcement practices” should occur, that would be the time to reevaluate its reasoning.\textsuperscript{114} Until then,

\begin{itemize}
  \item \textsuperscript{104} \textit{Id.}
  \item \textsuperscript{105} \textit{Id.} at 278–79.
  \item \textsuperscript{106} \textit{Knotts}, 460 U.S. at 278–79.
  \item \textsuperscript{107} \textit{Id.} at 279.
  \item \textsuperscript{108} \textit{Id.} at 280–81.
  \item \textsuperscript{109} See \textit{id.} at 281.
  \item \textsuperscript{110} \textit{Knotts}, 460 U.S. at 281–82; see also \textit{Michigan v. Chesternut}, 486 U.S. 567, 574–75 (1988) (holding that police following a suspect to determine where he was going and driving alongside him for a short distance was not a seizure under the Fourth Amendment).
  \item \textsuperscript{111} \textit{Knotts}, 460 U.S. at 282.
  \item \textsuperscript{112} \textit{Id.}
  \item \textsuperscript{113} \textit{Id.} at 283.
  \item \textsuperscript{114} \textit{Id.} at 284.
\end{itemize}
the mere fact that the beeper allowed law enforcement to be more effective or efficient in conducting vehicle surveillance did not raise Fourth Amendment concerns.\textsuperscript{115} 

The \textit{Knotts} Court specifically left open the question of whether monitoring the beeper after the chloroform drum had entered the cabin would have violated the Fourth Amendment.\textsuperscript{116} The Court addressed that issue a year later in 1984 in \textit{United States v. Karo}.\textsuperscript{117} The fact that the case involved a home shifted the Court’s analysis.\textsuperscript{118} 

In \textit{Karo}, agents from the federal Drug Enforcement Agency (the “DEA”) reacted to a tip from an informant that the defendants had ordered, from the informant’s company, fifty gallons of ether, an ingredient often used in cocaine production.\textsuperscript{119} With the informant’s consent, DEA agents substituted their own can of ether, in which they had installed a beeper, for one can of the ten-can shipment.\textsuperscript{120} The agents watched the respondent pick up the ether shipment from the informant and then followed the respondent to his house, using a combination of visual and beeper surveillance.\textsuperscript{121} 

At times relying on only the beeper signal, agents tracked the can of ether as it was moved among codefendants’ homes and eventually to a commercial storage facility.\textsuperscript{122} Realizing the beeper was not sensitive enough to reveal which storage locker contained the ether can, agents subpoenaed storage company records to learn which locker a codefendant had rented.\textsuperscript{123} Agents continued to use the beeper to locate the ether as the respondent and his codefendants moved the can among storage facilities; eventually, using a combination of beeper and visual surveillance, the agents tracked the ether can to a house the codefen-

\textsuperscript{115} Id. at 284–85. Justice John Paul Stevens, joined by Justices William Brennan and Thurgood Marshall, expressed concern in a concurring opinion over the Court’s sweeping language related to increased law enforcement efficiency due to technology. \textit{Id.} at 288 (Stevens, J., concurring). Justice Stevens noted that \textit{Katz} involved a technological enhancement used in a manner that violated the Fourth Amendment. \textit{See id.} (Stevens, J., concurring). Thus, although Justice Stevens thought the beeper was used appropriately in \textit{Knotts}, “it by no means follow[ed] that the use of electronic detection techniques does not implicate especially sensitive concerns.” \textit{Id.} (Stevens, J., concurring).

\textsuperscript{116} \textit{See Knotts}, 460 U.S. at 285. The Court noted the record did not indicate the beeper was used to reveal information about the movement of the drum inside the cabin. \textit{Id.}

\textsuperscript{117} 468 U.S. at 707.

\textsuperscript{118} \textit{Id.} at 714–15.

\textsuperscript{119} \textit{Id.} at 708.

\textsuperscript{120} \textit{Id.}

\textsuperscript{121} \textit{Id.} When the officers lost visual contact, they relied solely on the beeper to assist them in regaining location information. \textit{Id.}

\textsuperscript{122} \textit{Karo}, 468 U.S. at 708–10.

\textsuperscript{123} \textit{Id.} at 708.
dants had rented. At that point, because the agents wanted to avoid detection, they relied on the beeper to determine periodically if the ether can still was in the house. Based in part on information obtained through the beeper monitoring, agents secured a warrant to search the codefendants’ homes, where they found evidence sufficient to arrest the respondent on drug charges.

In evaluating whether the monitoring of the beeper was a search, the Court first implicitly accepted Knotts’s rationale regarding the constitutionality of DEA officers’ monitoring of the beeper as it moved on public thoroughfares. The monitoring of the beeper while it was in a private residence, however, raised different concerns. After noting that there is a heightened expectation of privacy inside a home, the Court stated that the beeper allowed the DEA agents to obtain information about activities occurring inside a private residence—namely, whether the beeper-laden ether can was present inside the home.

Even though the electronic monitoring was less intrusive than a physical search, the Court reasoned, it still revealed information about the inside of a home that the DEA agents could not have known without entering the residence. Therefore, monitoring the beeper while it was inside the home constituted a search. Because the search was conducted without a warrant, it violated the Fourth Amendment.

\[\text{References}\]

124 Id. at 709.
125 Id. at 709–10.
126 Id. at 710.
127 See Karo, 468 U.S. at 713–14.
128 Id. at 714.
129 Id. at 714–15. The Court noted that the monitoring of the beeper while it was inside the storage facility did not violate the Fourth Amendment because the beeper did not reveal which locker contained the beeper and ether can. Id. at 720. Thus, unlike the monitoring of the beeper while it was in the home, this monitoring did not tell the DEA agents anything about the contents of the locker. Id. at 715, 720–21.
130 Id. at 715.
131 Id. at 716.
132 Karo, 468 U.S. at 719. The government also asserted that requiring a warrant to monitor a beeper while it was inside a home amounted to requiring a warrant for all beeper uses, because law enforcement could not know prior to monitoring whether the beeper would travel inside a home. Id. at 718. The Court rejected this argument, saying it was not convincing enough to dispense with the warrant requirement. Id. The Court also indicated that law enforcement officers should have no difficulty describing with sufficient particularity the place to be searched as they apply for a warrant. Id. Although police would not know, before monitoring, where the beeper would travel, they could specify on the warrant application the object in which the beeper would be placed, the circumstances leading officers to desire using a beeper, and the time period they would monitor the beeper. Id.
B. Federal Statute on Tracking Devices

After the Supreme Court’s decisions in Knotts and Karo, Congress in 1986 addressed jurisdictional aspects of the use of tracking devices through a federal statute. The statute provides no guidance as to when the use of a tracking device is justified; instead, it states that courts otherwise authorized to issue a warrant or other order for the installation of such a device can authorize the use of the device outside the court’s own jurisdiction. Thus, because the statute does not require police to obtain court orders before installing or monitoring a tracking device, it does not guide law enforcement usage of tracking devices but merely solves jurisdictional problems that arise when police track individuals across state lines.

In fact, at least two lower courts have concluded the statute does not specifically prohibit police from installing and monitoring a tracking device without a court order, nor does the statute mandate exclusion of evidence obtained through use of a tracking device in contravention of the statute. Finally, the statute’s definition of “tracking device” may be somewhat outdated, given that GPS technology can be included in devices that have purposes besides tracking, such as cell phones. Therefore, the federal statute concerning tracking devices

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134 See id. § 3117(a).
135 See id.; see also United States v. Gbemisola, 225 F.3d 753, 757 n.2 (D.C. Cir. 2000) (explaining the rationale behind § 3117 as curing jurisdictional problems that accompanied the use of tracking devices).
136 United States v. Forest, 355 F.3d 942, 950 (6th Cir. 2004) (holding that even if a cell phone constituted a tracking device under § 3117, the statute provided no basis for excluding evidence derived from its use without a § 3117 court order), vacated on other grounds sub nom. by Garner v. United States, 125 S. Ct. 1050 (2005); Gbemisola, 225 F.3d at 758 (holding that § 3117 contains a basis for authorizing the use of tracking devices but does not bar uses of tracking devices that do not comply with that statute and further holding that § 3117 does not exclude evidence acquired without a § 3117 order).
137 See Forest, 355 F.3d at 950. In United States v. Forest, DEA agents obtained a court order to intercept cellular communications between the two defendants. Id. at 947. The agents also followed defendants’ vehicles periodically. Id. When law enforcement lost visual contact with the defendants’ vehicle, they dialed one defendant’s cell phone without letting it ring and used data obtained from the defendant’s cellular service provider to ascertain which cellular transmission towers had just been “hit” by signals from the defendant’s phone. Id. at 947. The cell-site data showed the location of the cell phone, allowing the federal agents to resume visual tracking of the defendants. Id. At trial and on appeal, the defendants claimed that this use of the cell phone converted the phone into a tracking device. Id. at 948. Even though interception of wire and oral communications is governed by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, which prohibits law enforcement interception of communications except under controlled circumstances, the U.S. Court of Appeals for the Sixth Circuit held the use of cell-site data was not a
is not intended to provide guidance for law enforcement’s use of GPS devices, nor does it prevent abuse of the technology.\textsuperscript{138}

C. Case Law Addressing GPS Tracking

Only a few courts have specifically considered whether the monitoring of GPS tracking devices is distinguishable from the monitoring of the beepers used in \textit{Knotts} and \textit{Karo}.\textsuperscript{139} Moreover, only a few courts have mentioned the possible constitutional implications of the monitoring of GPS tracking devices.\textsuperscript{140} Two federal courts have ignored or declined to address the monitoring issue, another federal court has held monitoring a GPS device was not a search by relying on the \textit{Knotts} reasoning, and two state courts have held monitoring a GPS device constituted a search on state law grounds.\textsuperscript{141}

In perhaps the most prominent case addressing GPS tracking, the Washington Supreme Court held in 2003 in \textit{State v. Jackson} that the monitoring of a GPS tracking device constitutes a search requiring a

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\item \textsuperscript{138} \textit{See} 18 U.S.C. \textsection 3117; \textit{Forest}, 355 F.3d at 950; \textit{Gbemisola}, 225 F.3d at 758.
\item \textsuperscript{139} \textit{See} United States v. Moran, 349 F. Supp. 2d 425, 467–68 (N.D.N.Y. 2005) (finding monitoring of GPS device directly analogous to monitoring of beepers used in \textit{Knotts}); United States v. Berry, 300 F. Supp. 2d 366, 367–68 (D. Md. 2004) (noting similarities and differences between beepers and GPS tracking devices, but declining to decide whether monitoring of GPS device constituted search); \textit{see also} People v. Lacey, No. 2463N/02, 2004 WL 1040676, at *4–8 (N.Y. Nassau County Ct. May 6, 2004) (unpublished decision) (reviewing GPS case law but declining to address similarities between GPS devices and beepers); State v. Jackson, 76 P.3d 217, 222–24 (Wash. 2003) (en banc) (declining to consider \textit{Karo} and \textit{Knotts} because GPS tracking devices constituted search on state-law grounds); \textit{cf.} \textit{Forest}, 355 F.3d at 950–51 (holding use of cell-site data to determine location did not constitute search because data revealed defendants’ movements on public roads; defendant lacked a reasonable expectation of privacy in his movements and in his cell-site data).
\item \textsuperscript{140} \textit{See} United States v. McIver, 186 F.3d 1119, 1123, 1127 (9th Cir. 1999) (evaluating the constitutionality of the installation of a GPS device); \textit{Moran}, 349 F. Supp. 2d at 467–68 (holding monitoring a GPS device was not a search because police could have attained the same information through visual surveillance); \textit{Berry}, 300 F. Supp. 2d at 368 (declining to decide whether monitoring a GPS tracking device on a vehicle constituted a search); \textit{Lacey}, 2004 WL 1040676, at *7–8 (holding monitoring a GPS device attached to a vehicle was a search under the New York constitution); \textit{Jackson}, 76 P.3d at 224 (holding monitoring a GPS device attached to a vehicle was a search under the Washington constitution).
\item \textsuperscript{141} \textit{See} McIver, 186 F.3d at 1123, 1127 (ignoring monitoring issue); \textit{Moran}, 349 F. Supp. 2d at 467–68 (relying on \textit{Knotts} to conclude the monitoring of a GPS device was not a search); \textit{Berry}, 300 F. Supp. 2d at 368 (declining to decide the monitoring issue); \textit{Lacey}, 2004 WL 1040676, at *7–8 (holding monitoring a GPS device was a search under the state constitution); \textit{Jackson}, 76 P.3d at 264 (same).
\end{itemize}
warrant under the Washington State Constitution.\textsuperscript{142} In \textit{Jackson}, police obtained warrants to impound and search two vehicles belonging to the defendant, who was suspected of murdering his daughter.\textsuperscript{143} While the vehicles were impounded, police installed GPS tracking devices; officers then returned the vehicles to the defendant without informing him the tracking devices had been installed.\textsuperscript{144} By downloading data from the GPS devices through the Internet, police learned of the defendant’s movements to a location where he had dumped the child’s body.\textsuperscript{145}

Acknowledging that the Washington version of the Fourth Amendment is broader in scope than the federal Fourth Amendment, the Washington court held that GPS tracking required a warrant under the state constitution.\textsuperscript{146} The court reasoned that GPS was a “particularly intrusive method of surveillance” because it did not merely augment the senses; rather, it served as a total substitute for visual tracking and therefore was distinguishable from other sense-augmenting devices like binoculars.\textsuperscript{147} Also pointing out that police obtained GPS data over the course of two and one-half weeks, the court stated it was unlikely police could have continued such constant twenty-four-hour visual surveillance throughout that period.\textsuperscript{148} In this vein, the court explicitly rejected the notion that GPS tracking equated to following the defendant as he traveled on public roads.\textsuperscript{149}

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\textsuperscript{142} See 76 P.3d at 224.
\textsuperscript{143} Id. at 220.
\textsuperscript{144} Id. at 220–21. Police obtained the following three warrants for the defendant’s vehicles: (1) a warrant to impound and search the vehicles, (2) a ten-day warrant to install the GPS devices, and (3) a ten-day warrant to maintain the GPS devices. Id. Because police had relied on valid warrants, their use of GPS devices did not violate the state constitution. Id. at 220.
\textsuperscript{145} Id. at 221.
\textsuperscript{146} Id. at 220, 222.
\textsuperscript{147} \textit{Jackson}, 76 P.3d at 223–24. Under Washington case law, no search occurs if police officers acquire information from a lawful vantage point through their senses. Id. at 222. “However, a substantial and unreasonable departure from a lawful vantage point, or a particularly intrusive method of viewing, may constitute a search.” Id. (quoting State v. Young, 867 P.2d 593, 598 (Wash. 1994) (alteration in original)). Furthermore, Washington case law looks to the kind of information gathered by police in the given situation; this analysis assists Washington courts in determining whether a given expectation of privacy is “one which a citizen of this state should be entitled to hold.” Id.
\textsuperscript{148} Id. at 223.
\textsuperscript{149} Id. The United States District Court for the District of Maryland hinted at similar reasoning in \textit{United States v. Berry}. See 300 F. Supp. 2d at 368. That court did not directly reach the issue of whether the monitoring of the GPS device police had placed on the defendant’s vehicle constituted a search because police had obtained a court order to install the device. Id. The court noted, however, that the U.S. Supreme Court’s beeper
The court bolstered its reasoning by holding that the information available through a GPS device is extensive.150 A GPS tracking device can show a detailed record of the individual’s life—everywhere the person has been, when, and for how long, which in turn reveals preferences, habits, associations, and eccentricities.151 Given this level of detail, the Jackson court held that a check on police power, through the warrant requirement, was necessary to protect Washington citizens’ right to be free from this kind of government intrusion.152

Thus, even though GPS devices are a kind of location tracking device, they may be different from the beeper version because they last longer; are much more accurate (currently to within one to three feet), and do not require police presence in the vicinity to provide data.153 So, GPS tracking devices might represent the kind of “dragnet-type” twenty-four-hour surveillance capabilities to which the Court alluded, with some disapproval, in Knotts.154 At the heart of this inquiry under the federal Constitution, however, is whether the information a GPS tracking device collects is the kind of information in which an individual has a reasonable expectation of privacy.155 Because the U.S. Supreme Court in Knotts relied significantly on the notion that one has no reasonable expectation of privacy in one’s travels along public streets, any evaluation of GPS tracking technology relates

150 Jackson, 76 P.3d at 223.
151 Id.
152 Id. at 224; see also Lacey, 2004 WL 1040676, at *7–8 (finding that the installation and monitoring of GPS tracking device installed on vehicle undercarriage violated the New York version of the federal Fourth Amendment). The Lacey court reasoned that “individuals must be given the constitutional protections necessary to their continued unfettered freedom from a ‘big brother’ society. Other than in the most exigent circumstances, a person must feel secure that his or her every movement will not be tracked except upon a warrant based on probable cause . . . .” Id. at *7.
153 See Berry, 300 F. Supp. 2d at 367–68; Jackson, 76 P.3d at 223–24; El-Rabbany, supra note 30, at 1–2, 5, 8–9; Pace et al., supra note 30, at 1; Grossman & Hift, supra note 33, at 24; Washington, supra note 33, at 1C; Wirbel, supra note 35, at 51.
154 See Knotts, 460 U.S. at 284.
155 See supra notes 67–79 and accompanying text.
to the base issue of whether citizens reasonably can expect a measure of privacy within the public space.\(^{156}\)

### IV. Expectations of Privacy Within the Public Space

Whether one can possess a legitimate expectation of privacy within the public space was highlighted by the U.S. Supreme Court for the first time in *Katz v. United States*.\(^{157}\) The Court stated that what a person “knowingly exposes” to the public cannot be the subject of Fourth Amendment protection, but what one attempts to keep private, even in areas readily accessible to the public, can be protected.\(^{158}\) Thus, the *Katz* Court recognized that the distinction between the public and the private realm may not always be a bright line, nor may it always be determined by purely physical boundaries.\(^{159}\) The contours of this distinction bear on an analysis of GPS tracking because one’s location, except one’s location within a home or other structure, technically is exposed to the public.\(^{160}\) Therefore, it is helpful to turn to an analysis of how the Court has interpreted *Katz’s “knowingly expose[d]” language*, how it has addressed Fourth Amendment protections in the public space, and the common criticisms of the Court’s approach, particularly in relation to new forms of technology.\(^{161}\)

#### A. Defining “Public” and “Private” Based on Physical Boundaries

Even though *Katz* indicated the Fourth Amendment “protects people, not places,” the U.S. Supreme Court since *Katz* has placed much weight on physical boundaries in determining whether an individual has a reasonable expectation of privacy.\(^{162}\) In analyzing police’s

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\(^{156}\) See Knotts, 460 U.S. at 280–84; *Katz v. United States*, 389 U.S. 347, 351–52 (1967).


\(^{158}\) Id.

\(^{159}\) See id.


\(^{161}\) See 389 U.S. at 351–52; see also *supra* notes 157–160 and accompanying text.

\(^{162}\) See *Katz*, 389 U.S. at 351; e.g., *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding a reasonable expectation of privacy just exists inside the home); *California v. Greenwood*, 486 U.S. 35, 39–41 (1988) (holding no reasonable expectation of privacy existed in trash bags left outside a home at a curb accessible to the public); *California v. Ciraolo*, 476 U.S. 207, 213–14 (1986) (holding no reasonable expectation of privacy exists in a fenced-in backyard, where the backyard was visible to the public from a plane flying overhead); *United States v. Karo*, 468 U.S. 705, 714–16 (1984) (holding a reasonable expectation of privacy exists in an item’s travels inside a home, because the indoor travels were withdrawn from public view); *Oliver v. United States*, 466 U.S. 170, 178–79 (1984) (holding no reasonable expectation of privacy exists in open fields that were not immediately adjacent to a home); *Knotts*, 460 U.S. at 281–82 (holding no reasonable expectation of privacy exists in
use of beepers in *United States v. Knotts* and *United States v. Karo*, the Supreme Court distinguished between public and private activities, relying on physical boundaries to demarcate the line between the two.\(^\text{163}\) Monitoring the beeper used in *Karo* became a search only when the container in which it was placed entered a home—a private place delineated by its physical boundaries.\(^\text{164}\) Conversely, the monitoring of the beeper in *Knotts* never constituted a search because government agents monitored the beeper only as it traveled on roads and streets—public places existing outside physical boundaries.\(^\text{165}\)

The Court’s distinction between public and private thus focuses heavily on whether police action has crossed physical boundaries.\(^\text{166}\) In turn, the analysis also assumes that whatever exists outside those boundaries is not private.\(^\text{167}\) The constitutionality of a GPS tracking device, then, might center on the fact that much of the location information obtained by GPS tracking devices is “public” by this definition.\(^\text{168}\) Like the tracking information provided by the beeper in *Knotts*, the location information obtained by a GPS tracking device attached to a vehicle would concern the device’s movement in public places—along roads and streets.\(^\text{169}\) By contrast, a GPS personal locator device worn on a wristband would concern activities and movements occurring in public, as the person traveled along roads and streets, as travels over public roads because a car’s occupants and contents are in plain view of the public); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) (holding a lesser expectation of privacy exists in a motor vehicle because a car has “little capacity for escaping public scrutiny” in its use on public roads); cf. Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (holding no reasonable expectation of privacy exists in phone numbers dialed from a private telephone in a home, because the numbers are voluntarily conveyed to a third party outside the home—the phone company).

\(^{163}\) See *Karo*, 468 U.S. at 714–15; *Knotts*, 460 U.S. at 281–82.

\(^{164}\) See 468 U.S. at 714–16.

\(^{165}\) See *Knotts*, 460 U.S. at 281–82.

\(^{166}\) See supra notes 162–165 and accompanying text.

\(^{167}\) See Marc Jonathan Blitz, *Video Surveillance and the Constitution of Public Space: Fitting the Fourth Amendment to a World That Tracks Image and Identity*, 82 Tex. L. Rev. 1349, 1371–74 (2004) (outlining the Supreme Court’s focus on physical location since *Katz*); St. Lawrence, supra note 87, at 163–64 (suggesting that the pre-*Kyllo* Court treated privacy as an absolute that exists or does not exist based on physical boundaries, despite the amount of detail provided by forms of enhanced visual surveillance); supra note 162.

\(^{168}\) See *Karo*, 468 U.S. at 714–16; *Knotts*, 460 U.S. at 281–82; see also Blitz, supra note 167, at 1384–88 (evaluating *Karo* and *Knotts* and suggesting that although tracking technology has changed since the two cases, a court still would grapple with their reasoning).

\(^{169}\) See 460 U.S. at 281–82.
well as movements occurring in private, as the person moved about inside a home.\footnote{See Karo, 468 U.S. at 714–16; Knotts, 460 U.S. at 281–82; see also Lee, supra note 47, at 392–94 (analyzing cell phone location data under the Fourth Amendment); Karim, supra note 7, at 509–12 (analyzing GPS personal locators under the Fourth Amendment); Werdegar, supra note 88, at 106–09 (analyzing cell phone location data under the Fourth Amendment).}

Commentators have criticized the rationale that physical boundaries determine the line between public and private for a variety of reasons, but perhaps the most frequent objection is based on a sense that American citizens likely do not expect to lose virtually all privacy when they step outside their front doors and outside the physical boundaries of their homes.\footnote{E.g., Blitz, supra note 167, at 1406–13 (noting a series of objections to the Supreme Court’s holdings finding no expectation of privacy in public); Colb, supra note 87, at 120–26 (arguing that degrees of privacy exist, in contrast to the Court’s all-or-nothing approach); Katz, supra note 87, at 565–66 (suggesting that although people expose numerous aspects of their daily lives to others each day, they do so believing their information will be restricted to a certain purpose and group of people); Werdegar, supra note 88, at 111 (suggesting that people expect to be anonymous in a crowd while moving about in public).} By contrast, the commentators note, there can be such a thing as finding privacy in public—taking refuge in the anonymity a public space provides.\footnote{See, e.g., Blitz, supra note 167, at 1419–20 (noting that the physical environment of the public space can provide substantial opportunity for privacy, such as by merging into a crowd or by interacting with different groups of people in different contexts); Helen Nissenbaum, Protecting Privacy in an Information Age: The Problem of Privacy in Public, 17 LAW & PHIL. 559, 575–76 (1998) (suggesting that before information technology, there was such a thing as being “[s]een by hundreds, noticed by none” while in public and assuming either that one has not been noticed or that each observer only possesses a discrete bit of information about any one individual). Professor Lewis Katz also argues that because much of one’s personal life is lived outside the home, the fact that the Court recognizes little to no Fourth Amendment privacy in the public space means that most aspects of modern life are denied the protections of the Fourth Amendment. Katz, supra note 87, at 568.} Therefore, they argue, if the “reasonable
expectation of privacy” concept is supposed to ensure that societal notions about privacy are incorporated into Fourth Amendment jurisprudence, then the Court’s method of differentiating between public and private seems to fall short.  

B. Knowing Exposure to the Public

That an individual’s reasonable expectation of privacy can depend so significantly on physical boundaries distinguishing public from private combines with the Supreme Court’s knowingly exposed rationale to constitute a major limitation on an individual’s reasonable expectation of privacy under the Fourth Amendment.  

The reason the knowingly exposed rationale has had a major effect on the scope of the Fourth Amendment is that the Court considers nearly everything that lies outside physical boundaries as knowingly exposed to the public. Since the Court articulated its knowingly exposed logic in *Katz*, it has used this language, explicitly and implicitly, to conclude that people have virtually no expectation of privacy in most areas, items, or information exposed to the public in some way.

Commentators have criticized this rationale for many of the same reasons they disapprove of the Court’s method of distinguishing between public and private. They also observe, however, that the initial premise of the Court’s knowingly exposed rationale is sound: When a person takes something that otherwise is personal and reveals it in public, that individual invites a degree of public scrutiny, such as a series of fleeting glances from other members of the public while one is driving down the street. Yet these commentators then point out that even though an individual knows some attention from others is likely, the level of scrutiny the person expects and risks merely by being in public is not the kind of highly individualized, targeted scrutiny imparted by law enforcement. Moreover, social graces—the

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173 See supra note 172.
174 See supra notes 162–173 and accompanying text; infra notes 175–202 and accompanying text.
175 See supra note 162; see also *Katz*, supra note 87, at 564 (arguing that the result of the knowingly exposed rationale has been to “strip the fourth amendment of its normative values which were intended to regulate and limit the powers of government”).
176 See supra note 162.
177 E.g., *Katz*, supra note 87, at 565.
178 See, e.g., *Colb*, supra note 87, at 125; *Katz*, supra note 87, at 565–68; *Nissenbaum*, supra note 172, at 575–76.
179 See *Blitz*, supra note 167, at 1408–11; *Colb*, supra note 87, at 136–37; *Katz*, supra note 87, at 565–66. Privacy advocates argue that privacy results not simply by preventing expo-
idea that one can stare back at someone who is staring—prevent the fleeting glances one expects in public from becoming more intrusive and lengthier stares.\textsuperscript{180} Thus, finding an individual has no expectation of privacy whatsoever whenever one knowingly exposes something to the public seems too simple for these commentators.\textsuperscript{181} Such an analysis fails to account for gradations in one’s expectations of privacy—the fact that being in public may diminish expectations of privacy, but not eliminate them altogether, as the Court’s precedent would hold.\textsuperscript{182}

An example of the U.S. Supreme Court’s all-or-nothing approach to its knowingly exposed rationale is found in the Court’s holding in 1988 in \textit{California v. Greenwood}.\textsuperscript{183} In \textit{Greenwood}, the Court held the defendants had no reasonable expectation of privacy in the opaque trash sure to others, but by controlling the nature of that exposure. \textit{See} Blitz, \textit{supra} note 167, at 1408–10; Katz, \textit{supra} note 87, at 565–66. Although individuals are not able to control what people think about them when their activities are observed in public, they can manage the image presented to others in the hope that the appearance presented is accurate. \textit{See} Blitz, \textit{supra} note 167, at 1408–10; \textit{see also} Nissenbaum, \textit{supra} note 172, at 581–86 (arguing that one aspect of privacy is ensuring one’s personal information is presented in the appropriate context—that information is not simply freely shifted to a variety of uses).

Moreover, commentators argue that although an individual is unconcerned about his or her public activities being viewed in isolation, that same individual may feel his or her privacy has been violated when such details are collected in the aggregate because that likely reveals much more information. Blitz, \textit{supra} note 167, at 1408–10. Finally, the targeted, permanent recording of one’s activities and movements over time itself may impinge on privacy; commentators argue that such a record limits one’s ability to be unencumbered by one’s past. \textit{E.g.}, Blitz, \textit{supra} note 167, at 1411; \textit{see also} Nissenbaum, \textit{supra} note 172, at 577–78 (describing technology as providing the ability to accumulate “ordered, systematized, and . . . permanent” records of what once was “scattered . . . transient” information in the public sphere).

\textsuperscript{180} \textit{E.g.}, Blitz, \textit{supra} note 167, at 1415–17; Colb, \textit{supra} note 87, at 137–39. As Professor Sherry Colb argues, “if someone stares at us . . . in a public place, we tend to notice. Having noticed, we can take measures to put a stop to the staring. . . . Our ability to observe our observers thus gives us the power to rebuff, confront, and escape invasions of our privacy. Knowledge is power.” Colb, \textit{supra} note 87, at 137–38.

\textsuperscript{181} \textit{See} \textit{supra} notes 178–180 and accompanying text.

\textsuperscript{182} \textit{See}, \textit{e.g.}, Colb, \textit{supra} note 87, at 120–26, 153–59 (arguing that the Supreme Court’s jurisprudence improperly equates risk of exposure, for which someone still expects a measure of privacy, with the renunciation of all privacy); Katz, \textit{supra} note 87, at 565–66 (suggesting that the Court incorrectly assumes that information disclosed for a limited use amounts to a complete renunciation of a privacy interest in that information); Andrew E. Taslitz, \textit{The Fourth Amendment in the Twenty-First Century: Technology, Privacy, and Human Emotions}, 65 LAW & CONTEMP. PROBS. 125, 153–57 (2002) (arguing that because one generally has power to control aspects of the self that are exposed to others and one can limit such disclosures, it is possible to maintain privacy in public).

\textsuperscript{183} \textit{See} 486 U.S. at 39–41.
bags they had placed for collection at the curb outside their home.\textsuperscript{184} Although the defendants had demonstrated a subjective expectation of privacy in their trash by using opaque bags, this was not a reasonable expectation because the defendants had knowingly exposed their trash to the public by placing it at the curb.\textsuperscript{185} The Court reasoned that it was widely recognized that anyone could come across a trash bag left at a curb and decide to open it.\textsuperscript{186} Therefore, the Court concluded, the defendants assumed the risk that police officers might choose to rummage through what the defendants knowingly placed in public.\textsuperscript{187} Without a reasonable expectation of privacy in their trash, police action to acquire the trash was not a search.\textsuperscript{188}

The \textit{Greenwood} dissenting Justices, however, took a more measured approach to the kind of privacy one can expect in a public space.\textsuperscript{189} They argued that the issue was not where the trash was placed, but the details about the defendants that the trash contained.\textsuperscript{190} Moreover, the only thing the defendants knowingly exposed to the public was the outside of the opaque, sealed trash bags.\textsuperscript{191} In the view of the dissenting Justices, the simple possibility that any member of the public might decide to rummage through the trash bags did not mean the bags’ owners relinquished all expectations of privacy in their contents.\textsuperscript{192} In their view, that possibility might lessen the bag owners’ expectation of privacy, but it did not eliminate it altogether.\textsuperscript{193}

Twelve years later, in 2000, in \textit{Bond v. United States}, the Court seemed to shift slightly toward the more measured view of the \textit{Greenwood} dissenting Justices.\textsuperscript{194} In \textit{Bond}, the Court held that a law en-

\textsuperscript{184} Id.
\textsuperscript{185} Id.
\textsuperscript{186} Id. at 40.
\textsuperscript{187} Id. at 40–41.
\textsuperscript{188} See \textit{Greenwood}, 486 U.S. at 40–41.
\textsuperscript{189} See id. at 53–54 (Brennan, J., dissenting).
\textsuperscript{190} Id. at 50–51 (Brennan, J., dissenting). Justice Brennan reasoned as follows:

\begin{quote}
A single bag of trash testifies eloquently to the eating, reading, and recreational habits of the person who produced it. . . . Like rifling through desk drawers or intercepting phone calls, rummaging through trash can divulge the target’s financial and professional status, political affiliations and inclinations, private thoughts, personal relationships, and romantic interests.
\end{quote}

\textsuperscript{191} Id. at 50 (Brennan, J., dissenting).
\textsuperscript{192} Id. at 53 (Brennan, J., dissenting).
\textsuperscript{193} \textit{Greenwood}, 486 U.S. at 54 (Brennan, J., dissenting).
\textsuperscript{194} See \textit{Bond v. United States}, 529 U.S. 334, 335 (2000); \textit{Greenwood}, 486 U.S. at 54 (Brennan, J., dissenting)
enforcement officer’s physical manipulation of the defendant’s closed, opaque, soft-sided piece of luggage during a routine border search of a bus constituted a search under the Fourth Amendment. The Court observed that the defendant knowingly exposed his luggage to the public by taking it on the bus, and thus he could expect his bag might be handled or moved by others. He did not expect, however, the particular kind of physical manipulation the border patrol officer conducted—squeezing the soft-sided luggage specifically to detect hard objects. In this case, the Court acknowledged that knowing exposure to the public did not translate necessarily into knowing exposure to all law enforcement practices—even though the Court’s reasoning in Greenwood seemed to say the opposite. Thus, unlike in Greenwood, the Bond Court recognized, at least in that limited context, that knowing exposure to the public did not eliminate all expectation of privacy.

Regarding GPS tracking devices, a person or vehicle whose location is tracked likely is exposing his activities and movements to the public. If there is no expectation of privacy in a public place, then an individual certainly has no expectation of privacy in his activities and movements tracked by the GPS device. If, instead, knowing exposure to the public diminishes, but does not eliminate, an individual’s expectation of privacy, then that person may maintain some kind of expectation of privacy in the accumulation of detail about his activities and movements.

C. An Individual’s Steps to Keep Information Private

Implicit in the Court’s knowingly exposed rationale, however, is the notion that a defendant’s steps to ensure something is not exposed to the public inform the decision that the defendant’s expecta-

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195 Id. at 335–36.
196 Id. at 338.
197 Id. at 336, 338–39.
198 See id.; Greenwood, 486 U.S. at 40–41; supra notes 183–193 and accompanying text; see also Taslitz, supra note 182, at 147–50 (discussing rationale of Bond decision).
199 See Bond, 529 U.S. at 338–39; Greenwood, 486 U.S. at 40–41.
200 See Karo, 468 U.S. at 714–16; Knotts, 460 U.S. at 281–82.
201 See Knotts, 460 U.S. at 281–82.
202 See Bond, 529 U.S. at 338–39; Katz, supra note 87, at 565–66 (highlighting the notion of a limited or proportional disclosure—the exposure of information to some but not to all, or for only a limited purpose).
tion of privacy was reasonable. Thus, concerning GPS tracking, the case for holding the monitoring of such a device constitutes a search would be stronger if the person being tracked took steps to keep his location and movements private. Given that GPS tracking is useful precisely because it allows users to pinpoint a person’s location as he travels about in open public spaces, this task is virtually impossible.

The practical impossibility of protecting against exposure to the public, however, does not necessarily insulate an individual from government monitoring. For instance, in *Dow Chemical Co. v. United States* in 1986, the U.S. Supreme Court held that no search occurred when Environmental Protection Agency (the “EPA”) officials flew over the 2000-acre tract adjacent to a Dow Chemical plant and used a sophisticated mapping camera to take pictures. Even though Dow Chemical could not feasibly erect an opaque cover over all 2000 acres in order to thwart aerial monitoring—meaning it had done all it possibly could to prevent monitoring—the Court held the industrial acres were knowingly exposed to the public. Because the area was knowingly exposed to the public, the Court reasoned, government inspectors could fly overhead to view the area just as any member of the public might have. The Court also discounted the fact that EPA officials had used a highly sophisticated commercial mapping camera to take detailed pictures of the area, stating that the simple fact that human vision was enhanced to a degree did not itself create constitutional concerns.

203 See, e.g., *Dow Chem. Co. v. United States*, 476 U.S. 227, 236–38 (1986) (holding the area surrounding a factory was knowingly exposed to the public through aerial observation, even though the factory’s owners could not feasibly take steps to prevent such observation); *Ciraolo*, 476 U.S. at 211–13 (holding that curtilage was knowingly exposed to the public through aerial observation because the defendant took no steps to prevent such observation, though he did erect fences to prevent observation from the ground); *Katz*, 389 U.S. at 352 (noting specifically that the defendant closed the door to the phone booth before engaging in conversation).

204 See *Dow Chem.* 476 U.S. at 236–38; *Ciraolo*, 476 U.S. at 211–13; *Katz*, 389 U.S. at 352.

205 See Elliott, *supra* note 45, at C6; Harmon, *supra* note 41, at A1; Schwartz, *supra* note 46, at C1; Selingo, *supra* note 41, at G7; see also Blitz, *supra* note 167, at 1406–08 (suggesting that much evidence of people’s private lives is available in the public space and that people often have little choice but to engage in private activities in public); *supra* notes 43–53 and accompanying text.

206 See *Dow Chem.*, 476 U.S. at 236–38. *But see Kyllo*, 533 U.S. at 29–31, 34 (holding that the fact that the defendant could not prevent the public exposure of heat waves was not dispositive to whether government action amounted to a search).

207 476 U.S. at 229.

208 See *id.* at 236–38.

209 *Id.* at 237–38.

210 *Id.* at 238.
Thus, in *Dow Chemical*, even though the technology of airplanes and sophisticated cameras virtually prevented the company from blocking the knowing exposure of its activities, the Court was unwilling to take this fact into account when finding the company had no expectation of privacy in the area surrounding its factory.211

**D. Kyllo v. United States: An Alternative Fourth Amendment Test?**

Nonetheless, the U.S. Supreme Court may be recognizing the difficulty of continuing to apply the aspect of its knowingly exposed rationale that places significance on a person’s steps to maintain privacy.212 The Court in its most recent Fourth Amendment case, *Kyllo v. United States*, seemed to acknowledge that as technology presents ever-greater possibilities for intrusion, it also continually decreases the ability of individuals to keep something private.213 Accordingly, in addressing whether a reasonable expectation of privacy existed in *Kyllo*, the Court relied less on the knowingly exposed rationale when addressing the law enforcement use of a new form of technology.214

In 2001, in *Kyllo*, the Court concluded that a search occurred when law enforcement officials used a thermal imager to detect heat waves emanating from the defendant’s home.215 As in *Dow Chemical*, in which the company could not feasibly cover its industrial acreage, it was nearly impossible for the *Kyllo* defendant to have prevented the knowing exposure of heat waves coming from his home.216 Also as in *Dow Chemical*, in which agents flew over Dow Chemical’s acreage, government agents in *Kyllo* engaged in their activities from a vantage point that required no physical intrusion; *Kyllo* agents were stationed across the street and simply aimed the device at the defendant’s home.217 Finally, in both cases, government agents used technological

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211 See id. at 236–39.
212 See infra notes 213–214 and accompanying text.
213 See 533 U.S. at 33–36.
214 See id. at 33–38.
215 Id. at 29, 40. A thermal imager is a device that detects infrared radiation invisible to the naked eye. Id. at 29. The imager converts the radiation it detects into an image reflecting the relative amount of heat present in each area; shades of gray deepen as heat lessens. Id. at 29–30. When law enforcement used the thermal imager at the defendant’s home, it detected a high level of heat along one wall of his home, which allowed agents to conclude the defendant was using high-intensity heat lamps to grow marijuana in that part of his home. Id. at 30. Agents then applied for a warrant to search the defendant’s home based in part on data obtained from the thermal imaging scan. Id.
216 See id. at 29–31; Dow Chem., 476 U.S. at 236.
217 See Kyllo, 533 U.S. at 30; Dow Chem., 476 U.S. at 237.
devices that provided them much more information than that observable with the naked eye.\textsuperscript{218} Despite these apparent similarities, the Court reached a different result in \textit{Kyllo} than it had in \textit{Dow Chemical}.\textsuperscript{219}

Although the \textit{Kyllo} Court did distinguish itself from \textit{Dow Chemical} by noting that \textit{Kyllo} involved the home, where Fourth Amendment protections are heightened, the \textit{Kyllo} Court also acknowledged more definitively that it could not ignore the fact that the Fourth Amendment privacy analysis has been affected by technological advances.\textsuperscript{220} After noting that the \textit{Katz} test is difficult to apply to government uses of technology, Justice Antonin Scalia wrote for the Court that a reasonable expectation of privacy simply \textit{exists} within the home—so the government’s use of technology to acquire information about activities in the home is necessarily a search.\textsuperscript{221} Although law enforcement officials did not physically intrude into the defendant’s home and only detected heat waves that were outside physical boundaries and arguably knowingly exposed to the public, the Court reasoned that use of the technology was like a physical intrusion into the home.\textsuperscript{222}

Thus, the Court held that using sense-enhancing technology to obtain information about activities inside the home—information that could be obtained only through physical intrusion absent the technology—constituted a search, just as a physical intrusion into a home also would be a search.\textsuperscript{223} The Court added a caveat, however, to this holding, by indicating that its reasoning worked for technology, such as the

\textsuperscript{218} See \textit{Kyllo}, 533 U.S. at 29; \textit{Dow Chem.}, 476 U.S. at 238–39. Admittedly, the sophisticated mapping camera used in \textit{Dow Chemical} enhanced only visual observation, whereas the thermal imager used in \textit{Kyllo} revealed what the eye cannot detect. See \textit{Kyllo}, 533 U.S. at 29; \textit{Dow Chem.}, 476 U.S. at 238–39. In distinguishing \textit{Dow Chemical}, the \textit{Kyllo} Court said in part that \textit{Dow Chemical} stands for the idea that “visual observation is no ‘search’ at all.” \textit{Kyllo}, 533 U.S. at 32.

\textsuperscript{219} See \textit{Kyllo}, 533 U.S. at 40; \textit{Dow Chem.}, 476 U.S. at 239.

\textsuperscript{220} 533 U.S. at 33–34, 37.

\textsuperscript{221} Id. at 34. The \textit{Kyllo} Court assumed that all details inside a home are intimate and thereby worthy of protection. \textit{Id.} at 37–38; see also \textit{Karo}, 468 U.S. at 714 (reasoning that “private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable”); \textit{United States v. United States District Court}, 407 U.S. 297, 313 (1972) (noting that the “physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed”); \textit{Silverman v. United States}, 365 U.S. 505, 511 (1961) (noting that “[a]t the very core” of the Fourth Amendment is the “right of a man to retreat into his own home and there be free from unreasonable government intrusion”).

\textsuperscript{222} See \textit{Kyllo}, 533 U.S. at 34–35, 40.

\textsuperscript{223} Id. at 31, 34–35, 40.
thermal imager, that was not in the “general public use.” 224 Yet on the whole, Kyllo shows that when confronted with technology that could provide more information than the government could have obtained through mere visual observation, the Court felt it necessary to develop an alternative test of constitutionality—a test that may or may not modify a Fourth Amendment analysis of GPS tracking. 225

V. Analysis: Recognizing Privacy in Public

At first blush, it may seem the constitutionality of the warrantless monitoring of a GPS tracking device, at least while the device remained on public roads and in public places, is not an open question. 226 In fact, a cursory analysis of GPS tracking under the Fourth Amendment would equate GPS tracking devices with the less sophisticated beeper devices addressed in United States v. Knotts and United States v. Karo. 227 Then, given Knotts’s pronouncement that a person traveling in a car in public has no reasonable expectation of privacy in his movements, one would conclude that warrantless GPS tracking is not a search and thus takes place outside the scope of the Fourth Amendment. 228

But there are several reasons such an analysis would be misguided. 229 First, GPS tracking devices can be distinguished from beepers in several ways that make them both more intrusive and more likely

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224 Id. at 34, 40. The Court provided no indication of when a technology becomes sufficiently pervasive to be considered “in general public use” but, rather, assumed that the thermal imagers at issue in the case were not in public use. See id.; see also id. at 47 (Stevens, J., dissenting). As Justice Stevens pointed out in his dissent in Kyllo, however, thermal imagers of the kind used in Kyllo were readily available through toll-free phone numbers and from half a dozen national companies; tens of thousands of units had been sold nationally. Id. at 47 n.5 (Stevens, J., dissenting). See generally Douglas Adkins, Note, The Supreme Court Announces a Fourth Amendment “General Public Use” Standard for Emerging Technologies but Fails to Define It: Kyllo v. United States, 27 U. DAYTON L. REV. 245 (2002) (suggesting various definitions for a “general public use” standard).

225 See 533 U.S. at 33–34, 40. Whether the Court intended to articulate an entirely new Fourth Amendment test in Kyllo, to be used in future Fourth Amendment cases, is an open question. See, e.g., McKenzie, supra note 87, at 185–87 (suggesting Kyllo developed a new test because its reasoning deviated from previous Fourth Amendment precedent). Notably, however, Justice Scalia’s majority opinion in Kyllo criticized and then did not apply the Katz reasonable expectation of privacy test to the thermal imager at issue in the case. Kyllo, 533 U.S. at 34–35.


227 See Karo, 468 U.S. at 714–16; Knotts, 460 U.S. at 281–82.

228 See Karo, 468 U.S. at 714–16; Knotts, 460 U.S. at 281–82.

229 See infra notes 230–232 and accompanying text.
to be subject to police abuse than are beepers. In one sense, GPS tracking devices create the potential for the twenty-four-hour “dragnet-type” surveillance alluded to in Knotts, where the Court said such constant surveillance would present a different constitutional question than the beepers at issue. But more importantly, GPS tracking devices are a technology highlighting the need for the Fourth Amendment to offer protection even within the public space—and language in Kyllo v. United States suggests the Court is beginning to recognize that technology often antiquates a Fourth Amendment analysis based purely on physical boundaries.

A. GPS Tracking Versus Beepers

At a base level, GPS devices and beepers are similar; both are external devices that can be covertly installed on something whose location is to be tracked. Though GPS devices and beepers can produce similar results—they both reveal the tracking device’s location at any given moment—GPS devices possess much greater potential for accuracy. More importantly, GPS devices track location regardless of whether a GPS receiver, which processes the tracking device’s signal to reveal location information, is in the vicinity. Thus, it is not necessary for police to remain in the vicinity with a receiver to obtain the GPS device’s location information.

230 See Knotts, 460 U.S. at 277–78, 283–84; Counter Intelligence Techs. Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48.
231 See 460 U.S. at 284; State v. Jackson, 76 P.3d 217, 223 (Wash. 2003) (en banc); Elliott, supra note 45, at C6; Counter Intelligence Techs., Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48; see also Blitz, supra note 167, at 1386–88 (suggesting that current location tracking technology means such constant monitoring no longer is a vision of an “unlikely future”).
233 See Knotts, 460 U.S. at 277–78; Jackson, 76 P.3d at 223; Elliott, supra note 45, at C6; Counter Intelligence Techs., Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48.
234 See Knotts, 460 U.S. at 277–78; Jackson, 76 P.3d at 223; Elliott, supra note 45, at C6; Grossman & Hift, supra note 33, at 24; Washington, supra note 33, at 1C; Wirbel, supra note 35, at 51; Counter Intelligence Techs., Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48.
235 See Jackson, 76 P.3d at 223; Balough, supra note 47, at 32–33; Elliott, supra note 45, at C6; O’Hartow, supra note 42, at E1; Counter Intelligence Techs., Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48.
236 See Jackson, 76 P.3d at 223; Elliott, supra note 45, at C6; Counter Intelligence Techs., Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48.
This high level of efficiency distinguishes GPS tracking from beeper usage and, indeed, is one of the reasons GPS tracking is attractive to law enforcement.\textsuperscript{237} The device does the surveillance work for the police—and makes a computer record of the tracking device’s movements at the same time.\textsuperscript{238} It is theoretically possible, then, especially as the technology improves, for police to attach a GPS tracking device on an individual’s vehicle and leave it for months at a time, checking the computer records periodically for suspicious behavior.\textsuperscript{239} For this reason, GPS tracking devices have been compared to having a police officer sitting in a vehicle’s back seat twenty-four hours a day, seven days a week—except the driver never knows the officer is there.\textsuperscript{240}

The technological differences between GPS technology and beeper technology are relevant to a Fourth Amendment analysis for two reasons.\textsuperscript{241} First, that the technology functions completely without police presence makes it less limited by the practical constraints of available human resources—and thus increases the potential for police abuse.\textsuperscript{242} Even though increased efficiency does not automatically mean the use of a technology is a Fourth Amendment search, it does suggest a court should approach the technology with greater skepticism.\textsuperscript{243}

\begin{itemize}
\item \textsuperscript{237} See supra notes 47–63 and accompanying text.
\item \textsuperscript{238} See Jackson, 76 P.3d at 223; Elliott, supra note 45, at C6; Counter Intelligence Techs., Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48.
\item \textsuperscript{239} See Jackson, 76 P.3d at 223; Elliott, supra note 45, at C6; Counter Intelligence Techs., Inc., supra note 48; Covert GPS Vehicle Tracking Sys., Inc., supra note 48.
\item \textsuperscript{241} See infra notes 242–253 and accompanying text.
\item \textsuperscript{242} See Jackson, 76 P.3d at 223; Elliott, supra note 45, at C6; Selingo, supra note 41, at G7; COUNTER INTELLIGENCE TECHS., supra note 48; COVERT GPS VEHICLE TRACKING SYS., INC., supra note 48; supra notes 55–63 and accompanying text; see also Taslitz, supra note 182, at 165–69 (suggesting that because technologies make the monitoring of individuals less burdensome, law enforcement may disproportionately use such techniques to target racial and ethnic minorities and others subject to negative stereotypes).
\item \textsuperscript{243} See Dow Chem. Co. v. United States, 476 U.S. 227, 238 (1986) (reasoning that “[t]he mere fact that human vision is enhanced somewhat, at least to the degree here, does not give rise to constitutional problems”); Knotts, 460 U.S. at 282 (explaining that “[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology
Second, and more importantly, the differences between GPS tracking and beeper tracking are relevant to a Fourth Amendment analysis because they indicate GPS tracking is less like visual surveillance, to which the U.S. Supreme Court analogized beeper tracking in *Knotts* and *Karo*. The *Knotts* Court believed beeper tracking was a more efficient form of visual surveillance; because visual surveillance was not a search, the Court’s reasoning proceeded, an efficient form of visual surveillance also was not a search. Police, after all, should not have to avert their eyes from what the rest of the public can see.

Although this is persuasive reasoning, it fails to take into account the full nature of what GPS tracking allows an officer to accomplish. GPS tracking is a form of prolonged surveillance that provides law enforcement with a comprehensive, detailed, and lengthy record of someone’s movements—a kind of record virtually impossible to obtain through visual surveillance or even beeper-attendant surveillance, unless police resources were unlimited. The Court’s language in *Knotts*, that the vehicle driver exposed his movements to “anyone who wanted to look,” merely encapsulates the idea that one in public normally experiences a series of fleeting glances by a variety of individuals over time.

Such reasoning fails to grasp that tracking and recording movements—a kind of license to stare—constitutes an entirely different invasion of privacy. Even though one may expect fleeting glances in public, and police should not have to avert their eyes from what they can see in public, one does not thereby expect the kind of targeted aggregation of data a GPS device collects on one’s movements, particularly a kind of surveillance the individual neither can detect nor afforded them in this case”). But see *Kyllo*, 533 U.S. at 36 (explaining that “[w]hile the technology used in the present case was relatively crude, the rule we adopt must take account of more sophisticated systems that are already in use or in development”).

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244 See *Karo*, 468 U.S. at 714–16; *Knotts*, 460 U.S. at 281–82.
245 See 460 U.S. at 281–82; see also *Boyd v. United States*, 116 U.S. 616, 628 (1886) (noting that visual surveillance is lawful because “the eye cannot by the laws of England be guilty of a trespass”) (quoting *Entick v. Carrington*, 19 How. St. Tr. 1029, 1066, 95 Eng. Rep. 807 (K.B. 1765)); Blitz, supra note 167, at 1384–86 (analyzing the Court’s comparison of beeper tracking technology to an enhanced form of visual surveillance).
246 See, e.g., *California v. Ciraolo*, 476 U.S. 207, 213 (1986) (explaining that the Fourth Amendment has never required police “to shield their eyes when passing by a home on public thoroughfares”).
247 See infra notes 248–253 and accompanying text.
248 See supra notes 234–240 and accompanying text; see also *Jackson*, 76 P.3d at 223.
249 See 460 U.S. at 281–82; see also Colb, supra note 87, at 134–36.
250 Blitz, supra note 167, at 1416; Colb, supra note 87, at 134–36; Taslitz, supra note 182, at 169–71.
An individual walking or driving in public engages in proportional disclosure analogous to the Court’s reasoning in *Bond v. United States*: That person knowingly exposes to others bits and pieces of his movements and activities, but he does not knowingly expose his movements and activities to all law enforcement practices. In this way, the kind of sophisticated surveillance provided by GPS tracking devices is fundamentally different, for privacy purposes, from visual surveillance.

**B. A Proposal for a Changed Definition of Public and Private**

What is most intuitively bothersome about GPS tracking technology is not so much that it allows police to obtain location information per se, but that it enables police to do so for a much longer period of time, with much less chance for detection, and with little idea of the justifications prompting such monitoring. The resultant lengthy, detailed record of one’s location then provides a comprehensive picture of one’s life. Location information reveals everything from daily habits like stopping at the same coffee shop on the way to work, to associations with other people, to visits to locales that reveal much more about a person’s particular characteristics, affiliations, or beliefs—such as a gay bar; a doctor’s office, HIV testing facility, or abortion clinic.

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251 See Jeffrey Rosen, *The Unwanted Gaze: The Destruction of Privacy in America* 15–16 (2000) (noting that social norms—such as the fact that it is considered rude to stare—guide both individuals’ conduct and their expectations of others’ conduct while both are in public); Taslitz, *supra* note 182, at 170 (suggesting that a person can sanction others’ staring when he is aware of it; the person “may glare back, grimace, express disfavor, or verbally protest”).

252 See 529 U.S. 334, 338–39 (2000); Blitz, *supra* note 167, at 1358 (noting that much of life is lived in public and though some details are private, their exposure to others is limited and unlike how law enforcement would use such information); Colb, *supra* note 87, at 135–36 (arguing that people perceive visual surveillance and tracking movements as entirely different activities); Katz, *supra* note 87, at 565–66 (suggesting that people share information with limited groups and for limited purposes—and that police would apply a more focused and less expected examination of the information).

253 See *supra* notes 244–252 and accompanying text.

254 See Elliott, *supra* note 45, at C6; Grossman & Hift, *supra* note 33, at 24; Washington, *supra* note 33, at 1C; Wirbel, *supra* note 35, at 51; *Counter Intelligence Techs., Inc.* *v.* *Covert GPS Vehicle Tracking Sys., Inc.*, *supra* note 48; see also *Jackson*, 76 P.3d at 224 (holding GPS tracking constituted a “particularly intrusive method of surveillance” because of the kind of detail it records); Blitz, *supra* note 167, at 1407 (arguing that mass tracking gathers a great amount of detail about people’s lives by taking advantage of the fact that much evidence of people’s private lives exists outside physical boundaries).

255 See Harmon, *supra* note 41, at A1; O’Harrow, *supra* note 42, at E1; Selingo, *supra* note 41, at G7; see also *Jackson*, 76 P.3d at 223.
tion clinic; a certain church, synagogue, or mosque; a strip club; or various political and civic organizations.256

1. Protecting the Features of Society That Preserve Privacy

For this reason, simply claiming one has no expectation of privacy in one’s travels on public roads misses the point.257 Rather than merely providing an account of one’s travels on public roads, GPS tracking also offers a significant amount of detail about one’s life.258 It is the accumulation of those personal details that the Fourth Amendment should protect, despite the fact that they are not shielded from public view by physical boundaries.259 Taking seriously the Court’s pronouncement in Katz v. United States that the Fourth Amendment protects people instead of places, the Fourth Amendment would encompass the features of society that protect the personal information recorded by GPS tracking devices.260 Without providing protection for those features, the behavior of individuals would change; one no

256 See Jackson, 76 P.3d at 223 (“In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles. The GPS tracking devices record all of these travels, and thus can provide a detailed picture of one’s life.”).

257 See supra notes 254–256 and accompanying text.

258 See Blitz, supra note 167, at 1363 (suggesting that the Fourth Amendment protects the privacy of people in places, not the privacy of the places themselves—so that its protections should move with people as they leave their homes and move about in public); Jeffrey H. Reiman, Driving to the Panopticon: A Philosophical Exploration of the Risks to Privacy Posed by the Highway Technology of the Future, 11 SANTA CLARA COMP. & HIGH TECH. L.J. 27, 33–34 (1995) (proposing that tracking data about one’s movements would be combined with existing databases, creating a much more significant threat to privacy).

259 See Kyllo, 533 U.S. at 34 (indicating that because technology has affected the Fourth Amendment, the issue to be addressed in the case was “what limits there are upon this power of technology to shrink the realm of guaranteed privacy”); Boyd, 116 U.S. at 630 ( remarking that “[i]t is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property” that is to be prevented); Blitz, supra note 167, at 1363–65 (arguing that the best way to secure privacy in public is to identify and protect the features of society, and of the public space, that encapsulate the kind of privacy expected under the Fourth Amendment); Nissenbaum, supra note 172, at 593 (arguing that physical boundaries should not define privacy because “values placed in jeopardy from invasions of the intimate realm are also jeopardized by various forms of public surveillance practiced today”); Reiman, supra note 258, at 29 (suggesting that “[i]f we direct our privacy-protection efforts at reinforcing our doors and curtains, we may miss the way in which modern means of information collection threaten our privacy by gathering up the pieces of our public lives and making them visible from a single point”).

260 See 389 U.S. 347, 352–53 (1967) (holding that the reach of the Fourth Amendment does not turn upon the presence or absence of physical intrusion into an enclosure and is not limited to searches and seizures of tangible property); supra note 259.
longer could assume one’s activities are not being watched and recorded for later analysis by government officials. Therefore, a Fourth Amendment analysis better equipped to handle changes brought about by technology would focus less on physical boundaries and more on whether allowing the law enforcement practice at issue would alter the degree of privacy experienced by society before the technology existed.

2. A Kyllo-Based Rationale

More generally, technology has changed traditional distinctions between public and private by breaking down physical boundaries that once shielded the private from the public, thereby increasing the ability of law enforcement to obtain such information and decreasing individuals’ ability to maintain privacy. In the context of GPS track-

261 Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 403 (1974) (arguing that unchecked surveillance means "the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of free and open society"); Katz, supra note 87, at 562 (suggesting that knowing one’s actions are being watched keeps one on guard, limiting the fulfillment of the human potential); Reiman, supra note 258, at 37–38 (arguing that knowing one’s actions may be observed and recorded eliminates the individual’s sense of freedom to act spontaneously).

262 See supra notes 257–261 and accompanying text. This view is similar to that advocated by Justice Harlan in 1971 in his dissent to the U.S. Supreme Court’s decision in United States v. White. See 401 U.S. 745, 786–87 (1971) (Harlan, J., dissenting). Rather than referring to the reasonable expectation of privacy test he had outlined in Katz, Justice Harlan indicated that a better test of Fourth Amendment protections required an assessment of "the nature of a particular practice and the likely extent of its impact on the individual’s sense of security balanced against the utility of the conduct as a technique of law enforcement." Id. at 786 (Harlan, J., dissenting). In White, Justice Harlan argued that bugging a suspect’s conversations with a government informant should require a warrant under the Fourth Amendment because should such a practice become widespread, people would begin to measure their words—"smother[ing] that spontaneity—reflected in frivouous, impetuous, sacrilegious, and defiant discourse—that liberates daily life.” Id. at 787 (Harlan, J., dissenting). Thus, only a few years after Katz, Justice Harlan moved away from a physical boundary-based analysis of the Fourth Amendment to focus on how police practices could alter the nature of the freedoms and privacy the Amendment secures. See id. at 786–87 (Harlan, J., dissenting).

263 See Nissenbaum, supra note 172, at 564, 575–76 (noting that traditional legal and philosophical theories of privacy have been ill-equipped to deal with technology and threats to privacy in public because they focus on notions of intimate, private realms); Reiman, supra note 258, at 29, 33 (describing the kind of informational picture of an individual provided by computer databases collecting a variety of personal data); McKenzie, supra note 87, at 153–54 (suggesting the advancement of technology has provided access to information otherwise obtainable only through physical intrusion). Not only does technology help break down physical boundaries, but people in modern society also conduct more of their activities in public. Katz, supra note 87, at 568. The fact that more of one’s
ing, technological advancements in general suggest that a Fourth Amendment analysis should not assume that all information available outside physical boundaries necessarily is “public” information, available for the taking.264 This point is contemplated, to an extent, by Justice Scalia’s majority opinion in Kyllo.265

Even though Justice Scalia’s ultimate conclusion was that all details within the home merit protection—a location-based decision—he may have paved the way for a more expansive way of thinking about the Fourth Amendment where technology is concerned.266 Instead of conceiving of the Fourth Amendment as protecting only what physical boundaries shield from government intrusion, the Kyllo Court recognized that the Fourth Amendment, at a minimum, protects those characteristics and features of life and society that provide and ensure privacy—one of which, in that case, was the physical boundary surrounding the home.267

Therefore, drawing from Kyllo, although a Fourth Amendment analysis can continue to rely on physical boundaries to demarcate those places whose physical features guarantee privacy (hence, Justice Scalia’s insistence that the home simply is protected), it simultaneously also must protect the features of society that provide the level of privacy originally contemplated by the Framers—or at least, that degree of privacy experienced before the technology existed.268 Technology has allowed law enforcement to gain easy access to information that the Framers (or modern society before the technology was invented) would have expected to keep private because of physical boundaries or otherwise.269 Therefore, to maintain a consistent level of privacy in the face of continued advances in technology, the Fourth

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264 See supra notes 254–263 and accompanying text.
265 See Kyllo, 533 U.S. at 33–34 (indicating that Kyllo involved more than naked-eye surveillance, that the question was how much technological enhancement was too much, and that technology has affected the level of privacy secured by the Fourth Amendment).
266 See Kyllo, 533 U.S. at 34, 37; see also St. Lawrence, supra note 87, at 169–73 (arguing the Kyllo decision provides a first step toward rebuilding principles of privacy first established in Katz). But see McKenzie, supra note 87, at 179 (suggesting the Kyllo test is unworkable and only creates further confusion).
267 See 533 U.S. at 33–34. The test the Kyllo Court created, prohibiting the use of technology to obtain information that otherwise only would have been accessible through physical intrusion, implicitly acknowledges that technology has made it possible to permeate boundaries absent physical intrusion. See id.
268 See id.; see also supra note 259 and accompanying text.
269 See Kyllo, 533 U.S. at 33–34; supra notes 259–262 and accompanying text.
Amendment must preserve not merely those physical boundaries but also those less physical features that also provide privacy.270

3. Why Monitoring a GPS Tracking Device Would Be a Search

If such a Fourth Amendment analysis were applied to GPS tracking, the monitoring of a GPS tracking device, even while it moved along open roads and streets, would be considered a search.271 The technology allows for an extensive accumulation of detail about a person’s life, beyond what is practically possible to obtain through visual surveillance, and that detail is recorded in a computer database accessible to law enforcement at any time.272 Widespread use of such a powerful technology, without judicial supervision, could trigger the assumption that one’s movements are being tracked and recorded at any given moment—creating the potential that individuals would alter their behavior to accommodate this perception.273 Such a result demonstrates that GPS technology impinges on the aspects of the public space that people now rely upon to establish a degree of privacy as they move about in public.274 Because the Fourth Amendment under this proposed interpretation protects the features of society that preserve privacy, the Fourth Amendment would consider the monitoring of a GPS tracking device to be a search, requiring a warrant based on probable cause.275 In that event, judges would ensure that police track a suspect’s location with GPS devices only when they possess sufficient justification and only for a time period appropriate to the purposes of the investigation.276

270 See Kyllo, 533 U.S. at 33–34. As commentator Jonathan Blitz argues,

[]just as the device of “constitutionally-protected zones” in twentieth-century Fourth Amendment jurisprudence gave individuals the power to decide for themselves what to shield in a home, office, or a suitcase, so twenty-first century Fourth Amendment jurisprudence should similarly recognize that the object of Fourth Amendment protections in public space is . . . to guarantee that the public sphere retains a character that continues to provide individuals the opportunities to preserve privacy where they believe they need it.

Blitz, supra note 167, at 1414–15; see supra note 259 and accompanying text.

271 See infra notes 272–276 and accompanying text.

272 See infra notes 254–258 and accompanying text.

273 See supra notes 259–262 and accompanying text.

274 See supra notes 259–262 and accompanying text.

275 See supra notes 254–270 and accompanying text.

276 See supra notes 71–72 and accompanying text; see also Katz, supra note 87, at 577 (noting that the Fourth Amendment guarantees “important decisions like search and seizure . . . are determined by neutral and detached judges”). Providing constitutional protections in public also does not mean that police could not engage in public surveillance;
Of course, whether the Supreme Court will continue to expand on the rationale expressed in the *Kyllo* decision is an open question, and the extent to which the Court’s “general public use” caveat will affect future cases also is unknown. For a technology like GPS tracking, which is used widely by the public, this caveat could prevent GPS tracking from constituting a search if the Court takes seriously its language in *Kyllo*. GPS technology is used daily by millions of Americans—a level meeting any definition of “general public use.”

C. An Alternative Proposal: Statutory Protection

Fourth Amendment applicability to one’s movements in public, in relation to GPS tracking, is uncertain under the U.S. Supreme Court’s existing precedent. Accordingly, until the Court addresses the issue, a statutory framework could fulfill some of the same privacy-protecting goals through provisions that would guide the circumstances in which federal and state law enforcement agencies can employ GPS tracking devices. Though tracking devices currently are

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277 See supra note 224 and accompanying text; see also Slobogin, *supra* note 87, at 1394–96 (examining various implications for interpretation of the “general public use” exception); McKenzie, *supra* note 87, at 179 (suggesting that the *Kyllo* test is unworkable in the long run and to different types of technology and was a missed opportunity to clarify the Fourth Amendment’s relation to technology).

278 See *Kyllo*, 533 U.S. at 34; Slobogin, *supra* note 87, at 1394–96; Adkins, *supra* note 224, at 252; McKenzie, *supra* note 87, at 179; see also Global Market to Top $22 Billion, *supra* note 40; Harmon, *supra* note 41; Selingo, *supra* note 41; Wirbel, *supra* note 35, at 51. As Justice Stevens’ dissent in *Kyllo* pointed out, however, a “general public use” exception to the Court’s test in *Kyllo* would lead to perverse results—allowing police use of technology and thereby increasing the threat to privacy as the use of intrusive, high-tech equipment becomes more widespread. *Kyllo*, 533 U.S. at 47 (Stevens, J., dissenting). Given this potential result and the majority opinion’s lack of clarity of the “general public use” exception, it is unclear how much weight the Court would grant this exception in a future Fourth Amendment analysis. See Slobogin, *supra* note 87, at 1394–96, 1402–06 (analyzing and suggesting definitions for “general public use” exception); Adkins, *supra* note 224, at 252–53 (highlighting the lack of clarity of the “general public use” exception).

279 See Global Market to Top $22 Billion, *supra* note 40; Harmon, *supra* note 41; Selingo, *supra* note 41; Wirbel, *supra* note 35, at 51; see also *supra* note 278 and accompanying text.

280 See *supra* notes 226–232 and accompanying text.

281 See *Blitz*, *supra* note 167, at 1420–21 (highlighting reasons to prefer statutory protections over constitutional protections against privacy infringement from technology used by police); Kerr, *supra* note 85, at 838, 858–60 (articulating reasons the Fourth Amendment cannot provide sufficient protection of privacy); Lee, *supra* note 47, at 402–03 (suggesting legislatures should act to protect location data, absent a change in Fourth Amendment jurisprudence); Slobogin, *supra* note 87, at 1433–37 (suggesting a legislative approach to ensure privacy from public surveillance technology).
addressed in a federal statute, that statute does not direct or restrict law enforcement use of the technology.282

At a minimum, a more comprehensive statute would require police to justify their actions to a judge or magistrate, based on probable cause or some lesser degree of suspicion that the suspect’s movements would lead police to evidence of a crime.283 The judge, then, could allow a tracking device to be installed for a limited period of time—perhaps ten days—with renewals possible if the judge finds police continue to have sufficient justification for monitoring.284 Finally, such a statute would provide for the sealing and eventual destruction of location information when the investigation ended, in an attempt to prevent the unnecessary accumulation of such information.285

This kind of statutory protection at least would ensure some records were kept of police usage of tracking devices and provide that a neutral, detached magistrate—rather than an “officer engaged in the often competitive enterprise of ferreting out crime”—decides when such governmental intrusion is justified.286 Nevertheless, holding the monitoring of a GPS tracking device is a search under the Fourth Amendment is preferable to a statutory scheme because such a result would signal a shift in how the Fourth Amendment applies to other technologies that collect information available in the public sphere.287

283 See Katz, supra note 87, at 568–69 (arguing that without judicial supervision, society relies only on government officials voluntarily to respect privacy—and that “[r]eliance alone on government self-restraint is a very weak foundation on which to support a commodity as fragile as individual freedom”).
284 See Kerr, supra note 85, at 850–55 (describing Title III of the Omnibus Crime Control and Safe Streets Act of 1968, and arguing its provisions governing the use of wiretapping—which include procedures for proving justification, a time limit for a single wiretap placement, and a requirement for the sealing and destruction of recorded evidence—show how a statute can address privacy concerns not abated by the Fourth Amendment).
285 See id. at 851–52.
286 See Johnson v. United States, 333 U.S. 10, 13–14 (1948) (explaining that the warrant requirement exists to interpose a neutral and detached magistrate between the citizen and the officer—a step necessary to protect Fourth Amendment privacy interests); see also Katz, 389 U.S. at 356–57 (holding that although law enforcement agents in the case acted with restraint in conducting the search, that restraint was imposed by the agents themselves, not by a judicial officer—and agents’ restraint could not substitute for a lack of judicial process).
287 See supra notes 254–279 and accompanying text.
CONCLUSION

GPS tracking technology constitutes a threat to personal freedom from government intrusion precisely because it involves the collection of data about one’s movements in the public space—an area where, under current Fourth Amendment jurisprudence, individuals lack a reasonable expectation of privacy such that police action must occur pursuant to a warrant. Although the U.S. Supreme Court generally has held that individuals lack a reasonable expectation of privacy in activities occurring within the public space or knowingly exposed to the public, GPS tracking presents a case for shifting this rationale because of the sheer amount of personal information such devices gather from the public space. In light of GPS tracking and other technologies functioning in the public space, the Supreme Court should shift its Fourth Amendment analysis to one that preserves some privacy within the public space and guarantees that technology does not further increase the capacity of police to collect personal data without any kind of physical intrusion. Such an analysis would avoid definitions of privacy based on physical boundaries, but instead would protect those features of society that provide privacy—and ensure privacy is maintained to the degree it existed before such technologies like GPS tracking. In this way, the Fourth Amendment once again will begin to secure the kind of privacy that truly sustains liberty.

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