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EDITORS' CORNER

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- ***THE EDITORS,***
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- ARTICLES -

CLASS ACTIONS TEN YEARS AFTER *WAL-MART STORES, INC. v. DUKES:* DIFFICULT BUT NOT IMPOSSIBLE

ALIX VALENTI*

I. INTRODUCTION

A class action lawsuit is brought by one or more individual plaintiffs in a representative capacity who possess the same interest and suffer the same injury as the class of individuals they seek to represent. Rule 23, the federal rule governing class actions, was enacted two years after the passing of the Civil Rights Act of 1964. While at first commenters noted that the class action procedure was particularly appropriate to resolve litigation under Title VII and many discrimination claims were certified under Rule 23, over time courts became increasingly less likely to certify classes in employment actions. This change was reflected in a 2011 sex discrimination lawsuit, where the Supreme Court narrowly construed the requirements for class actions under Federal Rule 23(a) and (b) and reversed the lower courts' certification of a class.[1]

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Legal scholars expected the decision to be the death knell for class action suits under Title VII. In fact, two years after the decision, it was reported that both the number of class action discrimination cases and the size of the settlements for class actions that were certified had dropped precipitously.[2] Despite the change in the legal landscape, motions for class certification have been granted in certain circumstances. This paper will first review the requirements for class actions under federal law especially with respect to discrimination claims and discuss cases decided before the Supreme Court's decision in the *Wal-Mart* case, followed by an in-depth analysis of that case. The paper then examines several federal court cases decided subsequent to *Wal-Mart*. The paper concludes by noting the conditions favorable in the post *Wal-Mart* era for class action certifications in discrimination lawsuits.

II. CLASS ACTION SUITS - LAW PRIOR TO *WAL-MART STORES, INC. V. DUKES*

A class action lawsuit is brought by one or more individual plaintiffs in a representative capacity who "possess the same interest and suffer

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[1] Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011).

[2] Nina Martin, *The Impact and Echoes of the* Wal-Mart *Discrimination Case*, PROPUBLICA, Sept. 27, 2013, https://www.propublica.org/article/the-impact-and-echoes-of-the-wal-mart-discrimination-case (last visited July 23, 2021).

the same injury" as the class of individuals they seek to represent.[3] Class actions are especially useful when several plaintiffs suffer the same injury but the costs of bringing individual lawsuits would be prohibitive. A class action enables the claims to be aggregated, spreading the costs of the claims over a large number of plaintiffs.[4] Class actions differ from non-class mass litigation where each plaintiff signs an individual retainer agreement with the attorney and settlements may be negotiated on a plantiff-by-planitff basis.[5] What makes class action suits so interesting is not only their complexity but the fact that few suits ever go to trial. The plaintiffs' end game is to obtain certification in order to force the defendant to settle, and they will develop any number of strategies to achieve that result. Similarly, defendants will use creative tactics to oppose certification.[6]

Initially it was thought that the courts would be fairly liberal in applying class action requirements to Title VII claims because of the remedial nature of Title VII and the fact that employment discrimination on the basis of a class characteristic is

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[3] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977).

[4] Bronsteen, John and Fiss, Owen, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419 (2003).

[5] Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 532-33 (2003).

[6] Andrew J. Trask, Wal-Mart v. Dukes: *Class Actions and Legal Strategy*, 2010-2011 CATO SUP. CT. REV. 319, 332 (2011).

by definition well-suited to class action treatment.[7] The Supreme Court noted in 1997 that discrimination claims alleging class-wide wrongs were uniquely appropriate to class resolution.[8] Nevertheless, federal courts gradually became less likely to certify a class of plaintiffs, producing a somewhat mixed interpretation and application of Rule 23 as it applies in civil rights cases.

A. Rule 23(a)

Rule 23 of the Federal Rules of Procedure governs the class action procedure in federal courts. Under Rule 23(a), a class of plaintiffs will be certified if all of the following are established:

> (1) the class is so numerous that joinder of all members is impracticable,
> (2) there are questions of law or fact common to the class,
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

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[7] *Comment, The Class Action and Title VII- An Overview*, 10 U. RICH. L. REV. 325, 326 (1976).

[8] E. Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 405 (1977).

> (4) the representative parties will fairly and adequately protect the interests of the class.[9]

The numerosity requirement involves an examination of the facts on a case-by-case basis and does not require an absolute limitation, although the Supreme Court noted that 15 putative cases would probably be too small to meet the standard.[10] The Second Circuit held that a class of 40 members was presumptively sufficient to meet this requirement. In making this determination, the court stated that "[p]laintiffs need not establish the exact number of potential class members as the courts are empowered to 'make common sense assumptions' to support a finding of numerosity."[11] Conversely, the Eighth Circuit held that separate classes of 13 and 11 applicants were too small to be certified as a class action.[12] A good faith estimate as to the class size is

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[9] Fed. R. Civ. P. 23(a). For an historical analysis of Rule 23 *see* John K. Rabief, *The Making of Class Action Rule 23—What Were We Thinking*?, 24 MISS. C. L. REV. 323 (2004-2005).
[10] Gen. Tel. Co. of the Nw., Inc. v. EEOC, 446 U.S. 318, 330 (1980).
[11] *Consol. Rail Corp. v. Town of Hyde Park,* 47 F.3d 473, 483 (2d Cir. 1995). In a 2021 decision, the 7th Circuit held that a putative class of 37 plaintiffs would not meet the numerosity requirement under Rule 23(a)(1). Anderson v. Weinert Enter., Inc., 986 F.3d 773, 777 (7th Cir. 2021).
12 Tuft v. McDonnell Douglas Corp., 581 F.2d 1304 (8th Cir. 1978).

sufficient to satisfy this requirement.[13] However, the actual number of class members cannot be too speculative.[14] Further, the plaintiffs must provide more than a bare allegation of numerosity.[15]

The actual number of plaintiffs alone will not guarantee class certification. The plaintiffs must also show that joinder of all members is impractical.[16] Where the proposed class had 32 employees but the employees were readily identifiable and lived in the same geographic area, a district court held that the plaintiffs failed to meet the numerosity requirement.[17] Similarly, while the plaintiffs did not specifically identify the scope of the putative class, the court determined that a class of potentially 30 female employees at one facility did not make joinder impractical.[18]

Before the *Wal-Mart* decision, certification of a class based on the commonality requirement was not difficult.[19] Commonality could be proved in a

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[13] *Radmanovich v. Combined Ins. Co. of Am.,* 216 F.R.D. 424, 431 (N.D. Ill. 2003).
[14] Marcus v. BMW of N. Am., LLC, 687 F.3d 583, 597 (3d Cir.2012).
[15] Wright v. Whitehall Sch. Dist., 92 F.R.D. 80, 86 (D. Ark. 1981).
[16] Andrews v. Bechtel Power Corp., 780 F.2d 124, 132 (1st Cir. 1985).
[17] Levels v. Azko Nobel Salt Inc., 178 F.R.D. 171, 176 (N.D. Ohio 1998).
[18] Marquis v. Tecumseh Prods. Co, 206 F.R.D. 132, 157 (E.D. Mich. 2002).
[19] Richard D. Freer, *Front-Loading, Avoidance, and Other Features of the Recent Supreme Court Class Action Jurisprudence 49 AKRON L. REV. 721, 730 (2015)*.

discrimination suit as long as there appeared to be common questions of law or fact, even though there may have been differences in the details of individual claims.[20] The commonality and typicality requirements of (a)(2) and (a)(3) tended to be treated as one issue where the court determined whether a class action was economical and whether the named plaintiffs' claims and the claims of the class were "so interrelated that the interests of all class members will be fairly and adequately protected." The Seventh Circuit defined the interrelationship between (a)(2) and (a)(3) as follows; under (a)(2) it is sufficient to show a "common nucleus of operative fact,"[21] while (a)(3) is satisfied by a representative plaintiff's claim that "arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory"[22] In *Fuller v. Fruehauf Trailer Co*.,[23] a district court in Michigan described the difference between (a)(2) and (a)(3) as follows:

> Under the commonality prong, a court must ask whether there are sufficient factual or legal questions *in common* among the class members' claims to make class certification

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[20] Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130, U. A., 657 F.2d 890, 895-96 (7th Cir. 1981).
[21] *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir.1998).
[22] *Id*. at 595 (citations omitted).
[23] 168 F.R.D. 588, 597-98 (E.D. Mich. 1986).

> economical and otherwise appropriate. In contrast, under the typicality prong, a court must ask whether, despite the presence of common questions, each class member's claim involves so many *distinct* factual or legal questions as to make class certification inappropriate . . . In short, commonality focuses on similarities, while typicality focuses on differences.

Under this directive, a class of female employees in a sexual harassment suit were found to have met the commonality requirement, but not the typicality requirement because some plaintiffs alleged specific acts of harassment by their supervisors while others alleged they were subjected to a more generalized hostile work environment by unnamed and unknown co-workers in an altogether different area of the plant.[24] Because the alleged harm suffered by victims in sexual harassment cases varies greatly with respect to both the nature and degree of the misconduct, class certification of sexual harassment claims was and continues to be unlikely.[25] In a claim alleging discriminatory

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[24] Marquis, 206 F.R.D. at 160.

[25] *E.g.*, Van v. Ford Motor Co., 332 F.R.D. 249 (N.D. Ill. 2019). The court found that plaintiffs could not meet either the commonality or typicality thresholds because the nature of the alleged misconduct varied greatly, with some women claiming

promotion practices, the claim of being passed over for promotion by a named plaintiff who repeatedly refused a promotion was atypical of the other members of the proposed class and, thus, certification was denied.[26]

The threshold question under Rule 23(a)(4) is whether the class representatives possess the same interest and suffer the same injury as the rest of the class members. In determining whether the named plaintiffs should be able to represent others without their knowledge or consent, "the court must be assured that the named parties are qualified and capable of fully pursuing the common goals of the class without collusion or conflicts of interests."[27] In *East Texas Motor Freight System, Inc. v. Rodriguez*, a Title VII action was brought by three Mexican-American drivers who alleged that they were denied transfers to more desirable line-driver jobs based on their ethnicity.[28] The Supreme Court reversed the class certification because at the time the class was certified, the named plaintiffs were not qualified for line-driver positions and could not have suffered

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sexual assault while others were exposed to a more ambient harassment. By aggregating the plaintiffs, the court was concerned that those with stronger claims would be prejudiced by not being able to prove allegations of severe misconduct that would entitle them to larger verdicts. Accordingly, it concluded that the typicality requirement was not met. *Id.* at 282.

[26] Armstrong v. Chi. Park Dist., 117 F.R.D. 623, 629 (N.D. Ill. 1987).

[27] Eggleston, 657 F.2d at 896.

[28] 431 U.S. 395 (1977).

injury as a result of the allegedly discriminatory practices; therefore, they were not eligible to represent a class of persons who did allegedly suffer such injury.[29] However, courts do not narrowly construe this requirement. For example, in *Newton v. Kroger Co*., [30] a Black plaintiff who was demoted from full-time to part-time status could represent a class consisting of all current, former and potential Black employees of Kroger stores. As noted in *Huff v. N.D. Cass Co. of Alabama*, "a class plaintiff who otherwise meets the demands of 23(a) and (b) should not be found to be disqualified solely by an advance determination that his claim is predictably not a winning claim and that, therefore, he cannot adequately represent the class as mandated by 23(a)(4)."[31]

Rule 23(a)(4) addresses an additional concern about the competency of class counsel and potential conflicts of interest.[32] That requires competent and experienced counsel able to conduct the litigation.[33] For example, it is well-accepted that a *pro se* litigant cannot adequately represent a putative class.[34]

The amount of evidence required to establish a certifiable class was and continues to be an issue.

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[29] *Id*. at 403–04.
[30] 83 F.R.D. 449, 451 (E.D. Ark. 1979).
[31] 485 F.2d 710, 714 (5th Cir. 1973).
[32] Gen. Tel. Co. of Sw. v. Falcon, 457 U. S. 147, 157–158, n.13 (1982).
[33] Eggleston, 657 F.2d at 896.
[34] Fymbo v. State Farm Fire & Cas. Co., 213 F.3d 1320, 1321 (10th Cir. 2000).

Some courts make a distinction whether the lawsuit alleges disparate treatment or disparate impact. Central to both theories of liability where class-wide discrimination is alleged "is the existence of an identifiable employment pattern, practice or policy that demonstrably affects all members of a class in substantially, if not completely, comparable ways." Disparate treatment involves an employment "pattern or practice," followed as a regular or standard operating procedure," which demonstrably treats the class so unfavorably that it justifies a rebuttable inference of an intention to treat them differently. In contrast, disparate impact theory also involves a practice or policy which, though demonstrably neutral or even benign, nevertheless produces a disproportionately adverse impact on the class without any justification of business necessity.[35] Under either theory, courts must necessarily delve into the merits of the case to determine:

> whether there is a sufficiently homogeneous class vis-a-vis an identified practice to permit binding or benefitting it by class judgment; whether the issues presented in respect of the putative class members' claims have sufficient commonality to permit their resolution on an individualized basis; whether the

[35] Stastny v. S. Bell Tel. & Tel. Co., 628 F.2d 267, 273 (4th Cir. 1980).

> individual claim of a representative plaintiff is sufficiently "typical" to permit its use as the prototype for resolution of the common claims of the class; and whether, given the nature of the representative's claim, adequate representation of class members' claims can be assured from the representative's efforts in effect requires answering the substantive question whether, under either of the available theories, there exists the requisite "pattern or practice" sufficiently and comparably affecting an identifiable class of protected employees.[36]

This presents a difficulty for lower courts to make a factual determination whether class status should be certified, often requiring the production of statistical evidence, in advance of an actual trial on the merits

B. Rule 23(b)

In addition to satisfying all of subsection (a) of the rule, the facts must fall within one of the following criterion:

[36] *Id.* at 274.

(1) prosecuting separate actions by or against individual class members would create a risk of:

(A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests,

(2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole, or

(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods

for fairly and efficiently adjudicating
the controversy.[37]

Employment discrimination class action cases are most often certified under Rule 23(b)(2) because they involve a claim by a group of employees that the defendant employer engaged in discriminatory conduct that must be prevented in the future.[38] The advisory committee notes to Rule 23(b)(2) specifically stated that civil rights cases are particularly appropriate for resolution under that provision.[39] Employment discrimination classes have also been certified under Rule 23(b)(3). This provision of Rule 23 is more controversial because it does not require the level of cohesiveness of a (b)(1) or (b)(2) class.[40] To certify a (b)(3) class, a court must conclude that questions common to the class predominate over any individual questions. This has been interpreted to allow certification of a class even if there are individual claims of damages as long as they do not predominate. However, there are increased costs associated with (b)(3) claims including notice and the ability of individuals to opt

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[37] Fed. R. Civ. P. 23(b).
[38] WILLIAM RUBENSTEIN, ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 23.29 (5th ed. 2011). Toronto, Ontario: Thomson Reuters.
[39] Fed. R. Civ. P. 23(b)(2) advisory committee's note ("Illustrative [of a (b)(2) class] are various actions in the civil rights field where a party is charged with discriminating unlawfully against a class....").
[40] Melissa Hart, *Will Employment Discrimination Class Actions Survive*?, 37 AKRON L. REV. 813–46, 816 (2004).

out of the class. Thus, this section is relied upon less frequently in Title VII lawsuits.

While Rule 23(b)(2) is framed to provide for injunctive relief or a declaratory judgment, it does not, on its face, preclude an additional and incidental claim for monetary damages. Conversely, class treatment under Rule 23(b)(2) is not appropriate for plaintiffs who are primarily seeking monetary relief. Until the passage of the Civil Rights Act of 1991, this was not an issue because the only monetary relief a plaintiff could be awarded was for back pay and front pay which were considered equitable in nature. The 1991 Act changed that by allowing the recovery of compensatory and punitive damages in disparate treatment claims. The question arises, then, whether the claim for damages is in fact incidental. On this issue, the circuit courts were split. In *Robinson v. Metro North Commuter RR. Co.*,[41] the Second Circuit rejected a "bright-line" approach, finding that the absence of all claims of compensatory and punitive damages is not necessary to certify a class. Instead, courts should assess whether injunctive or declaratory relief predominates by applying an ad hoc balancing that varies from case to case. The court offered the following key questions that should be considered in making this determination: (1) whether reasonable plaintiffs would bring the suit to obtain the injunctive or declaratory relief even in the absence of a monetary award, and (2) whether the injunctive or declaratory

[41] *267 F.3d 147, 167 (2d Cir. 2001).*

relief sought would be necessary in order for the plaintiffs to succeed on the merits. In its opinion, the court noted that "insignificant or sham requests for injunctive relief" should not be the basis for (b)(2) certification where the claim is essentially for monetary recovery.[42] The court held that although the plaintiffs were seeking monetary damages, the declaratory, injunctive, and equitable relief predominated, and thus the court reversed the district court's denial of the motion to the certify the class.

The *Robinson* court declined to follow an earlier Fifth Circuit decision in *Allison v. Citgo Petroleum Corp*.[43] In *Allison*, the court stated that incidental damages must flow directly from the liability to the class *as a whole.* It stated: "Ideally, incidental damages should be only those to which class members automatically would be entitled once liability to the class (or subclass) as a whole is established."[44] The recovery of incidental damages should be capable of computation by means of objective standards and not dependent on subjective differences among the class members. The court concluded that a claim for compensatory damages to which any individual class member might be entitled cannot be calculated by objective standards. In addition, the court held that punitive damages were also non-incidental because it would require "proof of how discrimination was inflicted on each plaintiff, introducing new and substantial legal and factual

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[42] *Id*. at 164.
[43] 151 F.3d 402 (5th Cir. 1998).
[44] *Id*. at 415.

issues, and not being capable of computation by reference to objective standards."[45] Interestingly, the district court had also ruled that entitlement to back pay and other equitable monetary remedies would also require separate hearings for each class member as to the amount of the loss, suggesting that almost any request for monetary relief would preclude certification based on Rule 23(b)(2). The Fifth Circuit did not embrace that part of the lower court's decision, limiting its holding to non-equitable monetary relief. Such claims will be deemed to predominate, said the court, unless they are incidental to related claims for injunctive or declaratory relief.[46]

Most circuits followed the more restrictive approach of *Allison* allowing monetary damages in a Rule 23(b)(2) class action only if they were incidental or for back pay.[47] The Second Circuit's reasoning was followed by the Ninth Circuit which held that a class may seek monetary damages under (b)(2) as long as such damages were not superior to the injunctive or declaratory relief sought. Similarly, a district court in DC., following *Robinson*, held that while a claim for compensatory damages and a request for a jury trial may be relevant considerations in deciding whether certification of a class under

[45] *Id.* at 418.
[46] *Id*. at 425.
[47] Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 789 (2013).

(b)(2) is appropriate, neither factor precludes certification as a matter of law.[48]

When Rule (b)(2) cannot be relied upon, plaintiffs can bring their claims under (b)(3) which is more suitable for actions seeking monetary relief. Claims under (b)(3) are more costly because notice to all potential class members is required and members of the class can opt out. Section (b)(3) also requires that "questions of law or fact common to class members predominate over any questions affecting only individual members."[49] Until the Supreme Court's decision in *Comcast Corp. v. Behrend*,[50] the presence of individualized damages would not defeat certification under (b)(3). As noted by one court: "Just as compensatory damages do not automatically negate the finding that injunctive relief predominates in a (b)(2) class action, they do not automatically negate the finding that common issues predominate in a (b)(3) class action."[51] The *Comcast* opinion suggested that the individualized damage issues would create serious predominance issues. The Court stated that:

> under the proper standard for evaluating certification, respondents' model falls far short of establishing that damages are capable of

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[48] Taylor v. D.C. Water & Sewer Auth., 205 F.R.D. 43, 52 (D.D.C. 2002).
[49] Fed. R. Civ. P. 23(b)(3).
[50] 569 U.S. 27, 34 (2013).
[51] Taylor, 205 F.R.D. at 51.

> measurement on a classwide basis. Without presenting another methodology, respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class.[52]

In a later wage and hour case (state wage and hour claims are generally governed by Rule 23), the Court stated: When "one or more of the central issues in the action are common to the class and can be said to predominate, the action may be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately, such as damages or some affirmative defenses peculiar to some individual class members."[53]

III. *WAL-MART STORES, INC. V. DUKES*

In *Wal-Mart Stores, Inc. v. Dukes*,[54] the plaintiffs were current or former employees of Wal–Mart who sought judgment against the company for injunctive and declaratory relief, punitive damages, and back pay, on behalf of themselves and a nationwide class of 1.5 million female employees. They alleged that Wal–Mart discriminated against

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[52] Comcast, 569 U.S. at 34.
[53] Tyson Foods, Inc. v. Bouaphakeo, 577 U.S. 442, 453 (2016) (citation omitted).
[54] 564 U.S. 338 (2011).

women in violation of Title VII of the Civil Rights Act of 1964, claiming that local managers exercised discretion over pay and promotions disproportionately in favor of men. The district court certified the class, finding that respondents satisfied the requirement of showing that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole."[55] The Ninth Circuit substantially affirmed, concluding, *inter alia,* that respondents met the rule's commonality requirement under 23(a)(2) and that their back pay claims could be certified as part of a (b)(2) class because those claims did not predominate over the declaratory and injunctive relief requests.

The Supreme Court reversed on both the 23(a)(2) and 23(b)(2) issues. On the commonality issue, the Court stated:

> [T]he mere claim by employees of the same company that they have suffered a Title VII injury, or even a disparate-impact Title VII injury, gives no cause to believe that all their claims can productively be litigated at once. Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on

[55] Fed. R. Civ. P. 23(b)(2).

> the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.[56]

Following its decision in *General Telephone Co. of Southwest v. Falcon*,[57] the Supreme Court held that commonality can be established in only two ways: 1. if the employer uses biased testing procedures or 2. if there is significant proof that the employer operated under a general policy of discrimination.[58] While a policy of allowing managers wide discretion in employment matters could satisfy this requirement, the plaintiffs would have to show a common mode of managers' exercising their discretion that pervades the entire company. In a company as large as Wal-Mart, the Court noted, it is unlikely that all managers would exercise their discretion in a common manner. The Court also found the plaintiffs' statistical and anecdotal evidence was insufficient to establish a company-wide policy of discrimination. Accordingly, the Court concluded that because the plaintiffs were unable to provide convincing proof of a company-wide discriminatory pay and promotion

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[56] Wal-Mart, 564 U.S. at 350.
[57] 457 U. S. 147 (1982).
[58] Wal-Mart, 564 U.S. at 353.

policy, they did not establish the existence of any common question.

The *Wal-Mart* Court also considered the plaintiffs' claims for back pay under Rule 23(b)(2) and concluded that any claim that that would require an individualized determination precludes certification under 23(b)(1) or (b)(2), including claims for back pay. The Court held: "Rule 23(b)(2) applies only when a single injunction or declaratory judgment would provide relief to each member of the class. It does not authorize class certification when each individual class member would be entitled to a different injunction or declaratory judgment against the defendant" or "when each class member would be entitled to an individualized award of monetary damages."[59] Only if class certification is requested under Rule 23(b)(3) may monetary damages be part of the requested relief, said the Court, because that subsection allows additional protections such as notice to all class members and the ability to opt out. The Court rejected the plaintiffs' assertion that a predominance test should be used. It also declined to distinguish back pay claims as an exception because they are in the nature of equitable relief, saying that such characterization is "irrelevant" as Rule 23(b)(2) applies only to injunctive and declarative relief.[60] In its opinion, the Court discussed the *Allison* case and narrowly construed its holding to permit certification under Rule 23(b)(2) only when the monetary relief is incidental to the

[59] *Id*. at 360–61.
[60] *Id*. at 365.

injunctive or declarative relief and requires no additional hearings or determinations as to the merits of any individual's claim. Finally, the Court refused to apply the Ninth Circuit's Trial by Formula proposal that a sample of plaintiffs could be selected for which damages could be calculated and applied to the rest of the class. This, said the Court, would illegally abridge the right of Wal-Mart to litigate its statutory defenses to individual claims.[61]

The *Wal-Mart* opinion also confirmed that a court may examine the merits of the underlying claim of discrimination to determine whether the class is certifiable. On this issue, the Court stated: "proof of commonality necessarily overlaps with respondents' merits contention that Wal–Mart engages in a pattern or practice of discrimination."[62] Later cases followed this approach holding that questions regarding the merits of a case may be considered to the extent that they are relevant to determining whether prerequisites under Rule 23 are satisfied.[63]

Legal experts commenting on the *Wal-Mart* opinion have criticized both the attorneys for the plaintiffs, the lower courts, and the dissenting opinions for overreaching and setting themselves up for ultimate defeat at the Supreme Court.[64] At the

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[61] *Id*. at 367.
[62] *Id*. at 352.
[63] Amgen, Inc. v. Conn. Ret. Plans and Trust Funds, 568 U.S. 455, 466 (2013); Stockwell v. City and Cty. of S.F., 749 F.3d 1107, 1111 (9th Cir. 2014).
[64] Catherine Ross Dunham, *Third Generation Discrimination: The Ripple Effects of Gender Bias in the Workplace*, 51 AKRON L. REV. 55 (2017).

outset, noted Suzanna Sherry, the proposed class was 1.5 million employees, the largest class ever, working at 3,400 stores; with such a large and diverse class it would be difficult to argue that all members of the class shared common questions of law and fact.[65] The sheer size of the plaintiffs' class together with a general disdain for class action suits created the "perfect storm" for the Court to take a stance on curbing the rise in class action claims.[66] Andrew Trask also noted that the plaintiffs' reliance on showing a pattern or practice of discrimination against women was problematical because Was-Mart had a strong anti-discrimination policy in place which had in fact won several awards.[67]

IV. DECISIONS AFTER *WAL-MART*

After the *Wal-Mart* decision, legal experts were in agreement that class action suits would be more difficult to certify for several reasons. First the commonality basis would be more difficult to prove. Following the *Wal-Mart* holding, not only must the plaintiffs raise a common question, but the answer must be the same for every class member;

[65] Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*. 11 THE SUP. CT. REV. 1–37 (2011).
[66] Michael Selmi & Sylvia Tsakos, *The Class Action after a Decade of Roberts Court Decisions*, 48 AKRON L. REV. 803, 804 (2015).
[67] *Supra* note 6, at 330.

dissimilarities among class members will undermine certification.[68] Under this standard, plaintiffs will have to prove the existence of a company-wide policy fostering discrimination that affects all class members or a bias of one supervisor affecting an individual store or department.[69]

Second, the Court held that Rule 23 does not provide a "mere pleading standard," but instead requires a putative class of plaintiffs to be "prepared to prove" all the elements required for class certification.[70] By so ruling the Court clarified once and for all that in deciding the certification issue, a court not only may but must delve into the merits.

Third, the Court narrowly construed the type of evidence used to establish commonality; neither statistical disparity between promotions of men and women workers nor anecdotal evidence would be sufficient for a finding of commonality.[71] Finally, the Court held that any type of monetary relief sought including back pay would preclude reliance on Rule 23(b)(2).

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[68] Wal-Mart, 564 U.S. at 350.

[69] Cianan M. Lesley, *Making Rule 23 Ideal: Using a Multifactor Test to Evaluate the Admissibility of Evidence at Class Certification*, 118 MICH. L. REV. 149, 153 (2019).

[70] John M. Husband & Bradford J. Williams, Wal-Mart v. Dukes *Redux, The Future of the Sprawling Class Action,* 40 COLO. L. 53, 54 (2011).

[71] Crystal Liu, Elizabeth Macgill & Apeksha Vora, *Sex Discrimination Claims under Title VII of the Civil Rights Act of 1864*, 17 GEORG J. GENDER & L. 411, 449 (2016).

The impact of the *Wal-Mart* case cannot be underestimated. In a study comparing pre- and post-*Wal-Mart* discrimination cases, the author found that in 2010 the top 10 settlements totaled $345million; in 2012 that total fell to $45million.[72] The study also found that the annual number of class action lawsuits had dropped from on average 25-30 before *Wal-Mart* to 10-12 after *Wal-Mart*. Moving forward, a later study found that this trend continued. In 2020, courts issued only 12 rulings on motions for class certification in employment discrimination lawsuits; plaintiffs prevailed in 5 of the 12 rulings, or 42%, with 4 of those rulings by the Ninth Circuit.[73] The success rate in the previous three years ranged from 27% to 63%.

Certification of a Title VII class action is still possible when the facts are clearly distinguishable from those in *Wal-Mart*. For example, a non-discretionary, centralized wage scale under which employees of one store, who were largely Hispanic, were paid less than their White counterparts at two other stores would support a class action alleging both disparate treatment and disparate impact.[74]

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[72] Martin, *supra* note 2.
[73] Seyfarth Shaw, Five Top Trends in Workplace Class Action Litigation: Trend # 5 Class Certification Trends, Jan. 12, 2010, https://www.jdsupra.com/legalnews/5-top-trends-in-workplace-class-action-3473088/ (last visited July 24, 2021). While the study found that plaintiffs experienced increased success in wage and hour and ERISA cases, the success rate for class certification in discrimination cases has remained relatively flat.
[74] Parra v. Basha's, Inc. 291 F.R.D. 360, 375 (D. Ariz. 2013).

Where the discrimination claim involved only one location or project, commonality is more likely to be established.[75]

A. *Effect of* Wal-Mart *on Rule 23(a)(2) Analysis*

One year after the *Wal-Mart* decision, a California court certified class status to the plaintiffs in *Ellis v. Costco Wholesale Corp.*[76] The *Ellis* court distinguished the facts from *Wal-Mart* on three bases: 1. The size of the proposed class was much smaller (700), 2. The lawsuit involved promotions to only two jobs (assistant general manager and general manager), and 3. The decision-making at Costco was much more centralized, suggesting a common direction or underlying policy.

Brown v. Nucor Corp.,[77] involved a class of approximately 100 Black employees alleging both discriminatory job promotion practices and a hostile work environment at a plant in South Carolina. The Fourth Circuit acknowledged *Wal-Mart*'s directive that statistical and anecdotal evidence are not sufficient to establish a general policy causing injury to the class. Nevertheless, the court reversed the district court's decertification of the class based on

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[75] Rollins v. Traylor Bros., Inc., No. C14-1414 JCC, 2016 WL 258523 (W.D. Wash. Jan. 21, 2016) (class decertified on other grounds) (defendant's site was a centralized, circumscribed environment, and the complaint involved only a single kind of worker).

[76] 285 F.R.D. 492 (N.D. Cal. 2012).

[77] 785 F.3d 895 (4th Cir. 2015).

several important differences that made *Wal-Mart* "inapposite" to the facts in *Brown.*[78] The class included approximately 100 members in a single steel plant where they shared common spaces and were in frequent physical contact with other departments; they could apply for promotions in other departments; and they were subject to discriminatory plant-wide policies and practices. The record contained numerous complaints of discrimination made to the plant's general manager, who apparently did nothing in response, suggesting a tolerance of discrimination from the plant's top management and supporting a contention of a class-wide injury that affected all of the plaintiffs. There was also ample evidence of graffiti, emails, and racial slurs supporting the plaintiffs' contention of a culture of racial bigotry. The Fourth Circuit also found that the anecdotal evidence of 16 employees, representing 16% of the class, had significantly more probative value than the similar type of evidence offered in *Wal-Mart.*[79]

The existence of some discretion in the decision-making process is not fatal to the commonality question if based on company policy. Discretionary pay and promotion procedures can satisfy the commonality requirement if lower-level supervisors operate under "a common mode of exercising discretion that pervades the entire company, such that individual discretionary decisions nonetheless produce a common answer to

[78] *Id*. at 909.
[79] *Id*. at 912.

the question '*why was I disfavored*?'"[80] As noted by the Fourth Circuit in *Brown*:

> Unlike a disparate impact claim, a showing of disparate treatment does not require the identification of a specific employment policy responsible for the discrimination. A pattern of discrimination, revealed through statistics and anecdotal evidence, can alone support a disparate treatment claim, even where the pattern is the result of discretionary decision-making.[81]

In a disparate impact claim the plaintiffs can succeed if they can show *a common mode* of exercising discretion. A common job evaluation procedure such as use of 360 reviews, quartiling, or cross-ruffing raises yes-or-no questions that can each be answered "in one stroke."[82] In deciding the commonality issue where discretion is allowed, the courts must examine whether lower-level supervisors operate under "a common mode of exercising discretion" which means that there exists a company-wide policy that could result in all managers exercising their discretion in a common

[80] Kassman v. KPMG, LLP, 416 F. Supp. 3d 252, 276 (S.D.N.Y. 2018) (citing Wal-Mart, 564 U.S. at 352).
[81] Brown, 785 F.3d at 915 (citation omitted).
[82] Chen-Oster v. Goldman, Sachs & Co., 325 F.R.D. 55, 75 (S.D.N.Y. 2018) (citing Wal-Mart, 564 U.S. at 350).

way.[83] The court in *Kassman v, KPMG, LLP* set forth four factors to determine whether a common mode of exercising discretion pervaded the entire company: (1) the nature of the purported class; (2) the process through which discretion is exercised; (3) the criteria governing the discretion and (4) the involvement of upper management.[84] Under the first factor, while size is not the determinative factor, the larger the class, the less likely that plaintiffs will be able to demonstrate a commonality in the exercise of discretion. In *Kassman*, the proposed class size of over 10,000 plaintiffs, while not as large as that in *Wal-Mart*, was sufficient to find that proving a consistent exercise of discretion would be difficult if not impossible.[85] Regarding the second factor the court distinguished the facts from *Ellis* which had only one pay procedure which constrained and channeled the exercise of discretion; conversely, "KPMG's pay and promotion procedures act more as a framework that dictates who will make discretionary decisions rather than how they will exercise their discretion."[86] Similarly, in *Valerino v. Holder*,[87] the court held that a common structure was not sufficient where it merely set forth the particular points where supervisors exercised their discretion. Third, KPMG's evaluation and promotion criteria

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[83] Moussouris v. Microsoft Corp., No. C15-1483JLR, 2018 WL 3328418 at *16 (W.D. Wash. June 25, 2018).
[84] Kassman, 416 F. Supp. 3d at 276.
[85] *Id*. at 277 (citing Brown, 785 F.3d at 916).
[86] 416 F. Supp. 3d at 277–78.
[87] 283 F.R.D. 302, 313 (E.D. Va. 2012).

were not sufficiently specific to constrain discretion. Subjective criterion are likely to result in different interpretations and are inconsistent with a finding of a common direction.[88] Finally, plaintiffs were unable to show sufficient involvement by top management in compensation decisions. Final approval by two national partners was merely a rubber stamp for decisions made at the local level and merely insured that the proper process was followed.[89]

In *McReynolds v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,*[90] although local lower-level managers had a measure of discretion regarding team formation and account distribution, the exercise of that discretion was influenced by company-wide policies authorizing brokers rather than managers to form and staff teams and basing account distributions on past success. The Seventh Circuit held that this established sufficient commonality for class certification because the question whether these policies created a disparate impact on African Americans could be resolved most efficiently in one claim. Citing *McReynolds*, the Seventh Circuit in a later case found that class action was maintainable under Rule 23(b)(2) when the first two stages of the decision-making process were based on objective criteria even though the final stage was the result of

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[88] 416 F. Supp. 3d at 278.
[89] *Id*. at 280.
[90] 672 F.3d 482, 491 (7th Cir, 2012).

a subjective, case-by-case analysis.[91] Moreover, said the court, "the fact that the plaintiffs might require individualized relief does not preclude certification of a class for common equitable relief."[92] However, the "prospective class must articulate at least one common question that will actually advance all of the class members' claims."[93]

Failure to present a company-wide policy adopted by management and applicable to all of the employer's locations is often fatal to gaining class certification.[94] Similarly, proof of wide variations in the defendant's employment practices, working environments, and functions among its locations will serve as a good defense against class certification.[95] Conversely, a showing of company-wide compensation practices including a salary range policy, a pay raise percentage policy, and a dual pay system for hirees and promotees where only vice presidents could make exceptions will establish commonality.[96]

B. Effect of Wal-Mart *on Rule 23(b)(2) Analysis*

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[91] Chi. Teachers Union Local No. 1 v. Bd. of Educ. of Chi., 797 F.3d 426, 439-40 (7th Cir. 2015).
[92] *Id*. at 442.
[93] Phillips v. Sheriff of Cook Cty., 828 F.3d 541, 550 (7th Cir. 2016).
[94] Bolden v. Walsh Constr. Co., 688 F.3d 893, 898 (7th Cir. 2012).
[95] Bennett v. Nucor Corp., 656 F.3d 802, 816 (8th Cir. 2011).
[96] Scott v. Family Dollar Stores, Inc., 733 F.3d 105, 116 (4th Cir. 2015).

In its decision, the Supreme Court made it clear that any claim that would require an individualized determination of damages takes the case out of Rule 23(b)(2); the Court stated: "we think it clear that individualized monetary claims belong in Rule 23(b)(3)."[97] The Court then examined the Fifth Circuit's decision in *Allison* which held that held that certification of a (b)(2) class is permissible only if monetary relief requested is "incidental to requested injunctive or declaratory relief," which was defined as "damages that flow directly from liability to the class as a whole." Under that definition, incidental damages should not require additional hearings to resolve the disparate merits of each individual's case.[98] The *Wal-Mart* Court decided that it did not need to determine what type of damages would meet this definition because in the case of back pay, the defendant would be entitled to an individualized determination of each plaintiff's claim under Title VII.

The Supreme Court's decision also highlighted the importance of cohesiveness among class members under Rule 23(b)(1) and (b)(2). Because these provisions do not allow class members to opt out, the plaintiffs must prove a strong commonality of interests.[99] Following the *Wal-Mart* decision, the Third Circuit stated that any "disparate factual circumstances of class members" may

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[97] Wal-Mart, 564 U.S. at 362.
[98] *Id.* at 366.
[99] *Id*. at 362.

prevent a class from being cohesive and, therefore, make the class unable to be certified under Rule 23(b)(2).[100]

If courts begin to require, as a prerequisite to class certification under (b)(2), that plaintiffs provide a methodology for proving damages on a class-wide basis, this will be yet another major impediment to class certification.[101] It is difficult to imagine what type of money damages could be capable of being decided without individual determinations regarding the amount. For example, in a lawsuit alleging that an employer withheld funds from employees' paychecks without remitting the funds to pay health insurance premiums, the court stated: "This court cannot fathom how the consequential damages alleged in this case could be resolved without additional hearings to determine, for example: the extent to which individual plaintiffs were entitled to benefits, denied coverage, charged late fees, had wages garnished, judgments entered against them, liens placed on their property, and credit ratings harmed."[102] An award of statutory penalties which is discretionary with the trial court and where the court must consider a number of factors including the prejudice to individual plaintiffs and the employer's

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[100] Gates v. Rohm & Hass Co., 655 F.3d 255, 264 (3d Cir. 2011) (quoting *Carter v. Butz,* 479 F.2d 1084, 1089 (3d Cir.1973)).

[101] Klonoff, *supra* note 47, at 800.

[102] Local 1522 of Council 4 v. Bridgeport Health Care Ctr., Inc., No. 15-CV-1019 (JCH), 2018 WL 1419792, at *14 (D. Conn. Mar. 21, 2018).

intent will weigh against a finding that damagers are incidental to the injunctive relief sought.[103]

Despite the language of the Court in *Wal-Mart*, some courts continue to certify a class even when monetary damages are sought. In a Sixth Circuit case alleging Fourth Amendment violations, the court held that a claim for individualized damages will not preclude certification based under Rule 23(b)(2), stating that *Wal-Mart* does not stand for the proposition that a court "must" deny certification under (b)(2) any time the plaintiff seeks individualized monetary damages.[104] The Second Circuit continued to apply a bifurcated approach in which the liability claims could be litigated on a class basis under (b)(2) and on a remedial basis under (b)(3), noting that the *Wal-Mart* decision did not overrule this method.[105] Certification of a hybrid

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[103] Slipchenko v. Brunel Energy, Inc., No. H–11–1465, 2013 WL 4677918, at *11 (S.D. Tex. Aug. 30, 2013). The court held that with respect to the (b)(3) issue, to the extent that bad faith or prejudice to individual plaintiffs affects whether or how much statutory penalty should be imposed, these individualized considerations do not predominate over the class issues. *Id*. at *14.

[104] McDonald v. Franklin Cty., Ohio, 306 F.R.D. 548, 560 (S.D. Ohio 2015) ("the Court rejects the County's argument that Rule 23(b)(2) certification is improper simply because Plaintiff seeks individualized money damages").

[105] Gulino v. Bd. of Educ. of the City Sch. Dist. of N.Y., 907 F. Supp. 2d 492, 507 (S.D.N.Y. 2012), *aff'd*, 555 F. App'x 37 (2d Cir. 2013); Easterling v. Conn. Dep't of Corr., 278 F.R.D. 41, 47 (D. Conn. 2011). A recent article suggested that issue class certification under Rule 23(c)(4) on the liability issues followed by subsequent proceedings to determine individual

class for injunctive and declaratory relief under Rule 23(b)(2) and monetary damages under Rule 23(b)(3) was also allowed by the District Court of South Carolina.[106] A similar approach was taken by a district court in California in *Ellis v. Costco Wholesale Corp*.[107]

One type of case that might meet the *Wal-Mart* Court's strict "incidental" standard is a breach of fiduciary duty case under ERISA where, in addition to the injunctive and declaratory judgment relief, plaintiffs seek restoration of losses arising from the breach, and the return of profits that the fiduciary made through the use of plan assets.[108]

C. *Effect of* Wal-Mart *on Rule 23(b)(3) Analysis*

Under Rule 23(b)(3), a court must find that the questions of law or fact common to class members predominate over any questions affecting only individual members. Although the majority opinion did not specifically address the predominance requirement of Rule 23(b)(3), a consequence of its approach to commonality is that it changed the predominance inquiry by raising the

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damages would be an efficient approach to class litigation. Myriam Gilles & Gary Friedman, *The Issue Class Revolution*, 101 B.U.L. REV. 133, 136 (2021).

[106] Johnson v. Flakeboard Am., Ltd., No. 4:11–2607–TLW–KDW, 2012 WL 2237004, at *7 (D.S.C. Mar.26, 20212).

[107] 285 F.R.D. at 537.

[108] Douglin v. GreatBanc Trust Co., 115 F.Supp.3d 404, 414 (S.D.N.Y. 2015). The court also held in this case that certification under Rule 23(b)(1) would have been appropriate.

bar for the identification of a common question under Rule 23(a)(2). It heightened the commonality and the predominance requirements by changing the meaning of a term critical to both requirements: the nature of "questions of law or fact common" to the class.[109] In her dissent in *Wal-Mart*, Justice Ginsberg rejected this approach and noted that the majority incorrectly blended Rule 23(a)(2)'s threshold criterion with the more demanding criteria of Rule 23(b)(3) and thereby elevated the (a)(2) inquiry so that it was no longer easy to satisfy.[110] The Court's emphasis on the differences between class members, said Justice Ginsberg, "mimics the Rule 23(b)(3) inquiry into whether common questions 'predominate' over individual issues."[111]

The Third Circuit had long taken a strict approach to the interpretation of Rule (b)(3) and its interplay with Rule(a)(2). According to the Third Circuit view, predominance imposes a "far more demanding standard," than the commonality standard of (a)(2) as it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[112] A class of plaintiffs seeking to try claims by representation pursuant to Rule 23(b)(3) may satisfy the

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[109] Theodore J. Boutrous, Jr. & Bradley J. Hamburger, *Three Myths about* Wal-Mart Stores, Inc. v. Dukes, 82 GEO WASH. L. REV. 45, 57 (2014).
[110] Wal-Mart, 564 U.S. at 375.
[111] *Id*. at 376.
[112] *In re Ins. Brokerage Antitrust Litig.,* 579 F.3d 241, 266 (3d Cir. 2009) (quoting *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623–24 (1997)).

predominance requirements only when the plaintiffs demonstrate that the elements of their claim are "capable of proof at trial through evidence that is common to the class rather than individual to its members."[113] As one author noted: "If proof of an essential element of the cause of action is found to require individual treatment such as to override the predominance of the common proof, class certification is unsuitable."[114]

In addition, in *Sullivan v. DB Investments, Inc.*,[115] the Third Circuit reiterated its position that Rule 23(b)(3)'s predominance requirement incorporates Rule 23(a)(2)'s commonality requirement and, therefore, they should be examined together. Applying this approach, a New Jersey District Court held that participants and beneficiaries of an employer-sponsored health plan seeking class certification in their action against the plan's insurer to recover unpaid benefits and for improper denial of out-of-network benefits failed to establish that common questions as to liability would predominate over individual ones, absent evidence that injury to all class members could be proven in one stroke.[116] A district court in the First Circuit took a similar approach in a breach of contract action,

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[113] *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311–12 (3d Cir. 2009).
[114] Candace A. Blydenburgh, *Class Actions: A Look at Past, Present, and Future Trends*, ASPATORE, 2015 WL 4967445, at *7 (2015).
[115] 667 F.3d 273, 297 (3d Cir. 2011).
[116] Franco v. Conn. Gen. Ins. Co., 299 F.R.D. 417, 428 (D.N.J. 2014).

finding that determining damages owed to any given class member would likely involve complex and individualized proof, and thus would predominate over the common question issues.[117]

Not all circuits follow this interpretation of Rule 23(b)(3). In the Second and Ninth Circuits, while courts recognize that (b)(3) claims may present individualized questions with respect each class member's entitlement to relief, plaintiffs can present their claims in a bifurcated framework in which, after liability is established, individual class members present their claims for relief in a second phase of trial where defendants have an opportunity to present individualized defenses with respect to each class member.[118] This framework survives the *Wal-Mart* opinion, noted the court.[119]

D. *Effect of* Wal-Mart *on the District Courts' Scrutiny of the Certification Question*

The *Wal-Mart* Court clarified the level of analysis required at the certification stage of the lawsuit. In a prior case, the Court had concluded that a private Title VII class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been

[117] Local 1522 of Council 4 v. Bridgeport Health Care Center, Inc., No. 15-CV-1019 (JCH), 2018 WL 1419792, at *15 (D. Conn. Mar. 21, 2018).
[118] Ellis, 285 F.R.D. at 539; United States v. City of N.Y., 276 F.R.D. 22, 34 (E.D.N.Y 2011).
[119] *Id*.

satisfied."[120] Nevertheless, there continued to be confusion as to the nature of the trial courts' determination based on an earlier Supreme Court decision in *Eisen v. Carlisle & Jacquelin*,[121] which questioned whether a court had the authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action. The Supreme Court in *Wal-Mart* characterized this statement as dicta and not controlling.[122] Rather, said the Court, proof of commonality necessarily overlaps with the merits of the case whether Wal-Mart engaged in a pattern or practice of discrimination.[123]

The Supreme Court later cautioned that Rule 23 does not grant courts "license to engage in free-ranging merits inquiries at the certification stage. Merit questions may be considered to the extent—but only to the extent—that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied."[124] In other words, district courts may not "turn the class certification proceedings into a dress rehearsal for the trial on the merits."[125]

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[120] Falcon, 457 U.S. at 161.
[121] 417 U.S. 156, 177 (1974).
[122] Wal-Mart, 564 U.S. at 351 n.6.
[123] *Id*. at 352.
[124] Amgen, Inc. v. Conn. Ret. Plans & Trust Funds 568 U.S. 455, 466 (2013).
[125] *In re* Whirlpool, 722 F.3d 838, 851–52 (6th Cir. 2013) (citing Messner v. Northshore Univ. HealthSystem, 669 F.3d 802, 811 (7th Cir. 2012)).

Courts' scrutiny of statistical evidence was intensified by the *Wal-Mart* decision. Merely showing an overall disparity does not establish a pattern or practice of discrimination and thus fails to establish the commonality condition. In *Brand v. Comcast Corp.*,[126] the plaintiffs presented statistical evidence showing on average that Black employees made less than their White counterparts. The district court stated that the "commonality inquiry concerns whether the individual experiences of those whose salaries make up the average share enough common ground." Plaintiffs' claim that they suffered adverse work conditions as a result of discrimination "actually references a host of decisions, any two of which could have been made for different reasons. Plaintiffs' statistical analyses do little to change this and for that reason go no further toward establishing commonality on behalf of plaintiffs' proposed terms and conditions class."[127] Conversely, in *Zollicoffer v. Gold Standard Bakery, Inc.*,[128] the court determined that the evidential data presented by the plaintiffs, which were statistically significant at nine standard deviations, together with anecdotal testimony were sufficient to establish a company-wide policy of discriminatory hiring practices rather than individualized decisions.

[126] 302 F.R.D. 201, 227 (N.D. Ill. 2014).
[127] *Id*.
[128] 335 F.R.D. 126, 154 (N.D. Ill. 2020).

V. CONCLUSION

The decision in *Wal-Mart Stores, Inc. v. Dukes* changed the analysis used by courts in determining whether they should certify a class of plaintiffs in discrimination claims. Plaintiffs' attorneys must consider carefully crafting their pleadings, presenting strong statistical evidence, and judiciously structuring the class to overcome the challenges to class certification. One study suggested that plaintiffs' attorneys are exercising more selectivity by seeking certification of narrower and more defined groups.[129] Classes with the most likelihood of certification are smaller (less than 1,000), representing employees of a single employer or within one region. Plaintiffs are also more likely to pursue hybrid class certification theories where injunctive relief is sought under Rule 23(b)(2) and monetary relief is sought under Rule 23(b)(3) or to forego claims for damages altogether and defer those issues to the settlement stage.[130] Courts are more willing to assess facts at the certification stage which overlap factual issues normally heard during the trial stage and will scrutinize the testimony of experts who present such data. Plaintiffs are well-advised to include both statistical evidence as well as statements from more

[129] Shaw, *supra* note 73.
[130] Seyfarth Shaw, 15th Annual Workplace Class Action Litigation Report (2019), https://www.seyfarth.com/dir_docs/publications/2019_WCAR_Chapters_1-2.pdf (last retrieved July 24, 2021).

than just a handful of employees to establish a culture of discrimination.

THE DECLINE OF INTERNATIONAL STUDENTS DURING THE TRUMP ADMINISTRATION AND THE INCREASE OF EXECUTIVE POWER

SEJAL SINGH*

I. INTRODUCTION

The U.S. was once the epicenter of educational and employment opportunities for international students.[1] Students were drawn to the modern facilities, the opportunity to conduct research with top faculty, and the freedom to socialize in a free and open environment.[2] However, international students were not the only ones who benefitted. International students and their host countries create a mutually beneficial relationship.[3] International students contribute to the economy,

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[1] Kavitha Cardoza, *Enrollment By International Students In U.S. Colleges Plummets*, NPR (Dec. 2, 2020), https://www.npr.org/2020/12/02/912669406/enrollment-by-international-students-in-u-s-collegesplummets#:~:text=But%20this%20year%2C%20in%20a,of%20thousands%20have%20deferred%20enrollment.

[2] *Id.*

[3] *Id.*

bring diversity, and serve the need of businesses seeking skilled professional talent.[4]

Unfortunately, studies indicate a downward trend in new international student enrollments.[5] The Institute of International Education found that new international enrollment decreased by 43% in fall 2020 and that thousands of students deferred enrollment.[6] Although this decline was largely attributable to the COVID-19 pandemic, the pre-pandemic data shows a 0.6 percent decline in new international enrollments in 2019-20, the fourth straight year of declines and almost a two percent decrease in the total number of international students.[7]

While several factors contributed to the decline of new international students, such as the visa process, overall cost of American higher education, fear surrounding gun violence, and global

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[4] *See infra* Part IV; *see also* Marcus Lu, *The Impact of International Students on the U.S. Economy*, Visual Capitalist, (Feb. 2020), https://www.visualcapitalist.com/international-students-impact-u-s-economy/ (noting how international students help the U.S. economy by growing the U.S. knowledge base, promoting foreign policy and international leadership, and leading successful businesses).

[5] *Id*.

[6] Julie Baer & Mirka Martel, *Fall 2020 International Student Enrollment Snapshot*, The Inst. of Int'l Educ., (Nov. 2020), https://www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports.

[7] *International Students in the United States 2020 Fast Facts*, Open Doors, https://opendoorsdata.org/fast_facts/fast-facts-2020/.

competition, the political climate also played a role.[8] President Trump's anti-immigration rhetoric and policies such as his travel ban and extreme vetting procedures caused prospective students to think twice about studying in the U.S. and created fear among students already here that if they left the country, they would not be allowed back in.[9]

President Trump's orders also renewed concern and criticism of the increased scope and use of executive actions.[10] For example, President Trump signed more executive actions in his first 100 days of office than any other president since Harry S. Truman.[11] Many scholars argue that the rise in unilateral presidential decision-making bypasses the protections put in place by the Constitutional framers and violates the separation of powers doctrine.[12]

This article examines the criteria for a student visa, and the impact of highly skilled students and workers in our society. It then discusses two executive actions taken by the Trump administration

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[8] *See* Jodi Sanger & Julie Baer, *Fall 2019 International Student Enrollment Snapshot Survey*, The Inst. of Int'l Educ., 6 (Nov. 2019), https://www.iie.org/Research-and-Insights/Open-Doors/Fall-International-Enrollments-Snapshot-Reports (according to the 2019 report, institutions reported that the U.S. social and political environment (57.9%) and feeling unwelcome in the U.S. (48.6%) were factors contributing to new international student declines).
[9] *See infra* Part V.
[10] *See infra* Part VII.
[11] Julie Rheinstrom, *Current Developments: One Hundred Days of President Trump's Executive Orders*, 31 GEO. IMMIGR. L.J. 433 (2017).
[12] *See infra* Part VII.

and their potential impact on international student admissions. Finally, the article analyzes the sources of presidential power over immigration, and the controversy surrounding executive orders.

II. F-1 STUDENT VISA PROGRAM

The Immigration and Nationality Act (INA) of 1990 governs immigration into the U.S.[13] The statute divides all non-American citizens into two groups, immigrants, and nonimmigrants.[14] Immigrants are admitted with a green card for permanent residence, whereas nonimmigrants are temporarily admitted for a fixed term.[15] These temporary visits must be connected to specific purposes, such as study, temporary work, business, or vacation.[16] The F-1 visa is the most common non-immigrant student visa and allows foreigners to study at educational institutions in the U.S.[17]

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[13] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 1990. (codified as amended at 8 U.S.C. § 1101 (2012)).
[14] *See* INA § 101(a)(15)(A)-(V), 8 U.S.C. § 1101(a)(15)(A)-(V) (2012) (defining "immigrant" as every alien except one within a subsequently laid out class of nonimmigrant aliens, such as an ambassador, a business visitor, a crewman, a student, a skilled worker, etc.).
[15] *See What is the difference between an immigrant visa and nonimmigrant visa,* https://citizenpath.com/faq/immigrant-nonimmigrant-visa/ (last visited Aug. 5, 2021).
[16] *Id.*
[17] *Students and Employment*, U.S. Citizenship and Immigration Services, https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment (last visited Apr. 29, 2021); INA §

To qualify for a student F-1 visa, the U.S. Citizenship and Immigration Services (USCIS) requires that the student meet the following criteria:

- [The student] must be enrolled in an "academic" educational program, a language-training program, or a vocational program.
- [The student's] school must be approved by the Student and Exchange Visitors Program, Immigration & Customs Enforcement.
- [The student] must be enrolled as a full-time student at the institution.
- [The student] must be proficient in English or be enrolled in courses leading to English proficiency.
- [The student] must have sufficient funds available for self-support during the entire proposed course of study.
- [The student] must maintain a residence abroad which they have no intention of giving up.[18]

After graduation, F-1 students are temporarily allowed to work in the U.S. in an area

101(a)(15)(F)(i) [8 U.S.C.A. § 1101(a)(15)(F)(i)]; 8 C.F.R. § 214.2(f); 22 C.F.R. § 41.61(b).

[18] *Id.*

directly related to their major under the Optional Practice Training (OPT).[19] The program was established by regulations and has been amended to expand the time frame that some students may remain in the U.S.[20] Most students are authorized to stay for twelve months after graduation, but students in the science, technology, engineering, and mathematics (STEM) fields have the option to extend their stay for an additional twenty-four months.[21]

Neither the F-1 visa nor the OPT program, however, provides a direct path to permanent residency and requires foreign students to enter the U.S. temporarily or have a permanent foreign residence. Therefore, many employers who hire F-1 students under the OPT program sponsor the students through the H-1B visa program, which unlike the F-1 visa, allows workers to lawfully pursue permanent residency while maintaining their H-1B status.[22]

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[19] *Optional Practical Training (OPT) for F-1 Students*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/working-in-the-united-states/students-and-exchange-visitors/optional-practical-training-opt-for-f-1-students (last visited Apr. 29, 2021); 8 C.F.R. § 214.2(f)(10)(ii).

[20] *Improving and Expanding Training Opportunities for F-1 Nonimmigrant Students with STEM Degrees and Cap-Gap Relief for All Eligible F-1 Students*, 81 FR 13040-01 (codified at 8 C.F.R. § 214.2(f)(10)(ii)(C)).

[21] *Id.*

[22] *See* Pia Nitzschke, *Building Bridges: Why Expanding Optional Practical Training is a Valid Exercise of Agency Authority and How it Helps F-1 Students Transition to H-1b Worker Status*, 66 AM. U. L. REV. 593, 602-03 (2016).

However, the INA placed numerical limitations on the number of H1-B petitions that can be approved each fiscal year.[23] Congress has both increased and decreased these limitations over the past twenty years.[24] Currently, the number of noncitizens who may be provided H1-B status is 65,000.[25] Furthermore, 20,000 additional H1-B visas are available for individuals who obtain a master's degree or higher from a U.S. university, and workers at universities and government research laboratories are exempt from all quotas.[26] Despite the caps, demand for H-1B workers has boomed in recent years. The number of applications rose from 124,000 for fiscal 2014 to 236,000 in 2017, before dropping to 199,000 for fiscal year 2018. By contrast, from 2000 to 2013 the visa cap was reached only twice, in 2008 and 2009.[27]

If USCIS receives more registrations than there are visa numbers available, USCIS will run a lottery.[28] USCIS selects H-1B petitions submitted on

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[23] *See H1-B Cap Season*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-cap-season.
[24] 8 U.S.C. § 1184(g)(1)(A)(vii) (2015).
[25] *Id.*
[26] *Id*. §1184(g)(5).
[27] Neil G. Ruiz, *Key facts about the U.S. H-1B visa program,* Pew Research Center (Apr. 27, 2017), https://www.pewresearch.org/fact-tank/2017/04/27/key-facts-about-the-u-s-h-1b-visa-program/.
[28] *See* U.S. CITIZENSHIP & IMMIGR. SERVS., *News Release on Final Rule for a More Effective and Efficient H-1B Visa Program* (Jan. 30, 2019), https://www.uscis.gov/news/news-

behalf of all beneficiaries under the regular cap, including those that may be eligible for the advanced degree exemption.[29] USCIS then selects from the remaining eligible petitions to reach the master's cap.[30] However, if a student visa holder is not selected for an H-1B visa, they must leave the country immediately and may not apply for another visa until the following year.[31] Moreover, the process of receiving an H-1B visa is complex and an applicant must overcome several obstacles.

III. H-1B VISA PROGRAM

To apply for an H-1B visa, the Immigration Act of 1990 requires that the applicant be in a specialty occupation.[32] Specialty occupation is defined as an occupation requiring: A. theoretical and practical application of a body of highly specialized knowledge, and B. attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the U.S.[33] Furthermore, if a state license is required to practice in the occupation, the applicant must obtain that license.[34] Some examples

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releases/dhs-announces-final-rule-a-more-effective-and-efficient-h-1b-visa-program.

[29] *Id.*

[30] Nitzschke, *supra* note 22, at 605.

[31] *Id.*

[32] 8 U.S.C. § 1184(i)(1) (2015).

[33] *Id.*

[34] *Id.* § (i)(2)(A).

of a *specialty occupation* mentioned in subsequent federal regulations include architecture, engineering, mathematics, physical sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts.[35]

The employer must also file a "labor condition application" (LCA) with the U.S. Department of Labor (DOL).[36] In the LCA, an employer attests to several things, including that (1) the employer is paying at least the prevailing wage level in the area of employment or the actual wage level received by others at the place of employment, whichever is greater; (2) the working conditions of similarly-employed workers will not be adversely affected; (3) there is not a strike or lockout; and (4) the employer has notified its existing employees of the filing, in specified ways.[37] The DOL uses these certifications to ensure that employment of the foreign skilled workers will not preclude employment opportunities for U.S. workers.[38] Once the Department of Labor approves and certifies the LCA, the employer must file the I-129 petition with USCIS to sponsor the foreign national as an H-1B nonimmigrant.[39] The application is reviewed by USCIS before the State Department interviews the

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[35] 8 C.F.R. § 214.2(h)(4)(ii) (2019).
[36] *See* Labor Condition Application (LCA) Specialty Occupations with the H1-B, H1-B1, and E-3 Programs, https://flag.dol.gov/programs/lca.
[37] *Id.*
[38] *Id.*
[39] *Id.* § 214. 2(h)(2)(i)(A).

foreign worker and issues the visa. The program allows employers to hire foreigners to work for up to six years in jobs, with the possibility of an extension if they have a green card application pending.[40]

Many agree that the complicated H-1B process is due for a major overhaul, however, there is continued controversy on how to fix the system.[41] Critics of the H1-B visa program argue that immigration policies should protect U.S. workers and advocates for the program argue that the caps do not adequately meet employer demands.[42] The next section argues that the U.S. should institute policies that attract high-skilled migration based on their economic, social, and technical contributions.

IV. BENEFITS OF HIGHLY SKILLED STUDENTS

[40] 8 U.S.C. § 1184(g)(4).

[41] *See* Samuel Gray, *Rethinking the Law and Economics of Immigration Policy for High-Skilled Migrants in the Global Knowledge Economy*, 34 GEO. IMMIGR. L.J. 473, 482 (2020) (arguing that the current system is too bureaucratic adding complexity to an already polarizing and controversial area of the law).

[42] *See* Kevin Miner & Sarah K. Peterson, *High Stakes for High-Skilled Immigrants: An Analysis of Changes Made to High-Skilled Immigration Policy in the First Year of the Trump Administration in Comparison to Changes Made During the First Year of Previous Presidential Administrations*, 44 MITCHELL HAMLINE L. REV. 970, 978 (2018).

Like the H-1B program, the presence of international students is a controversial subject.[43] On the one hand, academic institutions and various immigrant rights advocates view international students and workers in a positive light as advancing the American economy, promoting diversity, and enhancing innovative activity.[44] On the other hand, scholars question their economic value, and express concern regarding the impact of international students on national security and the educational and professional opportunities they potentially take away from American-born citizens.[45] Nevertheless, the U.S. has much to gain by admitting international students to study at our colleges and universities.[46]

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[43] *See* Meng Lu, *Not Part of the Family: U.S. Immigration Policy and Foreign Students*, 34 T. MARSHALL L. REV. 343, 345 (2009) (describing the controversies surrounding the impact of foreign students on the U.S. economy, national security, and educational and professional opportunities for native-born Americans).

[44] *Id*; *see also* Blair Jackson, *Documentation of International Students in the United States: Forging Alliances or Fostering Alienation*? 18 GEO. IMMIGR. L.J. 373, 376 (2004).

[45] Lu, *supra* note 43.

[46] *See* Jackson, *supra* note 44, at 374–377 (discussing the benefits international students bring to the U.S. including financial, foreign policy, and national security benefits).

A. Economic Value

Given the high cost of American higher education and that a large proportion of international students are from developing countries such as China and India, studying in the U.S. can be a tremendous hardship for many students.[47] Yet, thousands of students study in the U.S. each year and contribute billions of dollars to the economy.[48] According to NAFSA: Association of International Educators, international students contributed $38.7 billion to the economy during the 2019-2020 academic year.[49] They also created and supported 415,996 jobs by spending in areas such as higher education,

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[47] *See* Lu*, supra* note 43, at 360–61; *see also* Erin Duffin, *Number of international students in the U.S., by country of origin 2019/20*, STATISTICA (Nov. 23, 2020), https://www.statista.com/statistics/233880/international-students-in-the-us-by-country-of-origin/ (noting that the majority of international students in the U.S. are originally from China and India, totaling 372,532 students and 193,124 students respectively in the 2019/20 school year).

[48] *See* Lu, *supra* note 43; *see also* Arielle Mitropoulus, *Loss of International Students could damage U.S. economy, experts say*, ABC News (July 14, 2020, 5:07 PM), https://abcnews.go.com/Business/loss-international-students-damage-us-economy-experts/story?id=71754388#:~:text=International%20students%20contributed%20%2445%20billion,dependent%20on%20the%20revenue%20streams.

[49] *Economic Value Statistics*, NAFSA (last visited Mar. 3, 2021), https://www.nafsa.org/policy-and-advocacy/policy-resources/nafsa-international-student-economic-value-tool-v2#trends_reports.

accommodation, dining, retail, transportation, telecommunications, and health insurance.[50]

International students are an especially beneficial resource for educational institutions.[51] Many serve as research or teaching assistants for large universities where they conduct high quality research with top faculty.[52] They typically pay higher tuition than domestic students and are ineligible to receive federal financial aid, thereby reserving financial aid for American students.[53] In addition, international students are prohibited from off-campus employment except in cases involving extreme financial hardship or in limited circumstances after completing their first academic year.[54] Thus, more than half of all international students receive most of their financial funds from personal sources and from their home country governments or universities.[55]

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[50] *Id.*

[51] *See* Lu, *supra* note 43, at 346–47; *see also* Mitropoulus *supra* note 48.

[52] *See* Lu, *supra* note 43, at 356–57.

[53] *Id*. at 359-360

[54] *Id*; *see also Students and Employment*, U.S. CITIZENSHIP AND IMMIGRATION SERVICES, https://www.uscis.gov/working-united-states/students-and-exchange-visitors/students-and-employment.

[55] *See Research Special Reports and Analysis*, OPEN DOORS (lasted visited Mar. 3, 2021), https://opendoorsdata.org/services/research-special-reports-and-analyses/; *see also* Financial Aid for Undergraduate Students, NAFSA (last visited Mar. 3, 2021), https://www.nafsa.org/about/about-international-education/financial-aid-undergraduate-international-students.

B. Innovation and Technology

International students and foreign workers fill a critical need in the Science, Technology, Engineering, and Math (STEM) fields.[56] With respect to science and engineering, immigrants account for 29% of the United States college-educated workforce and 52% of its doctorates.[57] The National Foundation for American Policy found that many science and engineering majors and graduate programs at U.S. universities could not function without international students.[58] In 2015, there were only 7,783 full-time U.S. graduate students in electrical engineering, compared to 32,736 full-time international students.[59] Similarly, in computer science, in 2015, there were only 12,539 full-time

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[56] *See* Lu, *supra* note 43, at 345-47; *see also The Importance of International Students to American Science and Engineering*, National Foundation for American Policy, NFAP Policy Brief, (October 2017), http://nfap.com/wp-content/uploads/2017/10/The-Importance-of-International-Students.NFAP-Policy-Brief.October-20171.pdf.

[57] Sari Pekkala Kerr & William R. Kerr, *Immigration Policy Levers for Us Innovation and Startups*, Working Paper 27040, National Bureau of Economic Research, 2 (Apr. 2020), https://www.nber.org/system/files/working_papers/w27040/w27040.pdf.

[58] *The Importance of International Students to American Science and Engineering*, National Foundation for American Policy, NFAP Policy Brief, 2 (Oct. 2017), http://nfap.com/wp-content/uploads/2017/10/The-Importance-of-International-Students.NFAP-Policy-Brief.October-20171.pdf.

[59] *Id*. at 1.

U.S. graduate students compared to 45,790 international graduate students.[60] Moreover, there is no evidence that students participating in the OPT program with STEM majors deprive U.S. workers of job opportunities.[61] In contrast, employers are likely to hire foreign students when there is a shortage of U.S. workers.[62]

After graduation, many international students stay in the U.S. through the H1-B visa and are a large source of high-skilled, specialized talent in the U.S. [63] Many of them either work for technology companies or start their own.[64] Data indicates that one-quarter of the founders of $1 billion U.S. startups were international students[65] and that immigrants account for about a quarter of new firms and patents.[66] From 2000 to 2010, more immigrant inventors migrated to the U.S. than to all other countries combined.[67] In addition, contrary to

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[60] *Id*.
[61] Madeline Zavodny, *International Students, Stem OPT And the U.S. Stem Workforce*, National Foundation for American Policy, NFAP Policy Brief, 1 (Mar. 2019), http://nfap.com/wp-content/uploads/2019/03/International-Students-STEM-OPT-And-The-US-STEM-Workforce.NFAP-Policy-Brief.March-2019.pdf.
[62] *Id.*
[63] *See* Caleb Watley, *America's Innovation Engine Is Slowing*, ATLANTIC (July 19, 2020), https://www.theatlantic.com/ideas/archive/2020/07/americas-innovation-engine-slowing/614320/.
[64] *Id.*
[65] *See* Mitropoulus, *supra* note 48.
[66] *See* Kerr, *supra* note 57, at 2.
[67] *See* Watley, *supra* note 63.

popular belief, H1-B workers do not drive down wages of American born citizens, but in some cases positively impact wages overall. [68]

C. Diversity

International students contribute significantly to the diversity of a school.[69] They bring their culture and knowledge with them and take their knowledge of American culture and democracy back to their home countries.[70] Many colleges and universities publicly acknowledged the important cultural contributions that international students make to their institutions after President Trump issued his first travel ban.[71] For example, President Teresa Sullivan, and executive vice president and provost of the University of Virginia commented that "Being a *great* university in the 21st century means being a *global* university, and our entire university community is enriched and enlightened by

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[68] *THE H-1B VISA PROGRAM A PRIMER ON THE PROGRAM AND ITS IMPACT ON JOBS, WAGES, AND THE ECONOMY*, AMERICAN IMMIGRATION COUNCIL, 3 (APR. 2, 2020), https://www.americanimmigrationcouncil.org/sites/default/files/research/the_h-1b_visa_program_a_primer_on_the_program_and_its_impact_on_jobs_wages_and_the_economy.pdf.

[69] *See* Jackson, *supra* note 44, at 376

[70] *Id.*

[71] *See* Paul Fain, *Forceful Response*, INSIDE HIGHER ED (Jan. 30, 2017), https://www.insidehighered.com/news/2017/01/30/higher-education-leaders-denounce-trumps-travel-ban.

interacting with teachers and students from other nations."[72]

Although government officials often impose tighter visa restrictions for national security purposes, like in the travel ban cases, many scholars argue that educational exchanges that welcome international students and potential world leaders help promote our national security interests and help our fight against terrorism.[73] Colin L. Powell, retired four-star general of the United States army, remarked: "I can think of no more valuable asset to our country than the friendship of future world leaders who have been educated here."[74] The long list of leaders educated in America demonstrate the impact that a U.S. education system can have on foreign relations and the opportunity it presents to reduce stereotypes and build cross-cultural relationships.[75]

Hiring international students after graduation also creates a diverse workforce and fosters cross-

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[72] *Id.*
[73] *See* Jackson, *supra* note 44, at 374-76.
[74] *Losing Talent 2020 An Economic and Foreign Policy Risk America Can't Ignore*, NAFSA, 5 (Mar. 2020), https://www.nafsa.org/sites/default/files/media/document/nafsa-losing-talent.pdf.
[75] *See* Jackson, *supra* note 44, at 374 (summarizing several world leaders educated in the U.S. including Jorge Quiroga Ramirez, the former president of Bolivia, Benjamin Netanyahu, the former prime minister of Israel, Jacques Chirac, the former president of France, and Alejandro Toledo, the former president of Peru).

border work.[76] International workers bring creativity, new perspectives, and form an integrated work environment.[77] Moreover, as globalization continues to reshape our economy, foreign workers allow businesses to form international partnerships leading to greater profitability and productivity.[78] Without expanding opportunities for students to work in the U.S. after graduation, many worry that the U.S. will lose valuable talent and they will either return to their home countries or emigrate to more welcoming countries like Canada, Australia, and the United Kingdom where they are removing administrative barriers and quickly hiring foreign students from their own universities.[79] Canada, for instance, allows foreign students to count a portion of their schooling toward a residency requirement for citizenship.[80] The United Kingdom allows students to stay for two years after graduating while seeking employment.[81] As a result, international student enrollment in Canada increased by 16% in

[76] *See* Julie Monroe, *Protecting the H1-B visa*, 2019 U. Ill. L. Rev. 1385, 1405-6 (2019).
[77] *Id.*
[78] *Id.*
[79] *See* Gray, *supra* note 41, 478-79.
[80] *See* Eman Katem, *Canada Eases Pathway to Citizenship for International Students*, CANADA STUDY NEWS (Oct. 11, 2017), https://www.canadastudynews.com/2017/10/11/canada-eases-pathway-to-citizenship-for-international-students/.
[81] *See UK to allow foreign students to stay for two years after graduation to find work*, REUTERS (Sept. 11, 2019), https://www.reuters.com/article/us-britain-eu-students/uk-to-allow-foreign-students-to-stay-for-two-years-after-graduation-to-find-work-idUSKCN1VW0ZL.

2018, while U.S. international student enrollment was flat.[82] In the 2018-19 academic year, international students studying in the United Kingdom grew 5.9% with a sizeable 42% increase in new enrollments from India.[83] In comparison, in the U.S., enrollment from India grew just 2.9%.[84]

While other countries embrace high skilled workers and students, the Trump administration implemented executive orders that restricted their entry.[85] The next section discusses two of these executive orders, the Muslim travel bans and the Buy American, Hire America order.

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82 *Losing Talent 2020 An Economic and Foreign Policy Risk America Can't Ignore,* NAFSA, 10 (Mar. 2020), https://www.nafsa.org/sites/default/files/media/document/nafsa-losing-talent.pdf.

83 *Id.*

84 *Id.*

85 *See* Gray, *supra* note 41, at 483 (noting several anti-immigration actions taken by the Trump administration for their potential impact on U.S. economic growth, entrepreneurship, and innovation including greater scrutiny of H1-B visas, recission of the Obama-era International Entrepreneurship rule, and heightened screening of immigration regulations and adjudications); see also Kit Johnson, *Opportunities & Anxieties: A Study of International Students in the Trump Era*, 22 Lewis & Clark L. Rev. 413, 421-23 (2018) (discussing how Trump's actions during his campaign and after his election caused concern for international students and their families).

V. EXECUTIVE ACTIONS IN IMMIGRATION LAW

Executive actions are becoming increasingly popular to resolve large-scale national issues and they are particularly attractive during congressional gridlock.[86] One primary example is in immigration law where many practical policy changes are implemented through sub-regulatory action, such as executive orders, policy guidance memoranda, and agency adjudication policies.[87] The Trump administration especially made substantive and procedural changes to immigration law through sub-regulatory actions, such as the presidential proclamation banning travel from six Muslim majority countries and the Buy American and Hire American executive order.[88] While these executive actions did not directly target international students and were later rescinded by President Biden, they nevertheless affected current and prospective students.[89]

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[86] *See* Shany Winder, *Extraordinary Policy Making Powers of the Executive Branch: A New Approach*, 37 Va. Envtl. L.J. 207, 208 (2019) (noting that the executive branch's chief justification for expanding and redefining its authority is because of a dysfunctional legislative branch).
[87] *Id.*; *see also* Miner & Peterson, *supra* note 42, at 974.
[88] *See* Miner & Peterson, *supra* note 42, at 990–998 (noting that the Trump administration affected high-skilled immigration policy in its first two years more than the prior two administrations through a combination of sub-regulatory actions).
[89] *See* Ashvariya Kavi, *Biden's 17 Executive Orders and Other Directive in Detail*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/20/us/biden-executive-

A. Travel Bans

President Trump issued three travel bans during his presidency.[90] He instituted his first ban immediately after taking office in January 2017.[91] The ban restricted entry of nationals from seven Muslim-majority countries including Iraq, Syria, Iran, Libya, Somalia, Sudan and Yemen from visiting the country for ninety days.[92] The order also suspended entry of all Syrian refugees indefinitely and prohibited any other refugees from coming into the country for 120 days.[93] The order referenced Section 212(f) of the INA, which authorizes the president to suspend the entry of foreigners who "would be detrimental to the interests of the United

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orders.html; *see also President Biden Revokes 'Buy American and Hire American' Executive Order*, NATIONAL LAW REVIEW (Feb. 5, 2021), https://www.natlawreview.com/article/president-biden-revokes-buy-american-and-hire-american-executive-order; *see also* Johnson, *supra* note 85, at 419-24.

[90] Peter J. Spiro, *Trump v. Hawaii, 138 S. Ct. 2392. United States Supreme Court, June 26, 2018*, 113 Am. J. Int'l L. 109 (2019).

[91] Exec. Order No. 13769, 82 Fed. Reg. 8977 (Jan. 27, 2017).

[92] Exec. Order 13769, at § 3(c) (incorporating by reference those countries designated as countries of concern under Section 217(a)(12) of the Immigration and Nationality Act, 8 U.S.C. 1187). Under that section, nationals of Iraq, Iran, Sudan, and Syria were deemed ineligible for the visa waiver program, to which the Obama administration added by designation nationals of Libya, Somalia, and Yemen.

[93] *Id.*, at § 5.

States."[94] The ban resulted in mass protests and chaos at airports with people being detained, questioned, or temporarily deported.[95] Many visa-holders including legal permanent residents were also prohibited from boarding flights to enter the U.S. and were stranded at airports abroad.[96] Eventually, the Ninth Circuit upheld a district court's decision to block the ban nationwide.[97]

On March 6, 2017, President Trump revised his first travel ban.[98] The new ban, like the original one, suspended entry from Muslim majority countries except for Iraq.[99] It also removed the indefinite ban on Syrian refugees and allowed individuals who had a valid visa to enter the country, regardless of their origin.[100] The travel ban was enjoined by lower federal courts under the Establishment Clause and Section 212(f).[101] The plaintiffs successfully argued that the travel restrictions unconstitutionally disfavored a class of persons on a religious basis contrary to the First

[94] 8 U.S.C. § 1182(f).
[95] *See* Spiro, *supra* note 90, at 110.
[96] *Id.*
[97] Washington v. Trump, 2017 WL 462040 (W.D. Wash. Feb. 3, 2017); Washington v. Trump, 847 F. 3d 1151 (9th Cir. 2017).
[98] Exec. Order 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017).
[99] *Id.*
[100] *Id.*, § 3(a).
[101] IRAP v. Trump, 857 F.3d 554 (4th Cir. 2017) (en banc) (Establishment Clause grounds); Hawaii v. Trump, 859 F.3d 741 (9th Cir. 2017) (per curiam) (statutory grounds).

Amendment.[102] The lower courts also found the restrictions were not authorized by Section 212(f), and that Congress had not delegated power to the president to limit the entry of individuals otherwise eligible for admission to the U.S.[103]

However, in June 2017, the Supreme Court allowed the Administration to enforce the ban against persons from the affected countries who lacked a bona fide connection to a U.S. person or entity.[104] The Court's ruling also allowed the Trump Administration to conduct a worldwide review of countries whose nationals should be banned from traveling to the U.S.[105]

Subsequently, on September 24, 2017, President Trump issued a third version of the travel ban based on the worldwide review.[106] The order banned entry of most nationals of countries designated as "deficient with respect to their identity-management and information-sharing capabilities, protocols, and practices."[107] The countries included: Syria, Libya, Iran, Yemen, Somalia, Chad, and North Korea.[108] Like the March 6 ban, the third travel ban contained several exemptions for dual nationals, green card holders, and nationals subject to the ban who already had U.S. visa stamps or were already in

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[102] 859 F.3d at 755-56.
[103] *Id.*
[104] Trump v. IRAP, 137 S. Ct. 2080, 2087 (2017) (per curiam).
[105] *Id.*, at 2088.
[106] Proclamation No. 9645, 82 Fed. Reg. 45161 (Sept. 24, 2017).
[107] *Id.*
[108] *Id.*, § 1(g).

the U.S.[109] The order also allowed student and exchange visitor visas to be issued to nationals of Iran.[110] Nationals of Libya, Yemen, and Chad remained eligible for non-immigrant visas other than for temporary tourist or business visitors.[111] The ban also placed restrictions on certain Venezuelan government officials and designated nationals from Syria and North Korea as ineligible for all non-immigrant visa categories.[112]

Although the September order was once again enjoined in the lower courts, the Supreme Court upheld the order because, on its face, it supported legitimate national security interests under Section 212(f).[113] The majority found that the travel restrictions were rationally related to U.S. national security objectives.[114] The Court also held that laws prohibiting nationality-based discrimination did not limit the President's power to determine who may enter the U.S.[115]

Despite being upheld, the travel bans, along with President's Trump's other anti-immigration rhetoric, created concern for international students, their families, and academic advisors.[116] A February

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[109] *Id.*, § 3(b).
[110] *Id.*, § 2(b)(ii).
[111] *Id.*, § 2.
[112] *Id.*
[113] Trump v. Hawaii, 138 S. Ct. 2392 (2018).
[114] *Id*. at 2420.
[115] *Id.* at 2418.
[116] *See* Johnson, *supra* note 85, at 420-24 (Quoting Anton Crace, professional international education resources, US & THEM: EDUCATION AGENT EXECUTIVE WHITE PAPER 1

2017 survey found that agents who advise international students about where to apply, indicated that the travel ban "permanently damaged" how many recruiters saw the United States, and that it had "temporarily dampened" the opinion of another 44% of recruiters.[117] The bans also created fear among students and scholars already in the U.S. that if they left the country, they would not be allowed back in.[118] In fact, there were multiple cases of students being denied entry back into the U.S. to continue their studies despite having a valid visa.[119]

Alongside the travel bans, President Trump also directed federal agencies to tighten vetting

(2017)); *see also* Elizabeth Redden, *Will International Students Stay Away?* INSIDE HIGHER ED, (Mar. 13, 2017), https://www.insidehighered.com/news/2017/03/13/nearly-4-10-universities-report-drops-international-student-applications.

[117] *Id*. at 422.

[118] *See* Elizabeth Redden, *Stranded and Stuck,* INSIDE HIGHER ED, (Jan. 30, 2017), https://www.insidehighered.com/news/2017/01/30/students-and-scholars-are-stranded-after-trump-bars-travel-nationals-7-countries.

[119] *See* Elizabeth Redden, *Iranian Student Denied Entry to U.S.,* INSIDE HIGHER ED, (Jan. 22, 2020), https://www.insidehighered.com/news/2020/01/22/iranian-student-bound-northeastern-removed-us-despite-court-order (discussing several instances of Iranian students being denied entry back into the U.S. with valid visas); *see also* Kit Johnson, *Universities as Vehicles for Immigration Integration*, 46 FORDHAM URB. L.J. 580, 585 (2019).

procedures for prospective visitors.[120] To implement this extreme vetting directive, agencies made several changes including but not limited to allowing consular officials to conduct lengthier and more in-depth interviews; collecting personal information from foreign nationals such as five years' worth of social media handles, email addresses and phone numbers and 15 years of biographical information including addresses, employment and travel history; and requiring in-person interviews for employment-based adjustment applicants and certain family members of refugees and asylees.[121]

The extreme vetting procedures caused increased delays and denials especially for international students primarily because of heightened security checks.[122] University officials reported that processing times for foreign visas increased by 46% over the last two fiscal years. During the Trump Administration, it took about 180 days to complete security checks, as opposed to the previous 60 days.[123] In addition, in some cases students were not aware that they had been selected for greater security checks until they bought their plane tickets, secured housing, and selected their courses.[124]

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[120] August T. Fragomen et al., *§ 1:13. Executive actions on travel restrictions and "extreme vetting,"* Immigr. Legis. Handbook § 1:13 (May 2020).
[121] *Id.*
[122] *Id.*
[123] *Id.*
[124] *Id.*

B. Executive Orders Targeting H-1B Visas

Beyond the travel bans and extreme vetting procedures, another source of concern for international students was President Trump's position regarding the H-1B visa.[125] The H-1B visa is a gateway for many students to work in the U.S. and to eventually attain permanent residency.[126] If the H1-B visa was no longer attainable, studying in the U.S. would be less attractive and colleges and universities would receive fewer international applications.[127] Unfortunately, the Trump Administration made the H1-B process more cumbersome through the Buy American and Hire American (BAHA) executive order and other sub-regulatory actions.[128]

On April 18, 2017, President Trump signed the BAHA executive order.[129] Although the order was expressly issued to create higher wages and employment rates for U.S. workers, it also directed agencies to rigorously enforce and administer the

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[125] *See* Johnson, *supra* note 85, at 420–21 (discussing how Trump's comments regarding the H1-B visa caused concern for international students since many hope to work in the U.S. after graduation).
[126] See Julie Monroe, *Protecting the H1-B visa*, 2019 U. ILL. L. REV. 1385, 1387 (2019).
[127] *Id*. at 1404.
[128] *See* Miner & Peterson, *supra* note 42, at 990–1000.
[129] Exec. Order No. 13788, 82 Fed. Reg. 18,837 (Apr. 18, 2017).

immigration laws.[130] To implement the order, USCIS issued decisions leading to a dramatic increase in both the number of denials for H-1B petitions and requests for evidence (RFEs).[131] According to the National Foundation for American Policy, the rate of H-1B denials in the third quarter of Fiscal Year 2017 (FY 2017) was 15.9% and rose to 22.4% the following quarter (a 41% increase).[132] The report also found that the number of H-1B RFEs issued in the first, second, and third quarters of FY 2017 combined totaled 63,599 while the fourth quarter of FY 2017 alone resulted in issuance of roughly the same number, i.e., 63,184. This represented a roughly 67% increase in the total number of H-1B RFEs during the months of July, August, and September of 2017.[133]

USCIS increased the number of denials and RFEs in part by limiting the term *specialty occupation* and requiring additional evidence for third-party placements.[134] For example, in a line of cases, USCIS denied H-1B petitions for the proposition that the term *degree* in the statute and

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[130] *Id.*
[131] *H-1B Denials and Requests for Evidence Increase Under the Trump Administration*, National Foundation for American Policy 1 (July 2018), https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf.
[132] *Id.*
[133] *Id.*
[134] *See* John Medeiros & Allison Wells, *Administration's 'Culture of No' Undermines Immigrant Workers, Employers*, 75-NOV BENCH & B. MINN.10 (2018).

regulations refers not to just any baccalaureate or higher degree but to one in a specific specialty that is directly related to the occupation.[135] In a 2017 memo, USCIS also rescinded prior guidance indicating that a computer programmer was categorically a specialty occupation.[136] In addition, USCIS denied petitions and requested additional evidence in cases where the beneficiary was employed at a worksite other than petitioner's normal place of business.[137] This scenario often arises in technology outsourcing firms.[138]

President Trump's other actions also impacted the H-1B visa. Amid the Coronavirus pandemic, he suspended new work visas and prohibited thousands of immigrants from seeking

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[135] *See* Royal Siam Corp. v. Chertoff, 484 F. 3d 139, 80 A.L.R. Fed.2d 487 (1st Cir. 2007).

[136] *See* U.S. Citizenship & Immigr. Servs., Policy Memorandum on the Rescission of the December 22, 2000 Guidance memo on H-1B computer related positions, 2 (Mar. 31, 2017), https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf.

[137] *See* USCIS News Release*, "USCIS Strengthens Protections to Combat H-1B Abuses"* (Feb. 22, 2018), available at https://www.uscis.gov/news/news-releases/uscis-strengthens-protections-combat-h-1b-abuses.

[138] *See* Glenn Thrush, Nick Wingfield and Vindu, *Trump Signs Order That Could Lead to Curbs on Foreign Workers*, N.Y. TIMES, (Apr.18, 2017), https://www.nytimes.com/2017/04/18/us/politics/executive-order-hire-buy-american-h1b-visa-trump.html.

work in the U.S.[139] Four months before the 2020 election, his administration instituted rules substantially raising the wages a company must pay foreign workers and further narrowing the H-1B eligibility requirement.[140] The rules were later invalidated by three district courts for bypassing regulatory procedures.[141] In ruling that President Trump overstepped his authority, federal district court Judge Jeffrey S. White remarked "there must be some measure of constraint on presidential authority in the domestic sphere in order not to render the executive an entirely monarchical power."[142] Judge White's comment reflects the excessive use of presidential power in modern-day America especially in immigration law. The broad scope of the president's inherent, constitutional, and delegated powers over immigration has allowed presidents considerable latitude in creating immigration policies particularly during national

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[139] Michael D. Shear & Miriam Jordan, *Trump Suspends H-1B and Other Visas That Allow Foreigners to Work in the U.S.*, N.Y. TIMES, (June 22, 2020), https://www.nytimes.com/2020/06/22/us/politics/trump-h1b-work-visas.html.

[140] *Trump Administration Increases Salary Requirements for H-1B Visa Holders*, JD SUPRA (Jan. 14, 2021), https://www.jdsupra.com/legalnews/trump-administration-increases-salary-3132893/.

[141] *Id.*

[142] NAM v. DHS, 491 F. Supp.3d 549, 563 (N.D. Cal. 2020); *see also* Miriam Jordan, *Judge Blocks Trump's Ban on Foreign Workers*, N.Y. TIMES (Oct.1, 2020), https://www.nytimes.com/2020/10/01/us/foreign-workers-visas-h-1b-trump.html.

emergencies as evidenced by the travel bans and the restrictions placed on the H-1B visa.[143] The next part of the article discusses where executive power stems from in immigration law and the concerns with the rise of executive power.

VI. SOURCE OF PRESIDENTIAL AUTHORITY IN IMMIGRATION

Presidential power over immigration stems from the plenary power doctrine, congressional grant of power in the INA, and constitutional grant of power.[144]

A. Plenary Power Doctrine

The plenary power doctrine limits judicial scrutiny of immigration policies promulgated by Congress and the President.[145] The doctrine is based on the premise that since immigration is a question of national sovereignty, the political branches have the power to exclude, deport, or detain noncitizens.[146] It originated from the 1889 Chinese

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[143] *See* Fatima E. Marouf, *Executing Overreaching in Immigration Adjudication*, 93 TUL. L. REV 707, 717-723 (2019) (discussing the President's power over immigration including inherent powers related to sovereignty and foreign affairs, enumerated and implied constitutional powers, and powers delegated by Congress in the INA).
[144] *Id.* at 717.
[145] *See* Catherine Y. Yim, *Plenary Power in the Modern Administrative State*, 96 N.C. L. Rev. 77, 79 (2017).
[146] *Id.*

Exclusion Case, *Chae Chan Ping v. United States,* where the Supreme Court upheld a federal statute that excluded a Chinese worker from reentering the U.S., despite living here for many years and having the required reentry forms.[147] The Supreme Court concluded that the power to exclude noncitizens is not subject to judicial review but lies exclusively with the political branches of government.[148] Thereafter, the Court extended plenary power principles to administrative officials in *Nishimura Ekiu v. United States*.[149] Nishimura challenged an administrative agency's decision that she should be excluded from entering the U.S. The Court rejected her claim and held that the management of the immigration system rested with the legislative and executive branches.[150]

Although in recent years, federal courts have curtailed an agency's plenary power over immigration, the Supreme Court reaffirmed it with respect to presidential immigration decisions.[151] In the 2018 *Trump v. Hawaii* case, the Supreme Court

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[147] *Id*. at 84; *see also* Chae Chan Ping v. United States (*Chinese Exclusion Case*), 130 U.S. 581, 609 (1889).
[148] 130 U.S. at 609.
[149] Nishimura Ekiu v. United States, 142 U.S. 651, 659 (1892).
[150] *Id.*
[151] *See* Yim, *supra* note 145, at 115 (suggesting that courts have not rejected the plenary power directly but concluded that it does not apply to unelected officials. Courts are reluctant to extend plenary power to certain decisions by agency officials but are more likely to extend it to similar decisions when made by Congress or the President); *see also* Marouf, *supra* note 143, at 718–20.

applied a "rational basis" standard of review to President Trump's order.[152] Under this deferential standard, the Court upheld the order based on national security concerns, and in doing so, the chief justice remarked; "our inquiry into matters of entry and national security is highly constrained."[153] However, in shielding the president's actions, the Court further elevated the power of the presidency by basing its decision on the perceived skill and expertise of the president without considering his actual or concrete actions.[154]

B. Legislative Authority

The executive branch's power also depends on the scope of legislative authority.[155] In *Youngstown Sheet & Tube Co. v. Sawyer*, Justice Jackson's concurring opinion provided guidance when the president is authorized to act.[156] Under that framework, he divided presidential authority into three categories. First, the president's power is highest when acting with congress's approval.

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[152] See Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018).
[153] *Id.*
[154] *See* Avidan Y. Cover, *Quieting the Court: Lessons from the Muslim Ban* Case, 23 J. GENDER RACE & JUST. 1, 11 (2020) (arguing that in "*The Muslim Ban Case*, the Court elevated the abstract power of the presidency over the particular actions of President Trump.").
[155] Richard E. Levy, *Presidential Power in the Obama and Trump Administrations*, 87-SEP J. KAN. B.A. 46, 48 (2018).
[156] *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

Second, when Congress is silent on an issue, "he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." And, finally, the president's power is at the lowest when conflicting with congress.[157] In the immigration context, the INA delegates some of the broadest powers to the executive branch.[158] As referenced in the travel ban cases, Congress delegated to the President the power to "suspend the entry of all aliens or any class of aliens" when he or she "finds that [their] entry ... into the United States would be detrimental to the interests of the United States."[159]

Moreover, INA's broad and ambiguous language allows administrative officials to develop a wide array of policies to determine whether a particular provision applies to an applicant.[160] For example, when applying for an F-1visa, prospective students must prove that they have a "residence in a foreign country which he has no intention of abandoning."[161] To make this determination, agency officials developed criteria such as land ownership, financial security, and family relations.[162] The INA also prevents judicial review of a wide array of

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[157] *Id*.
[158] *See* Marouf, *supra* note 143, at 722.
[159] 8 U.S.C. § 1182(f) (2012).
[160] *See* Yim, *supra* note 145, at 96–97.
[161] INA § 101(a)(15)(F)(i); 8 U.S.C.A. § 1101(a)(15)(F)(i); 8 C.F.R. § 214.2(f); 22 C.F.R. § 41.61(b).
[162] *See* Yim, *supra* note 145, at 96-97.

immigration decisions including cases related to the expedited removal of foreigners based on fraud, lack of documentation, or the commission of past crimes.[163] Thus agency officials often have the final say in implementing the INA.[164]

C. Constitutional Authority

A president's authority in the immigration context also stems from Article II of the Constitution. The Vesting Clause states that "The executive power shall be vested in a President of the United States" and the Take Care Clause states "[The President] shall take care that the laws be faithfully executed."[165] Scholars have interpreted these clauses to establish a unitary presidency authorizing him with the power to implement the laws of the United States.[166] The Constitution also gives the President foreign affairs power. For example, he has the power to conduct diplomacy by making treaties and receiving ambassadors.[167] Finally, as the Commander in Chief, the President has military powers and they become directly relevant during national emergencies, when the President's power is at its peak.[168] Historically, however, presidential

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[163] *Id.*

[164] *Id.*

[165] U.S. CONST. art. II, § 1, § 3.

[166] Ming H. Chen, *Beyond Legality: The Legitimacy of Executive Action in Immigration Law*, 66 SYRACUSE L. REV. 87, 97 (2016).

[167] U.S. CONST. art. II, § 2, cl. 2.

[168] *Id.* § 2, cl. 1; *see* Marouf, *supra* note 143, at 721.

power did not return to its former limits when the crises ended, and over time, presidential power has grown to include lawmaking functions.[169]

VII. CONCERNS WITH THE RISE IN EXECUTIVE POWER

One concern, most notably in immigration law is that a stalemate in Congress has encouraged Presidents to set policies and make laws thereby exceeding their constitutional authority under the separation of powers doctrine.[170] The powers of the legislature, judiciary, and executive are identified in the United States Constitution. Although the powers may overlap, the Constitution embodies a system of separation of powers where Congress has the power to create laws, the executive branch has the power to carry-out the laws, and the judicial branch has the power to interpret the laws.[171] There is substantial evidence that our founding fathers intended to create a system of separation of powers to protect

[169] *See* Tara L. Branum, *President or King, The Use and Abuse of Executive Orders in Modern-Day America*, 28 J. Legis. 1, 6 (2002) (noting that once several crises were over such as the Civil War, Great Depression, and the World Wars, presidential power did not revert back to its former limits).
[170] Andrew M. Wright, *Presidential Executive Orders*, 52-SUM Ark. Law. 30 (2017).
[171] U.S. CONST. art. I, § 1; U.S. CONST. art. II, § 1; U.S. CONST. art. III, § 1.

individuals from arbitrary and oppressive exercise of power from one branch of government.[172]

Executive actions circumvent the procedural protections put in place by the founders in several ways. First, even though executive actions are easier to implement than legislation, they lack permanency and can be quickly reversed by the next president.[173] President Biden issued about 30 executive orders in his first two days in office targeting many of President Trump's executive mandates.[174] Legislation, on the other hand, requires a superseding legislative act or an adverse judicial ruling to alter it.[175] Second, laws passed by regular channels ensure the likelihood that proposed legislation has been publicly debated and carefully deliberated by the legislative and executive branches of government.[176] Finally, these procedures certify that legislation receive the approval of elected officials in the House, in the Senate, and by the President.[177]

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[172] *See* Branum, *supra* note 169, at 11–20 (describing the founding fathers' intent that separating responsibilities for creating and executing the laws was necessary to prevent arbitrary and tyrannical rule).
[173] *See id* at 32.
[174] *See* Glenn Thrush, *The Lure of Executive Orders: Easy to Implement, but Just as Easy to Cancel*, N.Y. TIMES (Jan 22, 2021),
https://www.nytimes.com/2021/01/22/us/politics/biden-executive-orders-trump.html.
[175] *See* Wright, *supra* note 170, at 32.
[176] *See* Yim, *supra* note 145, at 102.
[177] *See id.*

Moreover, in the immigration context, most enumerated powers related to immigration are vested with Congress. Article I states that Congress has the authority to "establish an uniform Rule of Naturalization,"[178] "regulate Commerce with foreign Nations,"[179] "declare War,"[180] and prohibit "[t]he Migration or Importation of such Persons as any of the States now existing shall think proper to admit."[181] Based on these Constitutional powers, the Supreme Court in *Fiallo v. Bell* stressed that "'over no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens."[182]

Yet courts have held executive actions unconstitutional in only a handful of cases. For example, in *Youngstown Sheet & Tube Co. v. Sawyer*, the Supreme Court held that President Truman lacked statutory and congressional authority to take possession of most of the country's steel mills.[183] In its decision, the Court emphasized the president's role as the executor as opposed to the lawmaker.[184] In *Chamber of Commerce v. Reich*, an appellate court overturned President Clinton's order

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[178] U.S. CONST. art. I, § 8, cl. 4.
[179] *Id.* § 8, cl. 3.
[180] *Id.* § 8, cl. 11.
[181] *Id.* § 9, cl. 1.
[182] Fiallo v. Bell, 430 U.S. 787, 792 (1977) (quoting Oceanic Steam Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909)).
[183] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).
[184] *Id.* at 587.

prohibiting the federal government from contracting with employers who hire permanent replacements for striking workers. The Court held that Clinton's actions, contradicted both a Supreme Court ruling and legislation.[185]

However, in general, courts are reluctant to get involved with presidential decision-making, and when they do, they are usually deferential to the president in the realm of rulemaking.[186] Congressional attempt to limit presidential lawmaking has also been largely unsuccessful, particularly in immigration law where legislation typically fails for lack of support.[187] Moreover, when Congress fails to act, the American public and other elected officials often expect presidents to use executive actions to quickly resolve difficult and large-scale issues.[188] This expectation that presidents promulgate laws and public policies is short-sighted and risky considering that the laws and policies are wholly dependent on who the next president is and how they use their power.[189] This approach also creates uncertainty and in the context of high-skilled immigration, if the process becomes too costly, time-consuming, or complicated, the question becomes how students and businesses will respond. In particular, will students continue to study in the U.S.

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[185] Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996).
[186] *See* Branum, *supra* note 169, at 60.
[187] *Id*. at 79.
[188] *Id*. at 57
[189] *Id.* at 86.

and will businesses continue to hire workers in the U.S. or take their work to countries like China and India that are sources of talent.[190] Thus, President Biden and Congress should work to enact immigration legislation that will stand the test of time and implement policies that will attract the best and brightest in the world.

VIII. CONCLUSION

International students contribute significantly to our society. They add tremendous economic value by contributing billions of dollars to the economy, and by supporting thousands of jobs. They fill a need in the STEM fields and contribute to the diversity of universities and colleges. Yet, there was a downward trend in international student enrollment during the Trump Administration. Executive actions such as the travel bans and the Buy American and Hire American orders created concern among prospective students, their families, and educational recruiters. Trump's executive actions also renewed concern regarding the rise of executive power. Executive actions bypass the democratic legislative process and the safeguards put in place by the Constitutional framers. Unfortunately, there is no push to limit unilateral presidential decision-making by the President, the courts, Congress, or the American public. In addition, the longer this situation continues, the tougher it will be to restrain

[190] *See* Miner & Peterson, *supra* note 42, at 123.

the abusive excesses of executive power by future presidents.[191] To help resolve this problem especially in the immigration context, President Biden should limit his actions and set an example for when presidential executive actions should be used. The American people should also be educated on the proper use of executive orders and the potential dangers of presidential overreaching. Finally, Congress should narrow the scope of authority it gives to the president in the immigration laws and limit his authority when it comes to declaring and maintaining a national emergency. Without these changes, immigration policies and rules will continuously be in flux and the U.S. will potentially lose many talented students and workers.

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[191] *Id.*

ADVOCATING FOR AUDITORS AND FINANCIAL STATEMENT USERS: REVISING STANDARDS BASED UPON LEGAL IMPLICATIONS OF ANALYTICS-DRIVEN AUDITING

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I. INTRODUCTION

The use of analytics-driven auditing by professional public accounting firms,[1] or specifically

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[1] Professional public accounting firms are professional organizations which can be "organized as proprietorships, general or limited liability partnerships, or corporations" which "typically offer a wide variety of professional services." WILLIAM F. MESSIER JR., STEVEN M. GLOVER & DOUGLAS F. PRAWITT, AUDITING & ASSURANCE SERVICES: A SYSTEMATIC APPROACH 40 (11th ed. 2019). When we use the term 'auditors' in this paper, we are referring to professional public accounting firms.

the use of data analytics[2] when performing an external audit of a company's financial statements,[3] has become prevalent in recent years as the focus on

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[2] The Public Company Accounting Oversight Board ("PCAOB"), an important regulatory body in this context, can be defined by its mission, which states "the PCAOB oversees the audits of public companies and SEC-registered brokers and dealers in order to protect investors and further the public interest in the preparation of informative, accurate, and independent audit reports." *About: Mission, Vision, and Values*, PUB. CO. ACCT. OVERSIGHT BD., ABOUT: MISSION, VISION, AND VALUES, https://pcaobus.org/about/mission-vision-values (last visited Oct. 2, 2021). The PCAOB sets the auditing standards for these types of audits, but does not specifically define "data analytics" in those standards. However, the PCAOB does indicate that "data analytics" includes the use of predictive analytics, regression analysis, correlation analysis, full population analysis, etc. PUB. CO. ACCT. OVERSIGHT BD., DATA AND TECHNOLOGY RESEARCH PROJECT UPDATE, https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/documents/data-technology-project-spotlight.pdf (last visited Oct. 6, 2021). For further explanation, Messier, Glover, and Prawitt define "data analytics [as] the process of obtaining, cleaning, transforming, and then using data to identify and communicate meaningful patterns, trends, outliers, and information in support of decision-making. Min Cao, Roman Chychyla & Trevor Stewart, *Big Data Analytics in Financial Statement Audits*, 29 ACCOUNTING HORIZONS, 423 (2015). In short, it is the process of using technology to transform *data* into *information*." In the context of a financial statement audit, Messier, Glover, and Prawitt define "audit data analytics . . . as the science and art of using analysis, modeling and visualization to discover and analyze patterns, anomalies, and other information for the purpose of planning and performing an audit." *Id.* at 758. For the purpose of our paper, when we use terms such as "data analytics" or "analytics-driven auditing," it is deemed to

emerging technologies continues to grow.[4] All of the current Big 4 professional public accounting firms, as well as other large professional public accounting

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reflect the same analysis that these definitions refer to.

[3] An external audit of a company's financial statements is a very specific type of assurance service, which encompasses attest services and financial statement audits. In general, Messier, Glover, and Prawitt define this process as follows, "*the evaluation of evidence to determine whether information has been recorded and presented in accordance with a predetermined set of criteria, together with the issuance of a report that indicates the degree of correspondence*." MESSIER ET AL., *supra* note 1, at 12. For a financial statement audit, the information is what the company's management is asserting occurred in its financial statements, the set of criteria that is commonly used is generally accepted accounting principles (in the United States), and the communication occurs through the audit report. *See* MESSIER ET AL., *supra* note 1.

[4] A few descriptions provide some context. "A whole host of technologies are emerging that promise to have dramatic effects on business and on the financial statement audit, including robotics, distributed blockchain databases, and artificial intelligence." *Id.* at 24. "The unprecedented improvements in computer-based analytics are fundamentally changing the way audits are being conducted. Computerization and cognitive technologies are allowing for greater precision, higher quality information, and more in-depth analysis in audits." *Id.* at 25. And finally, "until fairly recently, technology used to quickly analyze such large datasets required significant financial resources and specialized training. However, advances in technology now enable this data to be analyzed by a growing set of affordable and more user-friendly data mining and analytics software." *Id.* at 757.

firms,[5] have dedicated sections on their websites[6] indicating the extent to which emerging technologies and data analytics techniques are used in their audit processes.[7] For example, Ernst & Young (EY) uses EY Helix, which is a "global audit analytics platform

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[5] *Id.* at 41 ("Public accounting firms are often categorized by size. For example, the largest firms are the 'Big 4' [international] public accounting firms: Deloitte, Ernst & Young (EY), KPMG, and PwC. . . . Following the Big 4 in size are several national firms with international affiliations. This 'mid-tier' includes such firms as Grant Thornton, RSM, and BDO. . . . Last, there are thousands of regional and local CPA firms that have one or a few offices. These CPA firms provide audit, tax, accounting, and other services, generally to smaller entities than those served by the Big 4.").

[6] *See, e.g.*, *Audit Innovations*, DELOITTE TOUCHE TOHMATSU LTD., https://www2.deloitte.com/us/en/pages/audit/topics/audit-innovation.html?icid=top_audit-innovation (last visited Oct. 2, 2021); *see also Audit Technology*, ERNST & YOUNG GLOBAL LTD., https://www.ey.com/en_gl/audit/technology (last visited Oct 2. 2021); *Audit Data & Analytics*, KPMG INT'L LTD., https://home.kpmg/xx/en/home/services/audit/audit-data-analytics.html (last visited Oct. 2, 2021); *Tomorrow's Audit Today*, PRICEWATERHOUSECOOPERS, https://www.pwc.com/us/en/services/audit-assurance/financial-statement-audit-innovation.html (last visited Oct. 2, 2021).

[7] While there are many audit processes, a general summary can be found in Figure 1-4 of Messier et al., and it encompasses the following major phases: client acceptance/continuance, preliminary engagement activities, plan the audit, consider and audit internal control, audit business processes and related accounts, complete the audit, and evaluate results and issue audit report. MESSIER ET AL., *supra* note 1, at 19.

that allows analytics to be embedded into every significant aspect of the audit."[8] EY also uses an "analytics-driven approach to auditing resulting in more client-relevant audits" that enables them to "exercise a higher-level of professional skepticism."[9] Other large public accounting firms disclose similar information on their websites.[10]

A common theme on auditor websites is that the use of emerging technologies and analytics will increase both audit effectiveness (which we interpret as issuing the correct audit opinion in the audit report[11]) and audit efficiency (which we interpret as

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[8] *Audit Technology*, *supra* note 6.

[9] *Id.*

[10] Other accounting firms that have dedicated sections to data analytics and other emerging technologies include BDO USA, LLP; Grant Thornton; and RSM US LLP. *See, e.g.*, *Analytics & Insights*, BDO USA, LLP, https://www.bdo.com/digital/services/analytics-insights (last visited Oct. 2, 2021) (marketing "Digital" as a separate service); *see also Innovation Drives Increased Audit Quality and Value*, GRANT THORNTON, https://www.grantthornton.com/services/audit-services/audit-of-future.aspx (last visited Oct. 2, 2021); *Audit Innovation*, RSM US LLP, https://rsmus.com/what-we-do/services/assurance/featured-topics/audit-innovation.html (last visited Oct. 2, 2021).

[11] As summarized in Messier et al.'s Figure 18-1, a "clean" report is noted as an unqualified/unmodified report (which can have some modified wording based on certain circumstances). MESSIER ET AL., *supra* note 1, at 607. Variances from a "clean" report come from one of two ways. The first way is if there were problems in following the criteria that were supposed to be used in the financial statements themselves. Based on the severity, a qualified or adverse report can be

the extent of time and other resources[12] that are required to complete the audit), and therefore improve audit quality. If auditors employ analytics techniques such as regression analysis and full population analysis, then certain modern audit procedures have fundamentally changed from previous traditional audit procedures.[13] Moreover,

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issued. The second way is whether there were any limitations on obtaining evidence to support the report issued. Based on the severity of this limitation, either a qualified report or a disclaimer of opinion can be issued. There can be variations from this, based on specific circumstances, but this covers the main possible results.

[12] While there can be other resources that are needed based on the circumstances, this issue primarily relates to staffing requirements and using the staff in the most efficient way possible (i.e., reducing the costs associated with staffing in comparison to what the client will pay for the services performed). Ensuring there exists the proper engagement team is critical in ensuring an effective and efficient result. In determining the engagement team, Messier et al. note, "Public accounting firms need to ensure their engagements are completed by auditors having the proper degree of technical training and proficiency given the circumstances of the entity. Factors that should be considered in determining staffing requirements include engagement size and complexity, level of risk, any special expertise, personnel availability, and the timing of the work to be performed. . . . Generally, a time budget for planned work is prepared in order to assist with the staffing requirements and to schedule the fieldwork." MESSIER ET AL., *supra* note 1, at 70.

[13] An audit report written pursuant to the PCAOB's standards includes wording that describes these traditional audit procedures. While some of these terms have not yet been defined, we focus on the sampling component of this

we argue that this leads to a disconnect with current boilerplate language used in engagement letters and audit opinions.[14] For instance, the Public Company

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description. In Appendix B of the PCAOB's standards, the standard audit report states:

> Our audits included performing procedures to assess the risks of material misstatement of the financial statements, whether due to error or fraud, and performing procedures that respond to those risks. Such procedures included examining, on a test basis, evidence regarding the amounts and disclosures in the financial statements. Our audits also included evaluating the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the financial statements. We believe that our audits provide a reasonable basis for our opinion.

AS 3101: The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/oversight/standards/auditing-standards/details/AS3101 (last visited Oct. 4, 2021). The term audit sampling refers to the test basis examination of evidence to be completed in the conduct of an audit. Messier et al. provide some important perspective: "As a result, the auditor provides reasonable, not absolute, assurance that the financial statements are fairly presented. Accepting some uncertainty is the trade-off between the cost of examining all the data and the cost of making an incorrect decision based on a sample of the data." MESSIER ET AL., *supra* note 1, at 260–61.

[14] Messier et al. state:

Accounting Oversight Board (PCAOB) Standard AS 3101 requires a statement as part of the audit opinion in the audit report that the audit included "examining, on a *test basis* (emphasis added), evidence regarding the amounts and disclosures in the financial statements."[15] The use of "test basis"[16] in the audit opinion implies that sampling was used to perform audit procedures.[17] However, if auditors utilize

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> Auditing standards state that the auditor should document the understanding through a written communication with the entity. An *engagement letter* is used to formalize the arrangements reached between the auditor and the entity. This letter serves as a contract, outlining the responsibilities of both parties and preventing misunderstandings between the two parties.

MESSIER ET AL., *supra* note 1, at 71.

[15] *AS 3101*, *supra* note 13.

[16] In this paper, we make an important assumption that financial statement users perceive the term "test basis" in the audit opinion in the audit report as the use of audit sampling in the audit procedures performed, which is defined in the PCAOB Auditing Standards as "the application of an audit procedure to less than 100 percent of the items within an account balance or class of transactions for the purpose of evaluating some characteristic of the balance or class." *AS 2315: Audit Sampling*, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/oversight/standards/auditing-standards/details/AS2315 (last visited Oct. 4, 2021).

[17] As a definition of this term, Messier et al. state:

> *Audit sampling* is defined as the selection and evaluation of less than 100 percent of the items in a population of audit relevance in

analytics techniques, such as regression analysis and full population analysis, to perform audit procedures, then sampling on a test basis may not be employed, at least in part.

The use of data analytics in auditing has been the focus of academics[18] and practitioners.[19] For example, academics and practitioners have investigated the use of data analytics in auditing and the American Institute of Certified Public Accountants (AICPA)[20] has issued specific guidance

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> such a way that the auditor expects the sample to be representative of the population and thus likely to provide a reasonable basis for conclusions about the population.

MESSIER ET AL., *supra* note 1, at 261.

[18] Stephen Kozlowski, Hussein Issa & Deniz Appelbaum, *Making Government Data Valuable for Constituents: The Case for the Advanced Data Analytics Capabilities of the ENHANCE Framework*, 15 J. EMERGING TECHS. ACCT. 155 (2018).

[19] *See* Maria L. Murphy & Ken Tysiac, *Data Analytics Helps Auditors Gain Deep Insight*, 219 J. ACCT. 52 (2015).

[20] On its website, the AICPA states its mission and history as follows:

> Founded in 1887, the AICPA represents the CPA profession nationally regarding rule-making and standard-setting, and serves as an advocate before legislative bodies, public interest groups and other professional organizations. The AICPA develops standards for audits of private companies and other services by CPAs; provides educational guidance materials to its members; develops and grades the Uniform CPA Examination;

for the use of data analytics in auditing.[21] Furthermore, data analytics has received attention from the Association to Advance Collegiate Schools of Business (AACSB)[22] International.[23] This

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> and monitors and enforces compliance with the profession's technical and ethical standards.

AICPA Mission and History, AM. INST. OF CERTIFIED PUB. ACCTS., https://www.aicpa.org/about/missionandhistory.html (last visited Oct. 4, 2021).

[21] *See* AM. INST. OF CERTIFIED PUB. ACCTS., GUIDE TO AUDIT DATA ANALYTICS (2017).

[22] The AACSB is important in this context because it helps facilitate the education of future business leaders, who will become participants in the legal environment of business. On its own website, it states:

The [AACSB] connects educators, students, and business to achieve a common goal: to create the next generation of great leaders. Synonymous with the highest standards of excellence since 1916, AACSB provides quality assurance, business education intelligence, and professional development services to over 1,700 member organizations and more than 900 accredited business schools worldwide. When educational, professional, and business organizations become members of the AACSB Business Education Alliance, they are part of a movement united to improve the quality of business education around the world.

Who We Are, ASS'N TO ADVANCE COLLEGIATE SCHS. OF BUS., https://www.aacsb.edu/about/who-we-are (last visited Oct. 4, 2021).

[23] *See, e.g.*, ASS'N TO ADVANCE COLLEGIATE SCHS. OF BUS., 2013 ELIGIBILITY PROCEDURES AND ACCREDITATION STANDARDS FOR BUSINESS ACCREDITATION (2018) https://www.aacsb.edu/-/media/aacsb/docs/accreditation/business/standards-and-tables/2018-business-standards; *see also* ASS'N TO ADVANCE

increased attention and interest in data analytics is creating exciting opportunities for the accounting profession, which is reflected in the hiring practices of CPA firms.[24] Therefore, current and future auditors are involved in data analytics-based training in accounting and auditing.

Our purpose in this paper is to recommend that applicable regulatory bodies (e.g., PCAOB) consider revising current standards, related to appropriate wording in audit opinions and engagement letters, based upon the prevalent use of analytics-driven auditing. We also suggest that auditors should be given flexibility in the standards that allows the use of "test basis" language when analytics-driven audit procedures comprise less than a certain percentage (e.g., 50 percent) of total audit procedures. Likewise, since many auditors are essentially "advertising" the benefits of analytics-driven auditing,[25] we also recommend standard setters review policy as it relates to the

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COLLEGIATE SCHS. OF BUS., 2018 ELIGIBILITY PROCEDURES AND ACCREDITATION STANDARDS FOR ACCOUNTING ACCREDITATION (2018) https://www.aacsb.edu/-/media/aacsb/docs/accreditation/accounting/standards-and-tables/2018-accounting-standards.

[24] Ken Tysiac, *Report Finds Shift in Accounting Firm Hiring*, J. ACCT. (Aug. 13, 2019), https://www.journalofaccountancy.com/news/2019/aug/accounting-firm-hiring-trends-201921801.html.

[25] For examples of this type of advertising, please refer to the dedicated websites for the Big 4 public accounting firms and the large national public accounting firms mentioned previously, which include Deloitte, EY, KPMG, PwC, BDO, Grant Thornton, and RSM.

appropriateness of advertising in public accounting firms. Our main contribution, with a public interest focus, is associated with advocating for auditors and other stakeholders (financial statement users) motivated by stakeholder theory and the call for future research by Schnader, Bedard, and Cannon.[26] Part of the call in Schnader et al. relates to emphasizing the importance of the public interest and recognizing the multiple parties involved and impacted other than shareholders (as acknowledged by stakeholder theory). Schnader et al. highlight one way to accomplish this is to "consider how our existing regulatory structures facilitate, or impede, the auditor's ability to protect the public interest."[27] In this paper we address, at least in part, this particular call.

While prior research has focused on the benefits of utilizing data analytics in auditing, little research exists regarding the legal implications of the use of data analytics and emerging technologies in external auditing. Specifically, while the AICPA and PCAOB have emphasized the importance of ensuring that current auditing standards do not inhibit the use of data analytics in the audit,[28] no

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[26] *See* Anne Leah Schnader, Jean C. Bedard & Nathan Cannon, *The Principal-Agent Dilemma: Reframing the Auditor's Role Using Stakeholder Theory*, 15 ACCT. & PUB. INTEREST 22 (2015).

[27] *Id.* at 25.

[28] Murphy & Tysiac, *supra* note 19; *AICPA Mission and History*, *supra* note 21; PUB. CO. ACCT. OVERSIGHT BD., *supra* note 2; *Changes in Use of Data and Technology in the Conduct of Audits*, PUB. CO. ACCT. OVERSIGHT BD. (June 22,

publications, to our knowledge, have addressed revisions to the wording of the engagement letter or audit opinion to reflect the increased use of analytics-driven audit procedures. In particular, this would include auditors investigating and analyzing all of the data and transactions related to a specific component of the financial statements (i.e., the entire population for that specific component) rather than only analyzing and concluding based on samples of the entire population taken on a test basis. In addition, little exists regarding the investigation of potential legal implications from the failure to modify the language of the engagement letter (written contract) and audit opinion (representation) for the performance of external audit services that are different from traditional external audit procedures. We note, therefore, that there exists a gap between what current auditing standards require (which are primarily based on traditional audit procedures) and what external auditors are likely performing based on the emerging technologies that are now available to auditors when performing external audit services. We argue this gap results from technologies emerging at a pace faster than the review of policy and applicable audit standards. We structure this

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2021) https://pcaobus.org/oversight/standards/research-standard-setting-projects/changes-use-data-technology-conduct-audits; PUB. CO. ACCT. OVERSIGHT BD., SPOTLIGHT: DATA AND TECHNOLOGY RESEARCH PROJECT UPDATE, MAY 2001 (2021), https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/documents/data-and-technology-project-may-2021-spotlight.pdf.

paper with a public interest focus and advocate for auditors and other stakeholders (financial statement users) based upon stakeholder theory and Schnader et al.'s[29] call for future research.

Our paper proceeds as follows. In Section II, we provide a brief discussion of the public accounting profession. In Section III, we provide a history of advertising standards for public accounting firms. In Section IV, we discuss legal issues in external auditing including breach of contract and professional negligence. In Section V, we discuss the actual and potential use of data analytics and emerging technologies in the financial statement audit and the potential legal implications that may result, emphasizing the current wording used in the engagement letter and audit opinion. In Section VI, we provide proposed recommendations for regulatory bodies related to applicable wording revisions in both the engagement letter and audit opinion to reflect the level of data analytics use in the financial statement audit. We then summarize our discussion and concluding remarks in Section VII, which includes discussion of potential future research.

II. BRIEF DISCUSSION OF THE PUBLIC ACCOUNTING PROFESSION

While there are many professional services that a professional accounting firm can provide to its

[29] Schnader et al., *supra* note 26.

clients, Messier, Glover and Prawitt discuss the types of services that are most relevant to this paper:

> Accounting professionals can perform various services that provide assurance about the reliability and relevance of information given by one party to another. The broadest category of such services is simply called assurance services. Attest services are a subset of assurance services, and auditing is a type of attest service. Many times these terms are used interchangeably because they are related, and at a general level, they encompass the same process: *the evaluation of evidence to determine whether information has been recorded and presented in accordance with a predetermined set of criteria, together with the issuance of a report that indicates the degree of correspondence*.[30]

Therefore, public accounting professionals add value to information for decision-making purposes by providing an objective view on the information for other interested parties. There are many types of auditors, but in this paper we focus on

[30] MESSIER ET AL., *supra* note 1, at 12.

external auditors. Focusing on external auditors is important because it provides the means for these professionals to provide an objective view on the information. Specifically, "such auditors are called 'external' or 'independent' because they are not employees of the entity being audited."[31] Messier, Glover, and Prawitt add, "External auditors audit financial statements for publicly traded and private companies, partnerships, universities, government entities (such as counties, school districts, and municipalities) and other types of entities."[32] It is the audits of publicly traded companies (i.e., companies that make their own debt or equity securities available to the general public through the appropriate means) that we pay particular attention to in this paper.

For a brief discussion of how the external auditor plays a role with publicly traded clients, we will describe an example summarized by Figure 1-1 in Messier et al.[33] With a publicly traded company, assuming they are public because they sell stock in their company to the public, there exists a disconnect between what the stockholders know about the company (i.e., they are not involved in the day to day operations of the company, and are thus an absentee owner) and what management knows about the company (as they are involved in the day to day operations). This disconnect is defined as "*information asymmetry* [which] means that the

[31] *Id.* at 36.
[32] *Id.*
[33] MESSIER ET AL., *supra* note 1, at 7.

manager generally has more information about the 'true' financial position and results of operations of the entity than does the owner."[34] In addition, "because their goals may not coincide, there is a natural *conflict of interest* between the manager and the absentee owner. If both parties seek to maximize their self-interest, the manager may not always act in the best interests of the owner."[35] In order to address the information asymmetry and conflicts of interest that are present, an external auditor is hired to provide an objective view for the absentee owners and other interested parties about whether the financial statements are presented fairly in accordance with U.S. GAAP.

A final note will discuss the organizations that affect financial statement audits in the United States (based on Messier et al.'s Figure 2-2).[36] Because publicly traded companies are likely to have more implications from the legal environment of business due to the existence of the absentee owners, our paper focuses on the audits of publicly traded companies in the United States.[37] These audits fall

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[34] *Id.* at 6.
[35] *Id.*
[36] *Id.* at 48.
[37] For reference, Figure 2-2 of Messier et al. also covers the organization to follow with standards for performing private sector audits, which is the American Institute of Certified Public Accountants (AICPA) and its Auditing Standards Board. The financial statements, however, would still typically follow U.S. GAAP. For audits of governmental entities, the financial statements would follow the guidelines of the Governmental Accounting Standards Board (GASB)

under the oversight of the Securities and Exchange Commission (SEC), which oversees two parties in completing its role. The first is the Public Company Accounting Oversight Board (PCAOB), which formulates the auditing standards that are used by external auditors in performing an audit of a publicly traded company's financial statements. The other is the Financial Accounting Standards Board (FASB), which formulates accounting principles (commonly known as generally accepted accounting principles in the United States, or US GAAP) that are followed in the presentation of the financial statements. An external auditor audits the financial statements of a publicly traded company using auditing standards from the PCAOB to ensure that the financial statements are fairly presented in accordance with (typically) US GAAP. It is important to note that this does not result in a guarantee that financial statements are free of all errors, but that financial statements are fairly presented in a way that any possible misstatement that still exists would not adversely impact the decision-making process of financial statement users.

III. HISTORY OF ADVERTISING STANDARDS FOR PUBLIC ACCOUNTING FIRMS

Contemporary accountants enjoy the freedom to advertise their services in different media and do so in printed publications such as brochures

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and follow auditing standards of the AICPA and the Government Accountability Office (GAO). *Id.*

and pamphlets; in other tangible offerings such as coffee mugs, pens, and battery chargers; and online through firm websites and social media.[38] This freedom of expression as represented by these varied modes of marketing has not always existed for accountants, and a brief look at advertising rules and attitudes may prove instructive. In addition, we review the current rules regarding advertising in public accounting.

According to one study, the American Association of Public Accountants issued the first ban on advertising for the profession in 1894 covering all forms of advertising except for business cards in trade journals. Evidently this rule had little effect and accountants continued to advertise their services. By 1911 the *Journal of Accountancy* started publicizing especially egregious examples of unprofessional advertising by accountants, and over the next few years articles began to appear in the *Journal* that dealt with questions regarding how

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[38] For examples of this advertising, in addition to the analytics-driven auditing websites mentioned earlier, see the home pages of the following professional accounting firms (and each has links to social media at or towards the bottom of the home page) – Deloitte at https://www2.deloitte.com/us/en.html; EY at https://www.ey.com/en_us; KPMG at https://home.kpmg/us/en/home.html; PwC at https://www.pwc.com/us/en.html; BDO at https://www.bdo.com/; Grant Thornton at https://www.grantthornton.com/; and RSM at https://rsmus.com/.

accountants should advertise, and even whether they should advertise at all.[39]

In 1922, the American Institute of Accountants issued its Rules of Professional Conduct which included a rule generally banning advertising without permission of the Institute. It read as follows: "For a period not exceeding two years after notice by the committee on ethical publicity no member or associate shall be permitted to distribute circulars or other instruments of publicity without the consent and approval of said committee."[40] By 1923, the rule prohibiting advertising by member accountants read as follows:
No member or associate of the institute shall advertise his or her professional attainments or service through the mails, in the public prints or by other written word; but any member or associate may cause to be published in the public prints or otherwise what is technically known as a card. A card is hereby defined as an advertisement of the name, title (member of American Institute of Accountants, C. P. A., or other professional affiliation or designation) and address of the advertiser without further qualifying words or letters, or in the case of announcement of change of address or personnel of

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[39] Thomas D. Wood & Anne J. Sylvestre, *The History of Advertising by Accountants*, 12 ACCT. HISTORIANS J. 59 (1985).

[40] AM. INST. OF ACCTS., CONSTITUTION AND BY-LAWS AND RULES OF PROFESSIONAL CONDUCT AS AMENED SEPTEMBER, 1922 (1922), https://egrove.olemiss.edu/aicpa_assoc/486.

firm the plain statement of the fact for the publication of which the announcement purports to be made.[41]

The Institute's rules concerning advertising by its members continued to evolve over the next several decades. By 1959, the Institute had amended its Rules to include a complete ban on advertising by any means by its members.[42] Obviously, members of the American Institute of Accountants in their goal to reach professional status perceived advertising as an unprofessional activity. Specifically, according to a 2014 article in the *Journal of Accountancy*, "[T]here was a historical belief that advertising by CPAs diminished the profession's credibility and dignity. There was also fear that the public could be confused about a CPA's independence[43] if advertising were allowed."[44]

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[41] AM. INST. OF ACCTS., CONSTITUTION AND BY-LAWS AND RULES OF PROFESSIONAL CONDUCT AS AMENDED SEPTEMBER, 1923 (1923), https://egrove.olemiss.edu/aicpa_assoc/485.

[42] AM. INST. OF ACCTS., BY-LAWS, RULES OF PROFESSIONAL CONDUCT, NUMBERED OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS, 1959; BY-LAWS AS AMENDED JANUARY 13, 1959; RULES OF PROFESSIONAL CONDUCT AS REVISED JANUARY 20, 1958; NUMBERED OPINIONS [1959] (1959), https://egrove.olemiss.edu/aicpa_prof/194.

[43] Messier et al. provide context as to why this is important: "Independence, in both fact and in appearance, is very important to the assurance that CPAs provide: if the auditor is not perceived to be independent of the audited entity, it is unlikely that a user of the financial statements will place reliance on the CPA's work." MESSIER ET AL., *supra* note 1, at 641.

[44] Michael Buddendeck and Andrea Short, *Ibanez Ruling Set Precedent for Right of CPAs to Advertise Dual Credentials*, J.

In the years to come, the government and courts would communicate a different perspective on this prohibition against advertising. In 1977, the United States Supreme Court heard a case brought before it by members of the Arizona State Bar who advertised their legal services and were questioned for doing so. In its decision in *Bates v. State Bar of Arizona*,[45] the Court determined that the First Amendment to the United States Constitution protected commercial speech as long as it was not "false, deceptive, or misleading,"[46] or involved illegal activities.[47] This decision opened the door for advertising for Certified Public Accountants, and the American Institute of Certified Public Accountants (AICPA) amended its Code of Professional Ethics with a repeal of the ban on advertising.[48]

Today, the AICPA's Code of Professional Conduct includes Rule 1.600.001 which states:

ACCT. (Oct. 8, 2014), https://www.journalofaccountancy.com/news/2014/oct/201410695.html.

[45] 433 U.S. 350 (1977).

[46] *Id.* at 383.

[47] *Id.* at 384.

[48] Buddendeck & Short, *supra* note 44.

> A member[49] in public practice[50] shall not seek to obtain clients by advertising or other forms of solicitation in a manner that is false, misleading, or deceptive. Solicitation by the use of coercion, over-reaching, or harassing conduct is prohibited.[51]

The current Code of Professional Conduct also reminds members of their obligation to the public interest. Principle 0.300.030 states,

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[49] The AICPA Code of Professional Conduct defines a member as:

> [A] member, associate member, affiliate member, or international associate of the AICPA. When the term member is used in part 1 of the code, it means a member in *public practice*; when used in part 2 of the code, it means a *member in business*; and when used in part 3 of the code, it means all other members.

AICPA Code of Professional Conduct, AM. INST. OF CERTIFIED PUB. ACCTS., https://pub.aicpa.org/codeofconduct/Ethics.aspx (last visited Oct. 6, 2021). This reference comes from part 1 of the code. For reference, for the preface (part 0), it is entitled as being "Applicable to All Members" in the online publication itself. *Id.*

[50] The AICPA Code of Professional Conduct defines this term in this context as "consist[ing] of the performance of *professional services* for a *client* by a *member* or member's *firm*." *Id.*

[51] *Id.*

"*Members* should accept the obligation to act in a way that will serve the public interest, honor the public trust, and demonstrate a commitment to professionalism."[52] It also states in part in .03 of the same Principle, "*[M]embers* should act with integrity, guided by the precept that when *members* fulfill their responsibility to the public, *clients*' and employers' interests are best served."[53]

IV. LEGAL ISSUES IN AUDITING

Now that we have provided a brief overview of the professional public accounting profession and given a short history of advertising for the professional services that they provide, it is important to address legal issues that an external auditor can face when performing external audits, particularly for those of publicly traded companies. These legal issues can relate to many different elements of the service provided. These issues may encompass elements such as external auditor services *actually* performed compared to external auditor services they were *engaged* to perform, interpretations of contract wording in engagement letters, and representations made in audit opinions. Another important legal issue relates to whether certain advertising by public accounting firms impacts financial statement users' *perceptions* of services performed that may be different from *actual* services performed.

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[52] *Id.*
[53] *Id.*

A. Negligence and Breach of Contract

External auditors may face civil legal liability due to malpractice. A malpractice claim may take the form of a tort such as negligence, gross negligence, or negligent misrepresentation. Malpractice claims may also involve a breach of contract claim against an external auditor. For example, a client may claim that the external auditor failed to perform pursuant to the agreement made between client and audit firm, as manifested in an engagement letter.[54] Clients may make claims of action in tort or contract breach when external auditors fail to detect material misstatements[55] or

[54] Russell L. Wald, Annotation, *Accountant's Malpractice Liability to Client,* 92 A.L.R.3D 396 (1979).

[55] A definition of materiality is important to the understanding of what constitutes a material misstatement. Per Messier et al., "[m]ateriality refers to the amount by which a set of financial statements could be misstated [i.e., incorrect as it pertains to US GAAP and the underlying circumstances] without affecting the judgment of a reasonable person." MESSIER ET AL., *supra* note 1, at 14. Messier et al. also state, "The concept of materiality is important because it simply isn't practical or cost beneficial for auditors to ensure that financial statements are completely free of any small misstatements." *Id.* at 15. As additional insight, Messier et al. define misstatement as "a difference between the amount, classification, presentation, or disclosure of a reported financial statement item and the amount, classification, presentation, or disclosure is required for the item to be presented fairly in accordance with the applicable financial reporting framework [typically US GAAP]." *Id.* at 118. So, combining these ideas, a material misstatement is one where the financial statements are

fraud[56] during an independent audit. Furthermore, clients may claim that the external auditor failed to detect material misstatements or fraud because the external auditor did not perform according to the terms stated or implied in the engagement letter.

A recent case involving Pricewaterhouse Coopers LLP (PwC) illustrates the implications of legal liability for external auditors.[57] In 2017, the United States District Court in Middle District Alabama, Northern Division, heard claims brought against PwC pursuant to PwC's audit of Colonial BancGroup, Inc. and related parties.[58] In this cause of action, Colonial BancGroup, Inc. sued PwC for its failure to detect a sophisticated fraud perpetrated from 2002 to 2009 that ultimately led to the bankruptcy of a subsidiary, Colonial Bank.[59] The Federal Deposit Insurance Corporation (FDIC)[60]

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incorrect to an extent that it would impact the decision-making process of a financial statement user.

[56] Fraud is defined as "an *intentional* act by one or more among management, those charged with governance, employees, or third parties, involving the use of deception that results in a misstatement in the financial statements." *Id.*

[57] Ariail and Crumbley discuss this case in detail, along with its implications for external auditors. *See* Donald L. Ariail & D. Larry Crumbley, *PwC and the Colonial Bank Fraud: A Perfect Storm*, 11 J. FORENSIC & INVESTIGATIVE ACCT. 440 (2019).

[58] Colonial BancGroup Inc. v. PricewaterhouseCoopers LLP, Nos. 2:11-cv-746-BJR and 2:11-cv-957- BJR, 2017 WL 8890271 (M.D. Ala. Dec. 28, 2017).

[59] *Id.* at *1.

[60] For reference:

became Colonial Bank's receiver and joined in the suit against PwC.[61] Colonial BancGroup, Inc. and the FDIC claimed that PwC committed malpractice in its audit, and also claimed that PwC breached its contract as agreed upon in the external audit engagement letter.[62]

In its opinion, the court cited passages from both professional auditing standards[63] and the

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> [T]he Federal Deposit Insurance Corporation (FDIC) is an independent agency created by Congress to maintain stability and public confidence in the nation's financial system. To accomplish this mission, the FDIC insures deposits; examines and supervises financial institutions for safety, soundness, and consumer protection; makes large and complex financial institutions resolvable; and manages receiverships.

About, FED. DEPOSIT INS. CORP., https://www.fdic.gov/about/ (last visited Oct. 10, 2021).

[61] *Colonial BancGroup Inc.*, 2017 WL 8890271, at *2.

[62] *Id.* at *1.

[63] The current auditing standards applicable to external audits of publicly traded companies are found in the PCAOB Auditing Standards. *See Auditing Standards*, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/oversight/standards/auditing-standards (last visited Oct. 10, 2021). However, the timing of this case and the fact that when the PCAOB came into existence in the early 2000s it started with the auditing standards of the AICPA, it is also important to reference the current AICPA Clarified Statements on Auditing Standards. *See Clarified Statements on Auditing Standards*, AM. INST. OF CERTIFIED PUB. ACCTS., https://www.aicpa.org/research/standards/auditattest/clarifieds

engagement letter that referred to "reasonable assurance."[64] In particular, the court cited AU §110.02 and AU §316 when it stated that, "[T]he overarching standard that governed the PwC audits is that: '[t]he auditor has a responsibility to *plan and perform the audit to obtain reasonable assurance* (emphasis added) about whether the financial statements are free of material misstatements, whether caused by error or fraud.'"[65] In its conclusion, the court found that PwC had not met the applicable professional standards and was therefore guilty of negligence in the conduct of the external audit of Colonial BancGroup, Inc. and related parties.[66] The PwC case demonstrates that clients may bring causes of action against external auditors, both in tort and in contract. In addition, this court paid close attention to the auditing standards regarding reasonable assurance and held auditors to a higher standard than cited by the profession[67] when

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as.html (last visited Oct. 10, 2021). These Clarified Statements on Auditing Standards have superseded the standards mentioned here, currently identified as the Pre-Clarity Statement on Auditing Standards by the AICPA. *See Pre-Clarity Statements on Auditing Standards*, AM. INST. OF CERTIFIED PUB. ACCTS., https://www.aicpa.org/research/standards/auditattest/sas.html (last visited Oct. 10, 2021).

[64] *Colonial BancGroup Inc.*, 2017 WL 8890271, at *9.

[65] *Id.* at *13.

[66] *Id.* at *43.

[67] Specifically, Ariail and Crumbley note, "CPA firms must stop using the expectation gap as an excuse and accept the reality that people expect them to find the fraud. Otherwise, companies must be forced to pay for a forensic audit every

the court expected PwC to discover a fraud involving management collusion.[68]

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three or four years." Ariail & Crumbley, *supra* note 56, at 454. For reference, AICPA defines "*expectation gap* [as] the difference between what the public and financial statement users believe auditors are responsible for and what auditors themselves believe their responsibilities are." AM. INST. OF CERTIFIED PUB. ACCTS., PRIV. COS. PRAC. SECTION, EXPECTATIONS GAP STANDARDS: PROGRESS, IMPLEMENTATION ISSUES, RESEARCH OPPORTUNITIES (1992) https://egrove.olemiss.edu/aicpa_assoc/69. For more discussion related to the "expectation gap" between auditors and investors, see John E. McEnroe & Stanley C. Martens, *Auditors' and Investors' Perceptions of the "Expectations Gap,"* 15 ACCT. HORIZONS 345 (2001).

[68] Messier et al. provide this discussion about collusion:

> The effectiveness of segregation of duties lies in individuals' performing only their assigned tasks or in the performance of one person being checked by another. There is always a risk that collusion between individuals will destroy the effectiveness of segregation of duties. Collusion is cited many times as a source of fraud within companies. For example, an individual who receives cash receipts from customers can collude with the one who records the receipts in the customers' records to steal cash from the entity.

MESSIER ET AL., *supra* note 1, at 194. Due to the nature of this definition, collusion, particularly when it involves members of management, can be particularly difficult to identify.

B. Burden of Proof

Both negligence and breach of contract are claims brought in civil court. The plaintiffs in the PwC case discussed above had to prove that PwC more likely than not was negligent in conducting the audit and that it breached its contract with its client to prevail in those claims. In PwC's case, the court held PwC liable for negligence in its conduct of the audit, but it did not hold the firm liable for breach of contract because the other party to the contract had committed fraud and therefore breached the contract. Consequently, the other party could not recover under the breach of contract claim.[69] Plaintiffs in civil litigation must prove their claims with a "preponderance of the evidence" in order to prevail.[70] In contrast, the prosecution in a criminal case must prove its case "beyond a reasonable doubt."[71]

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[69] *See Colonial BancGroup Inc.*, 2017 WL 8890271, at *27.
[70] *See, e.g.*, *Preponderance of the Evidence*, CORNELL L. SCH. LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Oct. 10, 2021); *see also* Neil Orloff & Jery Stedinger, *A Framework for Evaluating the Preponderance-of-the-Evidence Standard*, 131 U. PA. L. REV. 1159 (1983).
[71] For reference, the burden of proof in criminal cases is described on the United States Courts website at https://www.uscourts.gov/about-federal-courts/types-cases/criminal-cases.

V. ANALYTICS-DRIVEN AUDITING: POTENTIAL LEGAL IMPLICATIONS

We now apply the previously discussed legal issues in auditing to the area of public accounting, particularly to an external auditor's performance and what they may advertise on websites. Specifically, we focus on the engagement letter and the audit opinion and what they may communicate explicitly or *implicitly*.[72] We will also discuss potential areas of litigation resulting from the use of emerging technologies and data analytics in the external audit in different types of engagements. Before we discuss potential areas of legal liability, we briefly consider ways data analytics can be employed in financial statement audits.

[72] The focus of our paper is the legal issues that may arise from the expectations gap described by Ariail and Crumbley and defined by the AICPA. Ariail & Crumbley, *supra* note 56; AM. INST. OF CERTIFIED PUB. ACCTS., *supra* note 67. The engagement letter represents a contract between the public accounting firm and the client, whereas the audit opinion is a representation made by the CPA firm. Other parties who incur damages may also seek to initiate legal action against auditors. *See* J. Keaton Grubbs & Jack R. Etheridge, Jr., *Auditor Negligence Liability to Third Parties Revisited*, 10 J. LEGAL, ETHICAL, & REGUL. ISSUES 75 (2007).

A. Levels of Data Analytics Use in External Audit Engagements

Auditing Spectrum	**Level I**	**Level II**	**Level III**	**Level IV**	**Level V**
	100% Traditional Audit Procedures No Data Analytics	Traditional Audit Procedures > Data Analytics	Traditional audit procedures = Data Analytics	Traditional Audit Procedures < Data Analytics	100% Data Analytics No Traditional Audit Procedures

Figure 1 above illustrates five different types of engagements that we will discuss, which are categorized based on the amount of analytics-driven auditing employed. Before discussing the figure further, we feel it is important to define the difference between traditional audit procedures and analytics-driven audit procedures. Traditional audit procedures are characterized by risk assessment[73]

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[73] Messier et al. note:

> Auditor risk assessment procedures are used to obtain an understanding of the entity [client] and its environment, including its internal control. Risk assessment procedures include inquiries of management and others, preliminary analytics procedures [initially evaluating the financial statements as compared to reasonable expectations], and observation and inspection. Such procedures are used to assess the risks of material misstatement at the financial statement and assertion levels [i.e., what management says

and audit sampling in order for the auditor to obtain sufficient appropriate evidence[74] for the audit opinion. When auditors use analytics-driven audit procedures, the purpose is still to obtain sufficient appropriate evidence to form an audit opinion. We employ the PCAOB's definition for data analytics, which states, "the term 'data analytics' encompasses the analysis of information for purposes of identifying trends and relationships in data sets. Such analysis may include, among other things, predictive

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> occurred in certain transactions, events, or account balances].

MESSIER ET AL., *supra* note 1, at 81.

[74] Messier et al. note:

> The *sufficiency* of audit evidence simply refers to the quantity of evidence the auditor obtains—does the auditor have enough evidence to justify a conclusion as to whether management's assertions [again, what management says occurred in certain transactions, events, or account balances] are fairly stated? The *appropriateness* of audit evidence refers to whether the evidence is relevant and reliable. *Relevance* refers to whether the evidence relates to the specific management assertion being tested. *Reliability* refers to the diagnosticity of the evidence. In other words, can a particular type of evidence be relied upon to signal the true state of the account balance or assertion being examined?

Id. at 16.

and regression analysis, visualization of data, full population analysis, or correlation analysis."[75]

Given this background, we now return to Figure 1. We define a Level I audit as an audit where external auditors use traditional sampling procedures and no analytics-driven audit procedures. A Level II audit takes place when external auditors employ analytics-driven audit procedures, but not more than traditional audit procedures. A Level III audit is an external audit where auditors use traditional audit procedures and analytics-driven audit procedures equally. We classify a Level IV audit as an external audit where the auditor utilizes more analytics-driven audit procedures than traditional audit procedures. A Level V audit is when auditors employ 100 percent analytics-driven audit procedures.[76] It is important to note, from the perspective of the PCAOB and its related standard setting, that an audit of this type is not encouraged or discouraged and that there are no specific standards

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[75] PUB. CO. ACCT. OVERSIGHT BD., *supra* note 2.

[76] The percentage that is mentioned in this paper is relative and subject to interpretation. It is conceivable that it relates to the amount of time an auditor takes in completing certain auditor procedures. It could also relate to a percentage of the total dollar amounts in any financial statement item where certain auditor procedures are employed. It also could be calculated or assigned in some other way. In this paper, for purposes of the percentage, we employ the idea that it would be based in whichever way makes the most sense for the professional audit firm and the way that they are able to track progress toward completion of the financial statement audit and distinguish whether the procedures performed have been analytics-driven or traditional.

governing such an audit (when considering audits of publicly traded clients). Specifically, the PCAOB states:

> The staff's activities to date have indicated that PCAOB standards are not currently impeding or detracting from firms' ability to use technology-based tools. However, PCAOB standards do not explicitly encourage the use of such tools or indicate when their use might be appropriate, or highlight related risks or pitfalls. The staff will consider how this could be addressed as part of our ongoing evaluation of our standards, including whether there is a need for guidance, changes to PCAOB standards, or other regulatory actions.[77]

B. Associated Legal Liability

We will now look at the legal implications associated with these levels of external audits. Before we discuss legal implications specifically in the context of our levels of audits, it is important to return to the PwC case and discuss how it focused on the professional standards, and particularly the use of "reasonable assurance" in the court opinion. Employing analytics-driven auditing may cause some to *perceive* that assurance[78] could be provided

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[77] PUB. CO. ACCT. OVERSIGHT BD., *supra* note 28.

[78] In this context, assurance can have many different definitions. One is its relationship with assurance services, which Messier et al. define as "independent professional services that improve the quality of information, or its context, for decision makers." MESSIER ET AL., *supra* note 1, at 13. In

at a level higher than reasonable assurance, particularly when using these techniques on entire populations. However, the implications of this idea can be problematic. Specifically, AS 1015.10 notes:

> *The exercise of due professional care*[79] *allows the auditor to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud, or whether any material weaknesses exist as of the date of management's assessment.*[80] *Absolute assurance is*

the context of a financial statement audit, the term "reasonable assurance" plays a major role because it relates to the amount of assurance that a financial statement audit provides for the users of the audit report. It is defined as "a term that implies some risk that a material misstatement could be present in the financial statements without the auditor detecting it, even when the auditor has exercised due care." *Id.* at 618. Its use here implies that users of the financial statements may perceive a higher level of assurance provided than reasonable assurance.

[79] Due professional care is defined as "a legal standard requiring that the auditor perform his or her professional services with the same degree of skill, knowledge, and judgment possessed by other members of the profession." *Id.* at 700.

[80] Messier et al. note, "Section 404 of the Sarbanes-Oxley Act requires managements of publicly traded companies to issue a report that accepts responsibility for establishing and maintaining adequate ICFR [Internal Control over Financial Reporting] and to assert [i.e., issue an assessment] whether ICFR is effective as of the end of the fiscal year." MESSIER ET

> *not attainable because of the nature of audit evidence and the characteristics of fraud. Although not absolute assurance, reasonable assurance is a high level of assurance.*[81]

Therefore, even if the client, client counsel, or other users of the financial statements could *perceive* a higher level of assurance due to enhanced usage of audit data analytics, both the nature of audit evidence and the possible occurrence of fraud limit the ability

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AL., *supra* note 1, at 218. This definition also refers to a material weakness, which would be included in this assessment should one exist. The PCAOB defines material weakness at AS 2201.A7 as "a **material weakness** is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a **reasonable possibility** that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis." *AS 2201: An Audit of Internal Control Over Financial Reporting That Is Integrated with An Audit of Financial Statements*, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/oversight/standards/auditing-standards/details/AS2201 (last visited Oct. 10, 2021). In other words, there was an issue with a company's internal control over the preparation of its financial statements that was judged significant enough that there was at least a reasonable possibility that it would not detect or prevent a material misstatement within a reasonable period of time.

[81] *AS 1015: Due Professional Care in the Performance of Work*, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/oversight/standards/auditing-standards/details/AS1015 (last visited Oct. 10, 2021).

to provide absolute assurance. Given the subjective nature of the "reasonable assurance" standard, we refrain from addressing its legal ramifications in this paper.

Instead, we focus on the use of the term "test basis" in the audit opinion (representation)[82] and the likely use of the term "test basis" in the engagement letter (contract).[83] Since a Level I audit employs

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[82] While we acknowledge that both the AICPA and the PCAOB are involved in setting external audit standards, our focus is on those that fall under the PCAOB's Auditing Standards as the likelihood of being sued is assumed to be greater when auditing public companies (due to the fact that there are holders of the company's debt or equity securities that are outside of the company's day to day operations). AS 3101 contains the PCAOB standards for audit reports, and the term "test basis" is used in the example report provided in Appendix B of AS 3101. *AS 3101*, *supra* note 13.

[83] Appendix C of AS 1301 includes guidance regarding engagement letters under PCAOB standards. This guidance does not use the term "test basis" directly. *AS 1301: Communications with Audit Committees*, PUB. CO. ACCT. OVERSIGHT BD., https://pcaobus.org/oversight/standards/auditing-standards/details/AS1301 (last visited Oct. 10, 2021). The AICPA standards, particularly AU-C §210.A42, also do not directly include "test basis" in its engagement letter example. AM. INST. OF CERTIFIED PUB. ACCTS., AU-C SECTION 210: TERMS OF ENGAGEMENT (2020), https://www.aicpa.org/Research/Standards/AuditAttest/DownloadableDocuments/AU-C-00210.pdf. However, we reasonably assume it is often used in the engagement letter, as it is included in an engagement letter example provided in Messier et al.'s auditing text on pages 71–73 and also is included in the audit report in the PCAOB auditing standards.

solely traditional audit procedures, and barring a situation where the auditors do not perform the audit in accordance with the applicable standards, we argue that no additional legal implications exist for the use of analytics-driven auditing because they are not being used and the current audit standards based on traditional audit procedures would apply. Therefore, we now turn to our Level II external audit where auditors use traditional audit procedures more than they use analytics-driven audit procedures. We argue, based on the previous discussion of legal issues in auditing, the use of "test basis" is appropriate, and there is a low likelihood of successful litigation against the auditor for misrepresentation. However, we understand it still can occur when a conclusion is drawn in a legal setting that the auditor did not perform the audit in accordance with the applicable professional standards, as evidenced by the successful case against PwC mentioned earlier.

We now turn our focus to our Level III external audit, which is when an auditor uses traditional audit procedures and analytics-driven audit procedures equally. In this case, we argue that the auditor may encounter borderline success in litigation that involves a claim of auditor misrepresentation. In a legal setting, "test basis" should still be adequate since the auditor still performed traditional procedures. However, various financial statement users may begin to develop a

MESSIER ET AL., *supra* note 1, at 71–73; *AS 3101*, *supra* note 13.

perception issue due to the level of analytics performed in the audit. In fact, research indicates that audit stakeholders still do not possess a clear understanding that an auditor performs an audit only to provide reasonable assurance that the financial statements are free from material misstatement, whether due to error or fraud. For example, since an auditor's report does not specifically address fraud related procedures or results,[84] readers may interpret

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[84] To clarify, the audit report under the PCAOB Auditing Standards does mention the word fraud, but not in the context that it specifically addressed fraud related audit procedures or results. Specifically, in Appendix B of the PCBOA's AS 3101, it states (in the "Basis for Opinion" section, bold typeface added):

> We conducted our audits in accordance with the standards of the PCAOB. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether due to error or **fraud**. Our audits included performing procedures to assess the risks of material misstatement of the financial statements, whether due to error or **fraud**, and performing procedures that respond to those risks. Such procedures included examining, on a test basis, evidence regarding the amounts and disclosures in the financial statements. Our audits also included evaluating the accounting principles used and significant estimates made by management, as well as evaluating the overall presentation of the financial statements. We believe that our audits provide a reasonable basis for our opinion.

that silence to mean that the auditors searched for fraud and found none.[85] With these three aforementioned audits, we argue the use of "test basis" is likely appropriate; however, it is worth considering adjusting the use of this term in the Level III context. We now discuss the two types of audits where the use of "test basis" may present the most legal liability considerations.

In our Level IV external audit definition, the auditor utilizes analytics-driven audit procedures for the majority of the audit. Therefore, given the burden of proof required in a civil suit, a client's attorney might argue that it is "more likely than not" the auditor obtained more sufficient appropriate evidence in forming its audit opinion from its use of data analytics than from its use of traditional audit procedures. This use of data analytics is inconsistent with the auditor's use of the term "test basis" in its audit report and its expected use in the engagement letter, which may be construed as misleading in a

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AS 3101, *supra* note 13 (emphasis added). So, in other words, it mentions that material misstatements themselves or risks of material misstatement can have a cause that can be attributed to either error or fraud, but the focus is on material misstatement and the related risks and not on procedures performed to detect and/or address fraud in the financial statements.

[85] Glen L. Gray, Jerry L. Turner, Paul J. Coram & Theodore J. Mock, *Perceptions and Misperceptions Regarding the Unqualified Auditor's Report by Financial Statement Preparers, Users, and Auditors*, 25 ACCT. HORIZONS 659 (2011).

court of law.[86] If financial statement users sue an auditor for failing to detect a material misstatement or fraud,[87] citing a case such as Colonial BancGroup, Inc. v. PricewaterhouseCoopers LLP, then the extent of data analytics used in audit procedures is likely to be revealed in court. This could include audit procedures performed on all data and transactions in a population and thus not be perceived as audit sampling or being consistent with the use of the term "test basis." In this instance, given the audit procedures that were actually performed, a court may find the auditor negligent for misrepresenting audit procedures.

We now turn to the final type of audit as defined in our proposed spectrum, Level V. The auditing standards currently do not permit or prohibit this type of engagement exclusively,[88] therefore we suggest that an audit engagement could be completely performed with analytics-driven audit procedures. Therefore, in our Level V external audit

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[86] A client's perception may or may not match up with what the judge or jury decides is reasonable.

[87] Grubbs & Ethridge, *supra* note 71.

[88] Again, regarding the PCAOB's current research project on the use of data and technology in audits, as mentioned previously, the project page notes the following: "The staff's activities to date have indicated that PCAOB standards are not currently impeding or detracting from firms' ability to use technology-based tools. However, PCAOB standards do not explicitly encourage the use of such tools or indicate when their use might be appropriate or highlight related risks or pitfalls." PUB. CO. ACCT. OVERSIGHT BD., *supra* note 28. We interpret this discussion to relate to our Level V external audits.

the auditor places complete reliance on data analytics, and, in so doing, the auditor may unknowingly increase legal liability for failing to detect misstatements, whether due to error or fraud. Specifically, the auditor may face a breach of contract claim, which could occur when the wording in the engagement letter (contract) may not reflect the actual audit procedures performed by the auditor.[89] In this instance, the auditor's actions (testing 100 percent of the population) do not match the language assumed to be in (or at least reasonably inferred in) the contract ("test basis"). Therefore, the client may sue the auditor for breach of contract in the event the auditor does not discover a material misstatement or fraud.[90]

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[89] As noted in the PCAOB's AS 1301.05, "[t]he auditor should establish an understanding of the terms of the audit engagement with the audit committee." *AS 1301*, *supra* note 82. Later, this rule mentions that this understanding includes communicating "the responsibilities of the auditor." In Appendix C of AS 1301, these responsibilities include "plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement, whether caused by error or fraud." *Id.* However, when using 100% analytics-driven auditing procedures, there would exist a measure of disconnect between these responsibilities (traditionally including and possibly stating within the engagement letter itself that it was done on a "test basis") and what was ultimately done. Therefore, explanatory language in light of the data analytics performed would be needed within the engagement letter (contract) itself.

[90] Wald, *supra* note 53.

Additionally, the audit opinion may be problematic. Specifically, the auditor could state that they investigated the financial statements on a "test basis" when in actuality, the auditor analyzed 100 percent of the population.[91] Therefore, this perceived expectations gap[92] could result in either a negligence claim or a claim of misrepresentation, which might result in a breach of contract claim.

C. Advertising

We acknowledge the importance of integrity in advertising for professional public accounting firms as many of them advertise on their websites the benefits clients and other financial statement users obtain from analytics-driven audit procedures. This form of advertising has the potential for unintended consequences. For instance, clients and other financial statement users may have the perception

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[91] It is important to note this difference in perception can also occur in current situations where an auditor tests 100% of the population of a particular account through the use of data analytics. For example, if an auditor obtains a file containing all accounts payable transactions, and utilizes data analytics on this entire population of transactions, an attorney might argue that the auditor provided absolute rather than "reasonable" assurance on that particular account because the auditor possessed and performed procedures on 100% of the population rather than drawing a conclusion on the population based on an extrapolated sample.

[92] For further discussion of the definition and application of this idea, see Ariail & Crumbley, *supra* note 56; AM. INST. OF CERTIFIED PUB. ACCTS., *supra* note 66; and McEnroe & Martens, *supra* note 66.

that auditors will uncover *all* improprieties and fraud since they use analytics-driven audit procedures to examine entire populations of transactions and data (i.e., not on a test basis). Additionally, clients and other financial statement users could perceive that claims in advertising and analytics-driven audit procedures performed do not coincide with current "test basis" wording included or inferred in the standards for the engagement letter and audit opinion.

VI. PROPOSED RECOMMENDATIONS FOR REGULATORY BODIES

Based on our previous discussions of auditor legal liability, the potential liabilities associated with the use of data analytics in the external audit, and the perception of the level of assurance perceived by financial statement users, we (1) focus on the Level IV and Level V audits where the use of data analytics exceeds traditional audit procedures, and (2) argue that interested parties should consider our recommendations in external audit situations where auditors apply traditional audit procedures and data analytics equally, our Level III audit. We recommend auditors evaluate their use of analytics and adjust the engagement letters accordingly to accurately reflect the levels of "test basis" and data analytics in the audit. Specifically, the engagement letter (contract) should accurately reflect the procedures performed. We recommend that regulatory bodies revise current wording in

applicable audit standards for engagement letters accordingly.

Furthermore, we recommend changes in the standard wording of the audit opinion.[93] We suggest that the audit opinion should not include "test basis" language if more than half of the audit was conducted with the use of analytics-driven audit procedures performed on entire populations of transactions.[94] We offer this suggested "cut-off," but understand that regulatory bodies may determine that a different percentage of analytics-driven audit procedures performed has better application, which may include our Level III audit where half of the audit was conducted with the use of analytics-driven audit procedures. Additionally, we suggest that the audit

[93] Here we refer to the audit report as prescribed by PCAOB Auditing Standards. A full example of this report is included in Appendix B AS 3101. *AS 3101*, *supra* note 13. The "Unqualified Report" contains "standard wording" as illustrated in Appendix B.

[94] As mentioned previously, the percentage or amount that is mentioned in this paper (more than half of the audit in this case) is relative and subject to interpretation. It is conceivable that it relates to the amount of time an auditor takes to complete certain auditor procedures. It could also relate to a percentage of the total dollar amounts in any financial statement item where certain auditor procedures are employed. It also could be calculated or assigned in some other way. Again, in this paper, for purposes of the percentage, we employ the idea that it would be based in whichever way makes the most sense for the professional audit firm and the way that they are able to track progress toward completion of the financial statement audit and distinguish whether the procedures performed have been analytics-driven or traditional.

opinion should not include the phrase “test-basis” if auditors evaluated 100 percent of transactions using data analytics. Such refined wording that clarifies what areas used “test basis” and what areas did not could include an addition to the audit report similar to either additional explanatory language (in the “Basis for Opinion” section of the audit report) or a separate emphasis of a matter paragraph, for which guidance is already provided in the PCAOB Auditing Standards.[95] In general, auditors should evaluate previous cases involving negligence and breach of contract when developing their audit opinions and

[95] This statement makes reference to a report issued pursuant to PCAOB standards. See an example in Appendix B of AS 3101. *AS 3101*, *supra* note 13. The “Basis for Opinion” section is the second section of the report (the “Opinion on the Financial Statements” being the first section following the title and addressee). AS 3101.18 describes “Explanatory Language Added to the Auditor’s Report” as “other standards of the PCAOB require that, in certain circumstances, the auditor include explanatory language (or an explanatory paragraph) in the auditor’s report, while not affecting the auditor’s opinion on the financial statements.” *Id.* While this appears to infer that it relates to the audit opinion in the opinion section itself, we believe it can have application to the basis section as well. Another option is described in AS 3101.19 as an “Emphasis of a Matter.” It states (along with some examples) that “the auditor may emphasize a matter regarding the financial statements in the auditor’s report (‘emphasis paragraph’). . . . If the auditor adds an emphasis paragraph in the auditor’s report, the auditor should use an appropriate section title.” *Id.* Similarly, while this focuses on items in the financial statements, we believe that an addition to the audit report similar to it in the audit report would help address this issue.

engagement letters, respectively.[96] Accordingly, we believe it is pertinent for regulatory bodies to review and address these issues in the audit standards related to the use of analytics-driven auditing and the appropriateness of advertising in public accounting firms.

VII. DISCUSSION AND CONCLUSION

In order for the accounting profession to maintain a high level of trust, professional character, and competence,[97] it is vital that a self-governing

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[96] We acknowledge that the AICPA, when it issued its clarified standards, removed the use of "test basis" from its audit reports [see the illustrations available in AU-C §700A.A63 of AU-C Section 700A.]. AM. INST. OF CERTIFIED PUB. ACCTS., AU-C SECTION 700A: FORMING AN OPINION AND REPORTING ON FINANCIAL STATEMENTS (2019), https://www.aicpa.org/content/dam/aicpa/research/standards/auditattest/downloadabledocuments/au-c-00700-a.pdf. Instead, the audit report notes the following, which represents a possible revision the PCAOB could consider [from Illustration 1 of AU-C §700A.A63]: "An audit involves performing procedures to obtain audit evidence about the amounts and disclosures in the consolidated financial statements. The procedures selected depend on the auditor's judgment, including the assessment of the risks of material misstatement of the consolidated financial statements, whether due to fraud or error." *Id.* Even with this change, however, we feel it is important for the revision to clarify the extent of the use of 100% testing of entire populations of data or transactions using analytics-driven auditing procedures for the benefit of the financial statement users.

[97] These qualities are extremely important to the accounting profession, as evidenced by their inclusion in the Principles of

environment exists.[98] In an auditing context, we view stakeholder theory as linked to exercising "sustainable and ethical value creation"[99] by focusing on policy that is in the best interest of the public. In this paper, given our public interest focus, we advocate for auditors and various other stakeholders (clients and financial statement users). We recommend that applicable regulatory bodies (e.g., PCAOB) revise standards related to consistent wording in the audit opinion and engagement letter to reflect the prevalent use of analytics-driven audit procedures. We suggest that regulatory bodies also consider allowing auditors flexibility and judgment to utilize the current "test basis" language in the standards when analytics-driven audit procedures employed account for less than a certain percentage (e.g., 50 percent) of total audit procedures

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Professional Conduct contained in the AICPA Code of Professional Conduct. *See AICPA Code of Professional Conduct*, *supra* note 48. Specifically, section 0.300.030.01 states, "*The public interest principle*. *Members* should accept the obligation to act in a way that will serve the public interest, **honor the public trust**, and **demonstrate a commitment to professionalism.**" *Id.* In addition, section 0.300.060.01 states, "*Due care principle*. A *member* should observe the profession's technical and ethical standards, **strive continually to improve competence** and the quality of services, and discharge professional responsibility to the best of the *member's* ability." *Id.* (bold type face added).

[98] Martin Stuebs & Brett Wilkinson, *Ethics and the Tax Profession: Restoring the Public Interest Focus*, 10 ACCT. & PUB. INTEREST 13 (2010).

[99] Bidhan L. Parmar et al., *Stakeholder Theory: The State of the Art*, 4 ACAD. MGMT. ANNALS 403 (2010).

employed.[100] This is even more important as recent accounting research reveals tension among financial reporting stakeholders in the global market regarding the use of data analytics. Austin, Carpenter, Christ, and Nielson find that company managers and auditors both believe that the overall paucity of data analytics related accounting regulation can be problematic and lead to unnecessary confusion.[101] Moreover, Austin et al. note that regulators have concerns about auditors utilizing data analytics to provide clients with deeper insights into their business because of auditor independence concerns.[102]

Additionally, as has been discussed in this paper, many auditors are "advertising" on their

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[100] To emphasize another time, the percentage or amount that is mentioned in this paper (less than half of the audit procedures in this case) is relative and subject to interpretation. It is conceivable that it relates to the amount of time an auditor takes in completing certain auditor procedures. It could also relate to a percentage of the total dollar amount in any financial statement item where certain auditor procedures are employed. It also could be calculated or assigned in some other way. Again, in this paper, for purposes of the percentage, we employ the idea that it would be based in whichever way makes the most sense for the professional audit firm and the way that they are able to track progress toward completion of the financial statement audit and distinguish whether the procedures performed have been analytics-driven or traditional.

[101] *See* Ashley A. Austin, Tina D. Carpenter, Margaret H. Christ & Christy S. Nielson, *The Data Analytics Journey: Interactions Among Auditors, Managers, Regulation, and Technology*, 38 CONTEMP. ACCT. RSCH. 1849-1887 (2021).

[102] *Id.*

websites the benefits (e.g., increase in audit quality) that clients and other financial statement users may obtain from analytics-driven audit procedures. Therefore, we also recommend standard setters review policy as it relates to the appropriateness of advertising in public accounting firms. A primary reason for the recommendation is that this form of advertising may have unintended consequences. For example, clients and other financial statement users may develop the perception that since auditors use analytics-driven auditing procedures to examine entire populations of transactions and data (as opposed to sampling), which they would perceive as an increase in audit quality, then *all* improprieties and fraud will be uncovered (even if collusion, etc. is involved). Moreover, clients and other financial statement users may perceive that claims in both the advertising and performance of analytics-driven procedures do not match the current "test basis" language either included or inferred in the standards for the engagement letter and audit opinion.

We recognize that emerging technologies present exciting possibilities for the future of the auditing profession. Those possibilities carry with them the need to explore ways that auditors can clearly communicate about audit procedures and levels of assurance with stakeholders in the engagement letter and the audit opinion. Given this context, we acknowledge that circumstances exist (and have occurred) where external auditors do not perform the audit in compliance with the applicable auditing standards and can legitimately be brought to

a cause of action in a legal setting by any interested party. Our purpose, however, is to highlight that the use of analytics-driven auditing could result in a legal cause of action for external auditors because the contract made with the client in the engagement letter – and the representation made to investors and other financial statement users in the audit report – do not necessarily correspond to actual audit procedures performed using analytics-driven auditing. We hope our paper will at least begin a discussion of whether, given an ever-evolving external auditing environment, legal issues mentioned herein need to be addressed as soon as practicable.

We suggest that future researchers investigate more deeply the types of data analytics and other emerging technologies that are being performed in external audits. We focus here on the policy implications of auditors advertising the benefits of analytics-driven audit procedures and corresponding language used in the engagement letter and audit opinion. However, we acknowledge that there are many other types of emerging technologies that can be utilized in an external auditing setting. Additional research could investigate those additional types more deeply, including additional legal and policy implications and recommendations. Furthermore, the concept and application of a continuous audit has received increased attention with the use of data analytics in subsets of accounting,[103] though this type of

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[103] *See, e.g.*, Marc Eulerich & Artur Kalinichenko, *The Current State and Future Directions of Continuous Auditing*

engagement is not yet utilized in external auditing nor have specific standards for its use been issued.[104]

Research: An Analysis of the Existing Literature, 23 J. INFO. SYS. 31 (2018); *see also* George C. Gonzalez & Vicky B. Hoffman, *Continuous Auditing's Effectiveness as a Fraud Deterrent*, 37 AUDITING: J. PRAC. & THEORY 225 (2018).

[104] See the PCAOB's current research project at PCAOB (which we assume refers to the potential use of continuous auditing in the future), and the detailed discussion of its possible future role in the profession in. *See* PUB. CO. ACCT. OVERSIGHT BD., *supra* note 28. A recent AICPA-sponsored publication entitled *Audit Analytics and Continuous Audit: Looking Toward the Future* discusses this idea in detail. In the second essay, the authors note the following:

> In summary, organizations are not yet reaping the entire array of benefits that CA/CM [Continuous Auditing/Continuous Monitoring] could yield. Although some noteworthy gains have been made in internal auditing [done by internal auditors, defined as "auditors who are **employees** of individual companies, government agencies, and other entities," MESSIER ET AL., *supra* note 1, at 36 (emphasis added)], there has not been a corresponding increase in external audit applications.

AM. INST. OF CERTIFIED PUB. ACCTS., AUDIT ANALYTICS AND CONTINUOUS AUDIT: LOOKING TOWARD THE FUTURE 59 (2015), https://www.aicpa.org/interestareas/frc/assuranceadvisoryservices/downloadabledocuments/auditanalytics_lookingtowardfuture.pdf. Earlier in the same essay, the authors note: "On a positive note, the public accounting arena seems to be encouraging organizations to internally develop and implement CA/CM programs. In doing so, auditors are

As a reference, in a document published by The Institute for Internal Auditors (IIA), the author defines continuous auditing as "any method used by auditors to perform audit-related activities on a more continuous or continual basis."[105] Also, in its Executive Summary, the document notes, "The power of continuous auditing lies in the intelligent and efficient continuous testing of controls and risks that results in timely notification of gaps and weaknesses to allow immediate follow-up and remediation."[106] Therefore, while we do not include this type of audit and its associated legal and policy implications and recommendations in this paper (which focuses on external auditing and audit procedures that are and can potentially be done as it relates to analytics-driven auditing), it certainly represents a topic that would be important to investigate in the right context.

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ultimately seeking to leverage the use of these devices in conducting external audits." *Id.* at 55. For evidence of the truth of this statement, refer to firms' websites such as the following: Deloitte (https://www2.deloitte.com/us/en/pages/audit/articles/continuous-monitoring-continuous-auditing.html), PwC (https://www.pwc.com/us/en/services/risk-assurance/internal-audit/internal-audit-of-the-future.html), and KPMG (https://home.kpmg/xx/en/home/services/advisory/risk-consulting/internal-audit-risk/continuous-auditing-and-monitoring.html). This topic certainly merits future research.

[105] D. CODERRE, INST. OF INTERNAL AUDITORS, GLOBAL TECHNOLOGY AND AUDIT GUIDE [IPPF – PRACTICE GUIDE], CONTINUOUS AUDITING: IMPLICATIONS FOR ASSURANCE, MONITORING, AND RISK ASSESSMENT 7 (2005).

[106] *Id.* at 2.

VIII. FIGURE 1 - AUDITING SPECTRUM

This figure illustrates what we understand to be the current and potential levels of use of audit data analytics in external audits, along with illustrating each type and its applicability to this paper – and thus to the related legal implications discussed herein.[107] The shading in the arrow below the spectrum indicates our proposed applicability of the legal issues discussed in this paper [no shading = no applicability → dark shading = complete applicability].

Auditing Spectrum	**Level I**	**Level II**	**Level III**	**Level IV**	**Level V**
	100% Traditional Audit Procedures No Data Analytics	Traditional Audit Procedures > Data Analytics	Traditional audit procedures = Data Analytics	Traditional Audit Procedures < Data Analytics	100% Data Analytics No Traditional Audit Procedures

[107] This figure should also be considered in context of both the current PCAOB Auditing Standards and the current AICPA Clarified Statements on Auditing Standards. See Auditing Standards, supra note 62; Clarified Statements on Auditing Standards, supra note 62. Even though our focus in this paper is on external audits subject to the current PCAOB Auditing Standards (due to the enhanced legal implications associated with publicly traded companies), standards from the AICPA are also important to the external auditing profession (due to the services performed in private company audits).

MAHANOY AREA SCHOOL DISTRICT V. B.L.: PROTECTING STUDENTS' OFF-CAMPUS SPEECH

EDWARD J. SCHOEN*

On June 23, 2021, the U.S. Supreme Court, in an 8-1 decision in *Mahanoy Area School District v. B.L.*,[1] decided that imposing a one year suspension from junior varsity cheerleading on Brandi Levi, a high school student, for using profanity in two social media posts, which she made outside of school hours and away from the high school's campus, violated her First Amendment rights.[2] This is the fifth major decision of the U.S. Supreme Court which examines the "special characteristics" of the public school environment which can sometimes justify the imposition of disciplinary measures imposed on students who exercise their freedom of expression.[3]

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[1] Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021). The majority decision was authored by Justice Breyer, in which Chief Justice Roberts and Justices Alito, Sotomayor, Kagan, Gorsuch, Kavanaugh and Barrett joined. Justice Alito filed a concurring opinion, and Justice Thomas filed a dissenting opinion.

[2] *Id.* at 2042-2043.

[3] *Id*. at 2045.

The first such decision, *Tinker v. Des Moines Independent Community School District*, was decided by the U.S. Supreme Court in 1969.[4] In *Tinker*, the Court ruled that limitations may be placed on students' expression only when that expression "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[5] This article examines the U.S. Supreme Court's decision in *Tinker* and traces its role in the ensuing four cases, culminating in *Mahanoy Area*.

I. *TINKER V. DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT*

A group of adults and students in Des Moines, Iowa, decided to wear black armbands during the 1965 holiday season to demonstrate their opposition to the war in Vietnam and their support for a truce to end the hostilities.[6] Two families, the Tinkers and the Eckhardts, participated.[7] The principals of the Des Moines schools became aware of the plan to wear armbands, and decided to ask students to remove their armbands and, if they refused, to suspend them from school until they

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[4] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969).
[5] *Id*. at 505-506. *See* Edward J. Schoen and Joseph S. Falchek. *Bong Hits 4 Jesus and Tinkering with Tinker*. SOUTHERN LAW JOURNAL, Vol. XVIII, No. 1, Fall 2008, p. 1-16.
[6] Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 504 (1969).
[7] *Id*.

returned without the armband.[8] Three students, Christopher Eckhardt, age 16, John Tinker, age 15, and Mary Beth Tinker, age 13 ("Petitioners"), wore armbands to school. They were suspended from school and returned to school after the holiday season ended.[9]

Petitioners filed an action under 42 U. S. C. § 1983 in the United States District Court to obtain an injunction prohibiting the school district from taking disciplinary action against Petitioners.[10] After conducting an evidentiary hearing, the District Court concluded the school district's disciplinary action was reasonably necessary to prevent disruption of school discipline and dismissed the complaint.[11] On appeal, the Court of Appeals for the Eighth Circuit reviewed the case *en banc*, but was equally divided in its opinion, thereby affirming the District Court.[12]

The United States Supreme Court granted certiorari and reversed the District Court,[13] noting that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of

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[8] *Id*.
[9] *Id*.
[10] *Id*.
[11] *Id*. at 505. The District Court referred to, but declined to follow, a contrary decision of the Court of Appeals for the Fifth Circuit, which ruled in Burnside v. Byars, 363 F.2d 744, 749 (1966), that wearing armbands cannot be prohibited under the First Amendment unless that activity "materially and substantially interfere[s] with the requirements of appropriate discipline on the operation of the school."
[12] *Id*.
[13] *Id*. at 514.

speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."[14] In reaching its decision, the Court examined three factors: the purpose of public education, the nature of the expression, and the absence of any disruption to school activities. The Court determined that, because public education is designed to prepare students for citizenship, it is imperative that school activities be conducted within the limits of the Bill of Rights.[15] Protecting constitutional freedoms in schools, the Court said, teaches young minds not "to discount important principles of our government as mere platitudes."[16]

Because Petitioners wore their armbands in school in a "silent, passive expression of opinion" without any accompanying aggressive or disruptive conduct, their expression constituted "pure speech" [17] which is "entitled to comprehensive protection

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[14] *Id*. at 506

[15] *Id*. at 507.

[16] *Id*., citing West Virginia v. Barnette, 319 U.S. 624, 637 (1943) (students in schools may not be compelled to salute the flag).

[17] The notion of "pure speech" arose when the focus in resolving First Amendment matters was on the so called "speech-action dichotomy," under which courts determined that speech alone was absolutely protected by the First Amendment, but the actions undertaken to communicate the speech could be regulated. *See* Donald M. Gillmor et al, MASS COMMUNICATION LAW: CASES AND COMMENTS, at 80 (6th ed. 1998) ("A generation ago, the distinction between speech and action was important to understanding the scope of First Amendment Protection. Under this approach, speech was absolutely protected while action could be regulated.").

In *Tinker*, the silent and passive wearing of armbands by school students produced no reaction or disturbance; hence, the speech was "pure speech" which could not be restricted or regulated under the First Amendment. A precursor to this approach appears in Stromberg v. California, 51 S. Ct. 532 (1931), in which the United States Supreme Court ruled that a statute, which prohibited the passive display of a flag in a public place as a sign of opposition to organized government, was unconstitutional, because it prohibited peaceful and orderly opposition to government by legal means. A more recent application of the "pure speech" doctrine occurred in Spence v. Washington, 94 S. Ct. 2727 (1974), in which the United States Supreme Court ruled that the First Amendment prohibited prosecution of the defendant for misusing a flag, when he affixed a peace symbol to the American flag and displayed it upside down in his window to protest the invasion of Cambodia. Because there was no evidence any people reacted to the inverted flag or even noticed it, the speech was "pure speech" which the government cannot regulate. A similar result occurred in Cohen v. California, 91 S. Ct. 1780 (1971). In *Cohen*, the defendant was convicted of disturbing the peace for walking through a municipal courthouse wearing a jacket on which the words "Fuck the Draft" were plainly visible. The United States Supreme Court overturned the conviction, determining that he wore the jacket to express his opposition to the war in Vietnam and the draft, that he did not thrust his message at viewers, that viewers could easily avert their eyes from the message, and that there was no evidence anyone was angered or disturbed by the message. The United States Supreme Court refused to apply the "pure" speech theory in United States v. O'Brien, 88 S. Ct. 1673 (1968). In *O'Brien*, the defendant was convicted for publically burning his draft card to encourage others to join him in his antiwar efforts, contrary to the 1965 amendment to the Universal Military Training and Service Act of 1948 which proscribed the deliberate destruction of Selective Service registration certificates. The United States Supreme Court determined that the 1965 amendment supported an important government

under the First Amendment."[18] Petitioners, silently and passively wearing the armbands, did not interfere with school activities, created no disorder or disturbance, and did not impinge on the rights of other students.[19] Hence Petitioners engaged in "pure speech" which cannot be restricted by the government.[20]

The District Court had decided that, because the school officials feared that the wearing of armbands in school would create disturbance, their suspension of Petitioners was reasonable.[21] The United States Supreme Court found that justification to be woefully insufficient to prohibit the expression of opinion, because the expression of any opinion which differs from the views of others always creates a risk of triggering a disturbance.[22] The First Amendment prohibits school officials from banning student expression merely because those officials "desire to avoid the discomfort and unpleasantness

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interest (maintaining an efficient draft system) and prohibited conduct, not expression, and upheld the conviction.

[18] *Tinker*, 89 S. Ct. at 506.

[19] *Id*. at 508. The Court noted: "There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises." *Id*. at 508.

[20] *Id*. at 509 ("Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.")

[21] *Id*. at 508.

[22] *Id*.

that always accompany an unpopular viewpoint."[23] Rather, school officials may restrict students' expression only when that expression "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[24] The District Court made no such determination, and nothing in the record demonstrated the wearing of armbands "would substantially interfere with the work of the school or impinge on the rights of other students."[25] Moreover, because school officials permitted other students in school to wear other symbols on their clothing - e.g., the Iron Cross (a symbol of Nazism) and national political campaign buttons - those officials singled out for disciplinary action the wearing of black armbands as a protest against the war in Vietnam.[26] By punishing the expression of one particular opinion without any evidence that it is "necessary to avoid material and substantial interference with schoolwork or discipline," school officials violated the First Amendment.[27]

Tinker is significant for two reasons. First, *Tinker* holds school officials to a tough standard in restricting student expression. They can do so only when "it is necessary to avoid material and substantial interference with schoolwork or

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[23] *Id*. at 509.
[24] *Id*. at 509, citing Burnside v. Byars, 363 F.2d 744, 749 (1966), *supra* note 11.
[25] *Tinker*, 393 U.S. at 509.
[26] *Id*. at 510.
[27] *Id*.

discipline."[28] Second, *Tinker* bravely provides First Amendment protection to student expression in schools, and insists that public school education should expose students to more viewpoints than those the State officially approves:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid

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[28] *Id*. at 512-513 ("A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.")

> reasons to regulate their speech, students are entitled to freedom of expression of their views.[29]

II. *BETHEL SCHOOL DISTRICT V. FRASER*

During a mandatory Bethel Hill High School school-wide assembly, scheduled for the purpose of nominating student candidates for student government offices and attended by 600 students, many of whom were 14-year olds, Matthew Fraser made a nominating speech for his candidate in which he employed "an elaborate, graphic, and explicit sexual metaphor."[30]

> I know a man who is firm – he's firm in his pants, he's firm in his shirt, his character is firm – but most of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts -- he drives hard, pushing and pushing until finally – he succeeds. Jeff is a man who will go to the very end – even the climax, for each and every one of you. So vote

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[29] *Id.* at 511.

[30] Bethel Hill Sch. Dist. v. Fraser, 478 U.S. 675, 678 (1986). Students who did not attend the assembly were required to report to study hall.

> for Jeff for A. S. B. vice-president –
> he'll never come between you and the
> best our high school can be. [31]

As Fraser delivered his nominating speech, some students "hooted and yelled" and made graphic gestures simulating the sexual activities alluded to in Fraser's nominating speech; other students were bewildered and embarrassed by the speech.[32] One teacher said she had to alter her scheduled lesson plan in order to discuss the speech with the class the following day.[33]

Two teachers with whom Fraser preliminarily shared the speech told him that it was inappropriate and should not be given, and that, if he delivered the speech, there would likely be "severe consequences."[34] Their advice was correct. The following morning, the Assistant Principal called Fraser to her office and told him his speech violated a Bethel High School rule prohibiting profane language.[35] The Assistant Principal gave Fraser copies of five letters prepared by teachers describing his conduct during the assembly, and gave him a

[31] *Fraser*, 478 U.S. at 687. The text of the nominating speech appears in Justice Brennan's concurring opinion.
[32] *Id*. at 678.
[33] *Id*.
[34] *Id*.
[35] *Id*. The Bethel High School disciplinary rule prohibiting the use of obscene language in the school states:
"Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

chance to explain his conduct.[36] Fraser admitted he gave the speech as described by the teachers and that he deliberately used the sexual metaphor in the speech.[37] Disciplinary actions followed. Fraser was suspended from school for three days and his name was removed from the list of candidates for graduation speaker at the school's graduation exercises.[38] Fraser's suspension was upheld by the School District's hearing officer, and his father, as guardian ad litem, initiated a claim under 42 U. S. C. § 1983 for violation of his son's First Amendment rights.[39]

The District Court determined that the school's disciplinary sanctions violated Fraser's First Amendment rights, that the school's disciplinary rule prohibiting the use of obscene language was unconstitutionally vague and overbroad, and that the removal of Fraser's name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because that sanction does not appear in the disciplinary code.[40] The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, rejecting the school district's arguments that Fraser's speech had a disruptive effect on educational activities, that the school

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[36] *Id*.
[37] *Id*.
[38] *Id*. Removing his name from the graduation speaker list was nullified when Fraser was elected graduation speaker by a write-in vote of his classmates, and Fraser delivered a speech at the graduation ceremonies. *Id*. at 679.
[39] *Id.* at 679.
[40] *Id*.

district had "an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school, and that, as part of its responsibility for the school curriculum, the school district has the power to control language spoken during school-sponsored activities."[41]

The U.S. Supreme Court reversed the Court of Appeals.[42] The Court initially chided the Court of Appeals for equating "the political message of the armbands in *Tinker*" and "the sexual content of [Fraser's] speech," and overlooking the Court's careful insistence that *Tinker* did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."[43] The Court then developed two main themes in support of its decision: the role and purpose of public education and the importance of protecting children from exposure to vulgar and offensive language. With respect to the former, the Supreme Court stated:

> [P]ublic education must prepare pupils for citizenship in the Republic . . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of

[41] *Id*. at 680.
[42] *Id*. at 687.
[43] *Id*. at 680.

> self-government in the community and the nation."[44]

These fundamental "habits and manner of civility" include tolerance of different political and religious views, even when the views expressed may be unpopular" and taking "into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students," who must be taught "the boundaries of socially appropriate behavior."[45] Noting that "our Nation's legislative halls, where some of the most vigorous political debates in our society are carried on," have rules prohibiting expressions that are offensive to other participants in the debate and that legislators have been censured for abusive language directed to other legislators, the Court pondered why those proscriptions were acceptable for Congress but "beyond the reach of school officials to regulate."[46] Likewise, the Court noted, "the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings."[47] While the First Amendment guarantees the right to express an antidraft viewpoint in a public

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[44] *Id*. at 681. The Court reiterated its statement of objectives for the public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system." *See* Ambach v. Norwick, 441 U.S. 68, 76–77 (1979).
[45] *Fraser*, 478 U.S. at 681.
[46] *Id*. at 682.
[47] *Id.*

place in highly offensive terms,[48] "[i]t does not follow . . . that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school."[49] In short, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."[50] The Court explained:

> Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech

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[48] *Id.*, citing Cohen v. California, 403 U.S. 15 (1985). The U.S. Supreme Court overturned Cohen's conviction of disturbing the peace for walking through a municipal courthouse wearing a jacket on which the words "Fuck the Draft" were plainly visible.

[49] *Fraser*, 478 U.S. at 682.

[50] *Id.*, citing Thomas v. Board of Education, Granville Central School Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (opinion concurring in result). *See Cohen supra* note 48.

> and conduct such as that indulged in by this confused boy.[51]

Addressing the second theme, the Court noted that the sexual innuendo in Fraser's speech was offensive to both students and teachers, insulting to teenage female students, and possibly injurious to younger students in the audience, many of whom were only 14 years old.[52] This allowed the Court to apply its previous decisions upholding restrictions on selling sexually oriented materials to children,[53] permitting the removal of vulgar books from public school libraries,[54] and protecting minors from

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[51] *Fraser*, 478 U.S. at 683.
[52] *Id.*
[53] *Id.* at 684, citing Ginsberg v. New York, 390 U.S. 629 (1968) (upholding a statute banning the sale of sexually oriented material to minors, even though the material was entitled to First Amendment protection with respect to adults).
[54] *Fraser*, 478 U.S. at 684, citing Board of Education v. Pico, 457 U.S. 853, 871–872 (1978). *See* Island Trees Union Free Sch. Dist. v. Pico, 102 S. Ct. 2799, 2810 (1982), in which the United States Supreme Court in a plurality decision recognized the school board's discretion to remove books from the school library when it deemed them excessively vulgar. The Court stated:

> Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the

exposure to vulgar and offensive spoken language in radio broadcasts,[55] in support of Bethel Hill school

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> order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioner' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*. On the other hand, respondents implicitly concede that an unconstitutional motivation would *not* be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. (Emphasis in original).

See Justin T. Peterson, *School Authority v. Students' First Amendment rights: Is Subjectivity Strangling the Free Mind at its Source,* 3 MICH. ST. L. REV. 931, 937-939 (2005).

[55] *Fraser*, 478 U.S. at 684, citing FCC v., Pacifica Foundations, 438 U.S. 726 (1978) (upholding the imposition

officials' efforts to shield school children from vulgar and offensive language in public discourse:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the 'fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the 'work of the schools.'[56]

The Court decided that the School District "acted entirely within its permissible authority" in suspending Fraser from school "in response to his offensively lewd and indecent speech."[57] School officials may properly determine "vulgar and lewd" speech undermines the school's basic educational mission, and impose sanctions to demonstrate that

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of penalties on a broadcaster for broadcasting indecent language at a time when children were undoubtedly in the audience).

[56] *Fraser*, 478 U.S. at 683.

[57] *Id*. at 685.

such speech "is wholly inconsistent with the 'fundamental values' of public school education."[58] Hence, *Fraser* creates an important exception to *Tinker*. Public school officials may impose sanctions on students for engaging in explicit speech that undercuts the school's effort to teach them that vulgar speech is highly offensive or threatening to others, contrary to the accepted rules of public discourse and the fundamental values of public education.[59]

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[58] *Id*. *See* Justin T. Peterson, *School Authority v. Students' First Amendment rights: Is Subjectivity Strangling the Free Mind at its Source,* 3 MICH. ST. L. REV. 931, 937-939 (2005).
[59] The danger inherent in denying First Amendment protection to sexually explicit, lewd or vulgar speech contrary to the accepted rules of public discourse is the lack of clarity in defining such speech. *See* Sarah Slaff, *Silencing Student Speech:* Bethel School District No. 403 v. Fraser**, 37 AM. U. L. REV. 203. 221-22 (1987) ("**Bethel adds a murky category to the kinds of student speech that may be constitutionally prohibited. By ruling that lewd and indecent student speech will receive no first amendment protection even without a distinct showing of material disruption and substantial interference, the Supreme Court established an elusive standard of impermissible student speech. The Court's decision, as Justice Fortas warned against in Tinker, threatens to transform students into "closed-circuit" recipients of state-selected communication. In the future, hoots and yells by students to a rendition of Henry IV may prompt censorship if the reaction is deemed to materially disrupt or substantially interfere with the educational process. A student who comprehends the brilliance of Melville's symbolism may now be prohibited from delivering a speech to his classmates on the sexual nuances of Moby Dick for fear of damaging the student audience's sexual development. Bethel has realized Cohen's

While *Fraser* is clear in upholding suspensions of students for employing vulgar speech that is highly offensive to others, it fails to address the issue of substantial disruption of schoolwork. The Court acknowledges the raucous conduct of some students in hooting and yelling and making graphic gestures simulating sexual activities in the school assembly, but did not address whether that conduct was sufficiently disruptive to justify the suspension of Fraser for his nominating speech. Likewise, the Court modifies the nature of public education as a justification for restricting student speech. In *Tinker*, the Court states schools prepare students for citizenship by giving them an appreciation of the importance of the constitutional protections provided by the Bill of Rights. In *Fraser*, the Court expresses the view that schools should prepare students for citizenship by inculcating them to the habits and manners of civility and dissuading them from using lewd, indecent, or offensive speech. Hence *Fraser* is unclear in two respects: (1) whether offensive speech in and of itself justifies student disciplinary measures or whether the offensive speech also had to create disruption to justify the imposition of disciplinary measures, and (2) whether the nature of public education supporting the imposition of disciplinary measures was shifting from citizenship preparation (based on an appreciation of constitutional protection of basic

worst fear by suggesting that debate in a public high school must be cleansed "to suit the most squeamish among us.")

rights) to the desirability and efficacy of engaging in civic discourse.

III. *HAZLEWOOD SCHOOL DISTRICT V. KUHLMEIER*

The Board of Education of the Hazlewood School District annually allocated funds to support the printing of *Spectrum*, the school newspaper of Hazlewood East High School.[60] *Spectrum* was written and edited by students enrolled in the Journalism II class of Hazlewood East, and published every three weeks or so during the school year.[61] More than 4,500 copies were distributed to students, school personnel, and members of the community.[62] The page proofs of each issue in the Spring 1983 semester were delivered by the instructor of the Journalism II class to the principal of Hazlewood East for a final review before publication.[63] On May 10, the journalism instructor delivered the proof of the six-page May 13 issue to the principal, who objected to two of the articles: one described the experiences of three pregnant Hazlewood East students and the other discussed the impact of divorce on Hazlewood East students.[64] The principal had two major concerns about the pregnancy story: (1) even though false names were

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[60] Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 262 (1988).
[61] *Id.*
[62] *Id*.
[63] *Id.* at 263.
[64] *Id.*

used to keep the students' identity secret, the identity of the pregnant students might be gleaned from text of the article; and (2) the articles references to sexual activity and birth control were inappropriate to the school's younger students.[65] The principal's concern with the divorce story was that one student's identity was revealed[66] and she raised several, specific complaints about her father in the story.[67] The principal thought that the student's parents ought to have the opportunity to respond to those complaints or to consent to their publication.[68] Believing the newspaper could not be printed and distributed before the end of the school year if the two stories were revised, the principal directed the instructor to eliminate the two pages containing the stories upsetting the principal.[69] He also informed his superiors of his decision and they concurred.[70]

Three former Hazelwood East students ("Respondents"), who were staff members of *Spectrum* and objected to the principal's decision, filed an action in the U.S. District Court for the Eastern District of Missouri seeking declaratory judgment that their First Amendment Rights were

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[65] *Id.*
[66] *Id.* Her identity had been deleted from the story by the instructor, but the principal was not aware of that change.
[67] *Id.* She complained that her father failed to spend enough time with the family prior to the divorce, spent too much time out of town on business, was out late playing cards, and always argued with her mother.
[68] *Id.*
[69] *Id.* at 264.
[70] *Id.*

violated, injunctive relief, and monetary damages.[71] The District Court concluded that school officials do not violate the First Amendment when they impose restraints on students' speech which is "an integral part of the school's educational function" (including the publication of the school's newspaper in a journalism class) as long as the officials' decision has "a substantial and reasonable basis."[72] That condition was fulfilled by the principal who had legitimate concerns about publishing the two stories, sought to shield younger students from exposure to unsuitable materials, wanted "to avoid the impression that [the school] endorses the sexual norms of the subjects," and legitimately thought he had to make an immediate decision because he believed there was insufficient time to correct the two stories.[73]

The Court of Appeals for the Eighth Circuit reversed, holding that (1) the *Spectrum* was not only part of the school's adopted curriculum but also a public forum "intended to be and operated as a conduit for student viewpoint" and (2) school officials were prohibited from censoring its contents except when confronted by a "material and substantial interference with school work or discipline."[74] There being no evidence in the record demonstrating the publication of the May 13 issue would disrupt class work or trigger substantial

[71] *Id.*
[72] *Id.* at 264.
[73] *Id.* at 264-265.
[74] *Id*. at 265.

disorder in the school, the school officials were not entitled to censor the articles.[75] Hence the school officials violated the First Amendment rights of the students when they deleted the two pages of the newspaper.[76]

The U.S. Supreme Court reversed the Court of Appeals.[77] The Court first rejected the notion that the *Spectrum* was a public forum for two reasons: (1) school facilities are deemed to be public forums only if they have been exclusively dedicated for use by the public,[78] and (2) the *Spectrum* was an activity embedded in the Journalism II course, which was taught by a faculty member during regular class hours and which was described in the Hazlewood East Curriculum Guide as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I.[79] Producing *Spectrum* was part of the educational curriculum and a normal classroom activity, and the instructors of Journalism II selected the editors, scheduled publication, determined the number of pages for each issue, assigned stories ideas to class members, helped students develop their stories, edited stories, and selected and edited the letters to

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[75] *Id*. The Court of Appeals stated school officials are entitled to censor articles if they could have imposed tort liability on the school. However, in the Court's view, neither article could result in tort liability for libel or invasion of privacy to the subjects of the two articles and their families.
[76] *Id*. at 267.
[77] *Id*. at 276.
[78] *Id*. at 267.
[79] *Id*.

the editor, many of those decisions being made without consulting the students.[80] Indeed, the instructors were "the final authority with respect to almost every aspect of the production and publication of *Spectrum*, including its content."[81] Moreover, after the instructor approved the page proofs, every issue of *Spectrum* had to be reviewed and approved by the principal prior to publication.[82] In short, *Spectrum* was clearly not a public forum.

The Court then differentiated between the school's obligation to tolerate expression of students that happens to occur on school premises and the obligation of schools to promote particular student speech through activities that are supervised by faculty members and undertaken as part of the school's curriculum (e.g., school-sponsored publications, theatrical productions, and expressive activities) that are reasonably perceived by students, parents, and member of the public to bear the school's imprimatur.[83] In the former situation, as in *Tinker*, the First Amendment issue is whether the school can silence the speech.[84] In the latter situation, the First Amendment issue is whether school officials are permitted exercise control or authority over the student expression and activities.[85] The Court said they were:

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[80] *Id*. at 268.
[81] *Id*.
[82] *Id*.
[83] *Id*. at 270-271.
[84] *Id*. at 271.
[85] *Id*. at 271-272.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself,' not only from speech that would 'substantially interfere with [its] work . . . or impinge upon the rights of other students,' but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and may refuse to disseminate student

> speech that does not meet those standards.[86]

Hence, the Court concluded, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[87] The Court then examined the conduct of the principal in reviewing the page proofs of the *Spectrum* and concluded he acted reasonably in omitting the articles appearing in the last two pages. The principal was legitimately concerned that the pledge of anonymity given to the pregnant students would be violated, because the identity of the students in the pregnancy article might be ascertained from the information in the article and the small number of pregnant students in the school.[88] The Court stated: "[A] teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls."[89] Moreover, if the identity of the pregnant students were ascertainable, then the privacy interests of their boyfriends and parents were also at risk.[90] The Court also agreed with the principal's concern that the

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[86] *Id.*
[87] *Id.* at 273.
[88] *Id.* at 274.
[89] *Id.*
[90] *Id.*

pregnant students' comments in the article about their sexual histories and their use or nonuse of birth control devices were "inappropriate in a school-sponsored publication distributed to 14–year–old freshmen and presumably taken home to be read by students' even younger brothers and sisters."[91] Moreover, the Court agreed with the principal's concern that comments by one student in the divorce article about her inattentive father warranted an invitation to the father to defend himself as part of journalistic fairness,[92] and noted that *Spectrum*'s faculty advisors in the previous school year testified they would not have printed that article unless the student's identity was deleted.[93] Notably, all of these concerns coalesced as an immediate deadline for printing the May 13 issue loomed, and the Court agreed the principal reasonably concluded "the newspaper had to be printed immediately or not at all," even though "[the principal] did not verify whether the necessary modifications could have been made in the articles, and [the journalism teacher] did not volunteer the information that printing could be delayed until the changes were made."[94] "[N]onetheless," the Court stated, "the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case."[95] Hence, because the

[91] *Id*. at 274-275.
[92] *Id*. at 275.
[93] *Id*.
[94] *Id*.
[95] *Id*.

Principal acted reasonably under the circumstances as he understood them, he did not violate the students' First Amendment rights.[96]

Kuhlmeier is an important decision that confirms the authority of school officials to control student expression in curriculum-based activities, and supplements *Tinker* as the controlling authority in high school newspaper law.[97] Nonetheless, there are some important limitations to *Kuhlmeier*. First, *Kuhlmeier* does not apply to public forums. That means any school newspaper that has been established as a public forum for student speech or whose student editors have clearly been given final authority to determine what will be printed in the newspaper will remain free from school official

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[96] *Id*. at 276 ("In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in *Spectrum*. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and 'the legal, moral, and ethical restrictions imposed upon journalists within [a] school community' that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of *Spectrum*, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them.")

[97] *See* Student Law Press Center, *Hazelwood School District v. Kuhlmeier: A Complete Guide to the Supreme Court Decision* at https://splc.org/2015/11/hazelwood-school-district-v-kuhlmeier-2/ (last visited August 31, 2021).

censorship.[98] Second, the regulated speech must be school sponsored, i.e., designed to achieve particular learning outcomes, supervised by teachers, supported financially by the school, or identified with the name of the school.[99] That means that "[u]nderground, alternative and even extracurricular student publications still retain much stronger *Tinker* protections,"[100] if they are not financially supported by the school.[101] Third, the restriction on speech must be coupled to genuine pedagogical concerns or designed to disassociate the school from the student speech, and must be implemented in a reasonable manner. That means school official censorship will be prohibited "[w]hen the censorship has 'no valid educational purpose,' "[102] and that, when school officials exercise their authority to control student expression, they should do so in a viewpoint-neutral manner, i.e. they did not censor simply because they disagreed with a particular view students were expressing.[103]

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[98] *Id.*
[99] *Id.*
[100] *Id.* at 3.
[101] *Id.*
[102] *Id.* at 4.
[103] *Id.* at 5. *See* Planned Parenthood of Southern Nevada, Inc. v. Clark County Sch. Dist., 941 F.2d 817, 829 (1991). The court stated:

> 'Control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.' The

Clearly *Kuhlmeier* moved the discussion of the constitutionality of restrictions on student speech in a totally different direction and into a totally new arena. *Tinker* focused on disruptive speech. *Fraser* focused on vulgar, lewd, and offensive speech. *Kuhlmeier* shifted the justification for restricting student speech to curriculum-based activities, such as school-sponsored publications, theatrical productions, and expressive activities, in which teachers are expected and entitled to exercise editorial control over the students' speech so that students attain the learning outcomes the activity is designed to attain, readers are not exposed to

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schools' refusal to publish Planned Parenthood's advertisements was viewpoint neutral. Planned Parenthood's advertisements were rejected, and schools enacted guidelines excluding advertising that pertains to "birth control products and information," in order to maintain a position of neutrality on the sensitive and controversial issue of family planning and avoid being forced to open up their publications for advertisements on both sides of the 'pro-life' – 'pro-choice' debate. In addition to believing the copy and Planned Parenthood to be controversial, some principals felt that parents would object to the advertisement. The school district also viewed Planned Parenthood's advertisements as implicating its statutorily prescribed sex education curriculum and sought to avoid conflict with the state requirements regarding the manner sex education is presented to students. (citations omitted)

inappropriate materials for their level of maturity, and the speech meets the high standards set by educators such as being grammatically correct, well written, adequately researched, unbiased, and suitable for immature audiences. The students' speech was generated by normal classroom activity in an established class (Journalism II) within the educational curriculum and under the supervision of the classroom teacher who was authorized to oversee almost every aspect of the publication, including its content. This was not political expression planned off-campus and executed on school premises. This was not vulgar or lewd language in a speech nominating a classmate for a student government position in a school wide assembly. This was a learning activity embedded in an established course taught by a high school teacher, a totally different category of student speech.

Significantly the majority opinion in *Kuhlmeier* ignores the role of public education in resolving the First Amendment issues. Rather the role of public education appears only in the dissenting opinion of Justice Brennan.[104] One commentator suggests that the Columbine high school shootings in 1999 and the Virginia Tech massacre in 2007 lessened the role of public education in resolving student speech cases. The Columbine shootings in in Littleton, Colorado, left

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[104] *Kuhlmeier*, 108 S. Ct. at 574 ("Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of our democratic republic.")

15 people dead, 23 students wounded, and high school administrators wondering how they might prevent its replication at their schools:[105]

> Quite simply, the events at Columbine gave high school administrators all the reasons — legitimate or illegitimate — they needed to trounce the First Amendment rights of public school students in the name of preventing violence. The first wave of censorship cases that swelled up in the year immediately following Columbine is now well documented. But the fear of Columbine-like violence that gave rise to that wave has not subsided in the years since. As the Washington Post observed in December 2002, many school administrators across the country 'are still on edge since the tragedy at Columbine High School.'[106]

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[105] *The Aftermath of Columbine on Student Writing*, CORWIN PUBLISHING COMPANY, file://rowanads.rowan.edu/home/schoen/Desktop/Mahanoy%20Area%20School%20District%20v.%20B.L/Columbine%20and%20Jonesboro%20Shootings%20effects%20on%20student%20writing.pdf (last visited August 29, 2021).

[106] *Id*.

Similarly, following the Virginia Tech shooting in 2007, in which 32 people died after being gunned down on the campus of Virginia Tech by a student at the university who later died by suicide,[107] public schools seem to have cracked down on student speech that expressed violent thoughts, and some school officials, endorsing this trend, said a tougher stance on "violent speech" might be necessary to expose or discourage potential school violence.[108] In any event, the role of public school education in resolving the student speech cases appears to have disappeared in *Kuhlmeier* and in subsequent U.S. Supreme Court considerations of the constitutionality of student speech restrictions imposed by public school officials.

IV. *MORSE V. FREDERICK*

Deborah Morse, the principal of Juneau-Douglas High School, decided to permit staff and students to watch the Olympic Torch Relay as it moved along the street in front of the school in Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah.[109] Students left their classes to

[107] *Virginia Tech Shooting leaves 32 dead*, HISTORY.COM, April 16, 2007, https://www.history.com/this-day-in-history/massacre-at-virginia-tech-leaves-32-dead (last visited August 29, 2021).

[108] *The Aftermath of Columbine on Student Writing*, *supra* note 105 at 5.

[109] Morse v. Frederick, 551 U.S. 393, 397 (2007). Chief Justice Roberts authored the majority opinion, in which Justices Scalia, Kennedy, Thomas, and Alito joined. Justice

observe the relay from either side of the street, while teachers and administrative staff monitored the students' actions.[110] Joseph Frederick, a high school senior, arrived at school late, and joined his friends and classmates across the street from the school.[111] As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner containing the legible phrase "BONG HiTS 4 JESUS." Seeing the banner, Morse quickly crossed the street, confiscated the banner, and told Frederick to report to her office.[112] Morse later explained that she advised Frederick to take down the banner because she thought it promoted illegal drug use and violated the school board's prohibition against "public expression that … advocates the use of substances that are illegal to minors."[113] When Frederick reported to her office, Morse told him he was suspended from school for 10 days.[114] Frederick pursued an administrative appeal of his suspension, and the Juneau School District Superintendent upheld the suspension but limited it to the eight days served.[115] The Superintendent prepared a memorandum in which he explained his decision: "Frederick had displayed the banner 'in the midst of

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Alito filed a concurring opinion, in which Justice Kennedy joined. Justice Stevens filed a dissenting opinion, in which Justices Souter and Ginsburg joined.

[110] *Id*.

[111] *Id*.

[112] *Id*. at 398.

[113] *Id*.

[114] *Id*.

[115] *Id*.

fellow students during schools hours at a school sanctioned activity' and the banner appeared to promote the use of illegal drugs.[116] He also clarified why he thought the message advocated the use of illegal drugs:

> The common-sense understanding of the phrase 'bong hits' is that it is a reference to a means of smoking marijuana. Given [Frederick's] inability or unwillingness to express any other credible meaning for the phrase, I can only agree with the principal and countless others who saw the banner as advocating the use of illegal drugs. [Frederick's] speech was not political. He was not advocating the legalization of marijuana or promoting a religious belief. He was displaying a fairly silly message promoting illegal drug usage in the midst of a school activity, for the benefit of television cameras covering the Torch Relay. [Frederick's] speech was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of

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[116] *Id*.

> illegal drugs and to discourage their use.[117]

The Juneau School District Board of Education upheld the decision of the superintendent and the suspension.[118] Claiming the school board and Morse violated his First Amendment rights, Frederick filed a complaint under 42 U.S.C. § 1983 in federal district court.[119] The District Court granted summary judgment for the school board and Morse.[120] The District Court determined that the school board and Morse were entitled to qualified immunity and had not infringed on Frederick's First Amendment rights.[121] The District Court also found that Morse's conclusion that the banner promoted illegal drug use was reasonable and that message violated the school board's drug abuse prevention policies.[122]

The Ninth Circuit Court of Appeals reversed the district court.[123] The Ninth Circuit decided that, even though Frederick's activity occurred during an authorized school activity and expressed "positive sentiment" about marijuana use, the school punished Frederick without any indication his expression created a "risk of substantial disruption."[124] The

[117] *Id*. at 398-399.
[118] *Id*. at 399.
[119] *Id.*
[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] *Id*.
[124] *Id*.

Court also ruled that Frederick's "First Amendment right to wield his banner . . . was so clearly established" that Morse should have understood her actions were unconstitutional when she seized the banner. Hence Morse was not entitled to qualified immunity.[125]

The U.S. Supreme Court granted certiorari on two questions: whether Frederick had a First Amendment right to display his banner, and, if so, whether that right was so clearly established that Morse can be held liable for damages.[126] Because the Court ruled Frederick did not have a First Amendment right to "wield his banner," the Court had "no occasion to reach the second."[127]

The Court initially rejected Frederick's argument that his display of the banner was not a school speech incident:

> The event occurred during normal school hours. It was sanctioned by Principal Morse 'as an approved social event or class trip,' and the school district's rules expressly provide that pupils in 'approved social events and class trips are subject to district rules for student conduct.' Teachers and administrators were interspersed among the students and charged with

[125] *Id*. at 400.
[126] *Id*.
[127] *Id*.

> supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot 'stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'[128]

Moreover, the Court said, while the message on Frederick's banner might be construed differently, Morse "thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one":[129]

> As Morse later explained in a declaration, when she saw the sign, she thought that 'the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana.' She further believed that 'display of the banner would be construed by students, District

[128] *Id*. at 400-401.
[129] *Id*. at 401.

> personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use'—in violation of school policy.[130]

The Court agreed with Morse's interpretation, because the words can reasonably convey either an imperative to use illegal drugs or a celebration of illegal drug usage.[131] While admitting Frederick's message may "surely" be interpreted as "gibberish," the Court insisted it was not the only plausible interpretation and "dismissing the banner as meaningless ignores its undeniable reference to illegal drugs."[132] Having interpreted the language as promoting illegal drug use, the Court then addressed the question of "whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."[133] The Court, relying on the basic principles enunciated from *Tinke*r, *Fraser*, and *Kuhlmeier*, said that it could.[134] *Tinker*, the Court said, made it clear that First Amendment rights, "applied in light of the special characteristics of the school environment" are available to teachers and students, and that "student expression many not be suppressed unless school

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[130] *Id*.
[131] *Id*. at 402.
[132] *Id*.
[133] *Id*.
[134] *Id*.

officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.' "[135] *Fraser*, the Court said, established two principles: (1) "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and, while Fraser's nominating speech "would have been protected in a public forum outside the school context," the special characteristics of the school permitted the circumscription of Fraser's First Amendment rights,[136] and (2) that the school's restriction of Fraser's First Amendment rights can be upheld without the application of the "substantial disruption" analysis employed in *Tinker*.[137] *Kuhlmeier*, the Court said, upheld the school's restrictions on student speech "that students, parents and members of the public might reasonable perceive to bear the imprimatur of the schools," and educators may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonable related to legitimate pedagogical concerns."[138] Further, while *Kulhmeier* is inapplicable to Frederick's expression, because no one would reasonably believe his banner bore the school's imprimatur, *Kulhmeier* confirms that the

[135] *Id*. at 403
[136] *Id*. at 404-405.
[137] *Id*. at 405.
[138] *Id*.

"substantial disruption" test in *Tinker* "is not the only basis for restricting student speech."[139]

Having gleaned these principles from *Tinker*, *Fraser* and *Kuhlmeier*, the Court built its case that "deterring drug use by school children is an 'important – indeed, perhaps compelling interest,' "[140] by citing: (a) various Fourth Amendment cases that lighten restrictions on searches by public authorities in schools, because Fourth Amendment rights "are different in public schools than elsewhere" and the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children"[141]; (b) National Institute on Drug Abuse survey results showing about "half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders," almost one in four 12th graders has used an illicit drug in the past month, and 25% of high school students say that they have been offered, sold, or given an illegal drug on school property

[139] *Id* at 406.
[140] *Id.* ("School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted.")
[141] *Id.*

within the past year[142]; and (c) Congress' declaration that schools must educate students about the dangers of illegal drug use in its enactment of the Safe and Drug–Free Schools and Communities Act of 1994, which requires schools receiving federal funding to convey a consistent and clear message that illegal drug usage is harmful and wrong and, in response to which, "[t]housands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message."[143]

The Court then linked the compelling interest in combating drug usage by children to the "special characteristics of the school environment and the governmental interest in stopping student drug usage" which permits "schools to restrict student expression that they reasonably regard as promoting illegal drug use."[144] Indeed, the Court cautioned, the interest in curbing illegal drug usage among students is far more "serious and palpable" than *Tinker*'s interest in quelling disruption of the work and discipline of the school.[145] The Court stated:

> When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act – or not act

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[142] *Id*. at 407.
[143] *Id*. at 408.
[144] *Id*. ("The 'special characteristics of the school environment,' and the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.")
[145] *Id*.

> – on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use – in violation of established school policy – and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributed to those dangers.[146]

Furthermore, while the Court noted that the language on the banner was subject to multiple interpretations, the Court accepted Morse's interpretation of that language as final because it was reasonable, again deferring to the school principal's judgment particularly in stressful situations, because "[s]chool principals have a difficult job, and a vitally important one" in shielding students from drug advocacy and need "legal cover to strike down student speech that can be 'reasonably regarded' as encouraging illegal drug use."[147]

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[146] *Id.* at 409-410.
[147] Judy Want, *U.S. Supreme Court's decision in Morse v. Frederick leaves narrow hole in landmark Tinker standard*, STUDENT PRESS LAW CENTER, https://splc.org/2007/08/chipping-away/ (last visited August 21, 2021).

V. *MAHANOY AREA SCHOOL DISTRICT V. B.L.*

In *Mahanoy Area School District v. B.L.*,[148] the U.S. Supreme Court ruled that the Mahanoy Area School District ("Mahanoy Area") violated the First Amendment rights of Brandi Levy, a rising sophomore enrolled in the high school, when it suspended her from the junior varsity cheerleading team for one year because, both disappointed that she did not make the varsity cheerleading team and was not selected to play right field on a private softball team, and upset that an entering freshman was placed on the varsity cheerleading squad, she posted two pictures on Snapchat, a social media application that permits posts of photos and videos that subsequently disappear after a set period of time.[149] The first picture showed Brandi and a friend with their middle fingers raised, along with the caption "Fuck school fuck softball fuck cheer fuck everything."[150] The second picture was blank but contained a caption which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?"[151] Brandi posted the pictures on the weekend during her and

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[148] Mahanoy Area School District v. B.L., 141 S. Ct. 2038 (2021).
[149] *Id*. at 2043 and 2048.
[150] *Id*.
[151] *Id*. The caption was accompanied with an upside-down smiley-face emoji.

her friend's visit to the Cocoa Hut, a local convenience store.[152]

Other Mahanoy Area high school students, some of whom were members of the cheerleading squad, belonged to Brandi's Snapchat "friends," one of whom took pictures of Brandi's posts and shared them with other members of the cheerleading squad.[153] One of those members showed the pictures to her mother, who was one of the two coaches of the cheerleading squad.[154] The images spread and, "visibly upset," several cheerleaders and other students approached the cheerleading coaches about the posts.[155] The other cheerleading coach taught an Algebra class, during which questions about the posts were raised.[156] The cheerleading coaches then discussed the matter with the school principal, and they determined that, because the posts contained profanity and were connected to a school extracurricular activity, the posts violated team and school rules.[157] The cheerleading coaches suspended Brandi from the junior varsity cheerleading team for the upcoming year, and, despite Brandi's apologies, the high school athletic director, principal, superintendent, and school board upheld the suspension.[158]

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[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.*

Brandi and her parents appealed the suspension in Federal District Court.[159] Ruling in favor of Brandi, the District Court granted a preliminary injunction directing the school to reinstate Brandi to the cheerleading team, subsequently granted Brandi's motion for summary judgment determining Brandi's Snapchat posts had not caused substantial disruption at the school, and decided the one-year suspension from the cheerleading squad violated Brandi's First Amendment rights.[160] The District Court awarded Brandi nominal damages and attorney fees and directed the Mahanoy Area to expunge Brandi's disciplinary record.[161]

Mahanoy Area appealed to the Third Circuit, which affirmed the District Court's conclusion in a panel decision.[162] The majority of the panel, interpreting the U.S. Supreme Court decision in *Tinker*,[163] decided that the freedom of the school to

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[159] *Id.*
[160] *Id.* at 2043-2044.
[161] *Id.* at 2044.
[162] *Id.*
[163] Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). As discussed more fully above in this article, *Tinker* held that a public high school could not constitutionally prohibit a peaceful student political demonstration consisting of " 'pure speech' " on school property during the school day, in the absence of evidence the student protest would "substantially interfere with the work of the school or impinge upon the rights of other students.. *Id*. at 505-506 and 509. *Tinker* also noted that "conduct by [a] student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially

discipline students for conduct that the First Amendment might otherwise protect does not apply to "off-campus speech," which it defined as "speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur."[164] Because Brandi posted Snapchat pictures when she was off-campus, the majority determined, Mahanoy Area could not discipline Brandi for engaging in a form of pure speech.[165] The third concurring member determined the school lacked sufficient justification to discipline Brandi, because her speech was not substantially disruptive.[166]

Mahanoy Area appealed to the U.S. Supreme Court, asking it to determine "[w]hether [*Tinker*], which holds that public school officials may regulate speech that would materially and substantially disrupt the work and discipline of the school, applies to student speech that occurs off-campus,"[167] and the U.S. Supreme Court granted the petition for certiorari.[168]

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disrupts classwork or involves substantial disorder or invasion of the rights of others is ... not immunized by the constitutional guarantee of freedom of speech." *Id*. at 513.

[164] *Mahanoy Area*, 141 S. Ct. at 2044. B.L. v. Mahanoy Area School District, 964 F.3d 170, 189 (2020).

[165] *Mahanoy Area*, 141 S. Ct. at 2044.

[166] *Id*.

[167] *Id*.

[168] *Id*. *See* Thomas Shannan and Allison Franz, *Mahanoy Area School District v. B.L. (20-255)*, THE FEDERAL LAWYER, July/August 2021, at 71, file://rowanads.rowan.edu/home/schoen/Desktop/Mahanoy%2

The U.S. Supreme Court initiated its analysis by quoting familiar language from *Tinker*: "students do not 'shed their constitutional rights to freedom of speech or expression,' even 'at the school house gate.' "[169] The Court noted that, while "minors are entitled to a significant measure of First Amendment protection," courts are required to apply the First Amendment "in light of the special characteristics of the school environment."[170] The Court reiterated that there were three categories of student speech that can be regulated by schools in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech communicated during a school assembly on school grounds,[171] (2) speech promoting "illegal drug use" uttered during a school activity,[172] and (3) speech that other individuals may reasonably understand as "bear[ing] the imprimatur of the school," such as that appearing in a school-sponsored newspaper.[173] Moreover, the Court stated, "schools have a special interest in regulating speech that 'materially disrupts

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0Area%20School%20District%20v.%20B.L/The%20Federal%20Lawyer%20-%20July-August,%202021.pdf (last visited August 30, 2021).

[169] *Mahanoy Area*, 141 S. Ct. at 2044, citing *Tinker*, 393 U.S. at 506.

[170] *Mahanoy Area*, 141 S. Ct. at 2044, citing *Kuhlmeier*, 484 U.S. at 266.

[171] *Mahanoy Area*, 141 S. Ct. at 2045, citing *Fraser*, 478 U.S. at 685.

[172] *Mahanoy Area*, 141 S. Ct. at 2045, citing *Morse*, 551 U.S. at 409.

[173] *Mahanoy Area*, 141 S. Ct. at 2045, citing *Kuhlmeier*, 484 U.S. at 271.

classwork or involves substantial disorder or invasion of the rights of others,' "[174] and "[t]hese special characteristics call for special leeway when schools regulate speech that occurs under its supervision."[175]

Parting ways with the Third Circuit, the U.S. Supreme Court emphasized that "the special characteristics that give schools additional license to regulate student speech" do not "disappear when a school regulates speech that takes place off-campus."[176] Rather, the school's interest in regulating speech remains "significant in some off-campus circumstances" involving conduct that requires school regulation, such as bullying or harassing particular individuals, threatening teachers or other students, disregarding rules governing lessons, writing papers, using computers, participating in online school activities, and breaching security devices protecting school

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[174] *Mahanoy Area*, 141 S. Ct. at 2045, citing *Tinker*, 393 U.S. at 513.

[175] *Mahanoy Area*, 141 S. Ct. at 2045.

[176] *Id*. The Third Circuit has favored the privacy of students engaged in off campus bullying in contrast to other circuits which recognized the ability of the schools to regulate such off school grounds conduct. Thus, the Third Circuit diverged from other Circuits in not applying Tinker to off campus student postings on My Space wherein students mocked a principal and the Court found no substantial disruption occurred in the school. *See* e.g. J.S. v Blue Mountain School District, 650 F.3d 915 (3d Cir. 2011) (student created a vulgar profile of the principal) and Layshock v. Hermitage, 650 F.3d 205 (3d Cir. 2017). (student created a fake profile of his principal on his grandmother's computer).

computers.[177] The Court also cited multiple activities that blur the on-campus and off-campus distinction: "travel en route to and from the school; all speech taking place over school laptops or on a school's website; speech taking place during remote learning; activities taken for school credit; and communications to school e-mail accounts or phones."[178] Further these lists may vary because of the "student's age, the nature of the school's off-campus activities, or the impact of the school itself."[179] In short, it is impossible to accurately classify activities as off-campus or on-campus, particularly in an era of "computer based learning."[180] Hence the Court rejected the Third Circuit's dichotomy between off-campus and on-campus activities, because the distinction between the two types of activities is often not clear and wrongfully impinges on the "school's special need to prevent [certain types of off-campus behavior], e.g., substantial disruption of learning-related activities or the protection of those who make up a school community."[181]

The Court than identified three features of off-campus speech that shrink the authority of schools to regulate off-campus speech.[182] First,

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[177] *Id*.
[178] *Id*.
[179] *Id*.
[180] *Id*.
[181] *Id*.
[182] *Id*. at 2046. One commentator describes the three factors as follows:

- Whether a school stands in the place of parents—in loco parentis—who aren't there to protect and guide their children. "Geographically speaking, off-campus speech will normally fall within the zone of parental, rather than school-related, responsibility," Breyer wrote.
- Whether the regulation of speech would include all the student's speech, both on- and off-campus. Courts should be more skeptical of a school's efforts to regulate speech for 24 hours per day. In addition, "When it comes to political or religious speech that occurs outside school or a school program or activity, the school will have a heavy burden to justify intervention," Breyer wrote.
- Whether the school has an interest in protecting unpopular expression. "Schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it,'" Breyer wrote.

See Debra Cassens Weiss, *Cheerleader's Snapchat vulgarity had a message, Supreme Court says in 8-1 ruling against school,* ABA JOURNAL, June 23, 2021, https://www.abajournal.com/news/article/supreme-court-rules-for-cheerleader-suspended-for-using-f-word-on-snapchat?utm_medium=email&utm_source=salesforce_410461&sc_sid=00001392&utm_campaign=weekly_email&promo=&utm_content=&additional4=&additional5=&sfmc_j=410461&sfmc_s=50724387&sfmc_l=1527&sfmc_jb=21008&sfmc_mid=100027443&sfmc_u=11854387 (last visited June 26, 2021).

schools rarely stand *in loco parentis* when the student's speech takes place off-campus; rather off-campus speech normally falls within the zone of parental responsibility, rather than school responsibility.[183] Second, because school regulations targeted to any student utterances off-campus may result in eliminating all student speech, courts must be skeptical of school restrictions on off-campus speech, and, if the restriction is directed to political or religious speech occurring outside school or a school program or activity, "the school will have a heavy burden to justify intervention."[184] Third, the Court noted, schools cannot overlook their responsibility to instill in their students the importance of democracy, democratic practices, and the need to protect both popular and unpopular ideas, and thereby ensure that future generations understand and continue the workings of democracy.[185] "Taken together," the Court noted, "these three features of much off-campus speech mean that the leeway the First Amendment grants to schools in light of their special characteristics is diminished."[186]

The Court then turned its attention to Brandi's speech, and identified several characteristics of that speech: (1) while vulgar, Brandi's posts conveyed a criticism of the cheerleading team, the team's coaches, and the

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[183] *Id.*
[184] *Id.*
[185] *Id.*
[186] *Id.*

school, i.e., the rules of the school community in which she was a part[187]; (2) Brandi's speech was neither "fighting words" nor obscene[188]; (3) Brandi posted the photos "outside of school hours from a location outside the school[189]; and (4) Brandi did not identify the school or target any particular member of the school community with vulgar or offensive language.[190] These characteristics, the Court noted, diminished the school's interest in disciplining Brandi for her speech.[191]

The Court next examined the interests advanced by the school to justify its disciplining Brandi: teaching good manners by discouraging students from using vulgar language, preventing disruption of school-sponsored extracurricular activity, and maintaining good morale among members of the cheerleading team.[192] The first interest failed, the Court determined, because (1) Brandi spoke outside the school on her own time during which the school did not stand *in loco parentis*, and (2) the school presented no evidence of any program or general effort to discourage students from using vulgarity outside the classroom.[193]

The second interest also failed, because there was "no evidence in the record of any 'substantial

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[187] *Id*.
[188] *Id*. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) and Cohen v. California, 403 U.S. 15 (1971).
[189] Mahanoy Area, 141 S. Ct. at 2047.
[190] *Id*.
[191] *Id*.
[192] *Id*. at 2047-2048
[193] *Id*. at 2047.

disruption' of a school activity or a threatened harm to the rights of others that might justify the school's actions," other than some cheerleaders being "upset" about the content of Brandi's posts and a discussion that "took, at most 5 to 10 minutes of an algebra class 'for a couple of days.' "[194] Indeed, when asked if the posts disrupted class or school activities – other than the facts students inquired about it – one of Brandi's coaches simply responded "No."[195]

The third interest failed as well, because there was no evidence that "suggests any serious decline in team morale—to the point where it could create a substantial interference in, or disruption of, the school's efforts to maintain team cohesion."[196] This was confirmed by the testimony of one coach who said Brandi was disciplined, not because of an specific negative impact on a member of the school community, but because the "negativity" in Brandi's message "could" impact students in the school.[197] That concern, the Court stated, is "not enough to overcome the right to freedom of expression."[198]

Having determined that the school district had not identified any interest sufficient to overcome Brandi's First Amendment rights, the U.S. Supreme Court agreed with and confirmed the judgment of the Third Circuit.[199]

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[194] *Id*. at 2047-2048.
[195] *Id*. at 2048.
[196] *Id*.
[197] *Id*.
[198] *Id*.
[199] *Id*.

VI. SUMMARY

The United States Supreme Court has decided five major cases dealing with the First Amendment rights of public school students. In the first, *Tinker*, the Court overturned the suspension of students from school for wearing an armband to publicize their objections to the war in Vietnam, boldly recognizes that public school student speech is protected by the First Amendment, and holds school officials to a tough standard in disciplining student speech: when it is "necessary to avoid material and substantial interference with schoolwork or discipline." These rights were protected, the Court said, to expose students to more viewpoints than those the state officially provides and to let students appreciate First Amendment rights by experiencing them. Three factors provide the foundation of the decision: the purpose of public education, the nature of the expression, and the absence of disruption to school activities. More particularly, public education should prepare students for citizenship, and school activities do so by giving students an appreciation of the protections provided by the Bill of Rights. Moreover, wearing armbands is a form of "pure speech," which is entitled to comprehensive First Amendment protection. Finally, restrictions on student speech are permitted only when the student speech creates disturbance or disorder that interferes with schoolwork or discipline.

In the second decision, *Fraser*, the Court upholds the suspension imposed of a student for including "an elaborate, graphic and explicit sexual metaphor" in his nomination speech. The Court bases its decision on the grounds that younger students should be protected from vulgar language and schools were supposed to inculcate the "habits and manners of civility" in school children. It is unclear, however, whether the Court in *Fraser* moved from "substantial disruption" basis for protecting student speech to the "lewd and indecent speech" basis for regulating student speech. While the Court recognized the nominating speech triggered hooting and yelling and graphic gestures simulating sexual activities, the Court did not directly address whether the students' reactions were sufficient to justify the suspension of Fraser from class. Rather the Court based its decision on the role and purpose of public education (inculcating the habits and manners of civility and demonstrating the appropriate form of civil discourse and political expression) and the importance of protecting children from exposure to vulgar and offensive language. In short, it is uncertain whether those factors were subordinate or supplemental to the "substantial disruption" test and whether the need of public education to prepare students for citizenship was a viable justification for restricting student speech.

In the third decision, *Kuhlmeier*, the Court upholds the right of school officials to censor the student newspaper to insure desired learning

objectives are attained, audiences are not exposed to materials inappropriate to their age and maturity, and the school is able to disassociate itself from expression that does not meet its educational standards. Hence the Court supplements acceptable student speech restrictions on disruptive speech (*Tinker*) and vulgar and offensive speech (*Kuhlmeier*) with acceptable restrictions on speech activities sponsored by the school and part of the school's educational mission. In doing so, *Kuhlmeier* moves the consideration of restrictions on student speech to a new arena, namely school sponsored speech embedded in an existing course in the school's curriculum taught and overseen by a high school teacher who must be authorized to exercise editorial control over student speech in order to guarantee that educational objectives are met. That authority empowers the teacher to select the editors, schedule publication, fix the number of pages for each issue, assign stories to students in the class, help students to develop their stories, choose and edit letters to the editor, and review and approve the page proofs of every issue, subject to the final approval of the principal. In short, school sponsored speech is a species of speech separate and apart from *Tinker* and *Fraser* and governed by very different principles, none of which related to preparing students for citizenship or the role of public education. Significantly, in a post-Columbine and post-Virginia Tech world, the absence of any consideration of preparing students for citizenship or the role of public education in promoting civic

discourse may be attributed to an emerging public school role in which school officials have become far more proactive in seeking out and disciplining student speech that contains violent thoughts.

In the fourth decision, *Morse*, the Court holds that suspending a student from school for unfurling a banner during a high school sponsored and supervised event did not violate the First Amendment, because his expression promoted illegal drug usage contrary to school policy, and the school officials did not want the school to be associated with speech that was contrary to the policies it was trying to promote. Notably, even though the banner's message is subject to various interpretations, the Court upheld Frederick's suspension from school on the basis of the school principal's "reasonable" interpretation of the banner's message as promoting illegal drug usage in violation of school policy. Indeed, the U.S. Supreme Court deems the interest in deterring school children from using illegal drugs to be compelling, as evidenced by Fourth Amendment search cases in schools, National Institute on Drug Abuse survey results confirming increased drug usage by students, particularly among high school seniors, and the enactment of the Safe and Drug–Free Schools and Communities Act of 1994. While *Morse* focuses on student speech promoting illegal drug usage, there is little doubt that *Morse* permits far greater deference to school officials' efforts to curtail student speech, because it accepts as final the school official's interpretation of the student's speech as long as that

interpretation is reasonable, thereby providing "legal cover" to eliminate student speech that can reasonably be interpreted as encouraging illegal drug use. *Morse* also underscores the diminution, if not abandonment, of the historic role of public school education in protecting student speech: preparing students for citizenship or the role of public education in promoting civic discourse.

In the fifth case, *Mahanoy Area*, the Court made its first foray into the constitutionality of school officials disciplining a high school student for off-campus speech. Upset at not being selected for the varsity cheerleading team, the student posted a photo and captions containing vulgar language to Snapchat, a social media website. The photo, which showed the student and a friend with their middle fingers extended, was posted on the weekend during their visit to a local convenience store. The cheerleading team's coaches reviewed pictures of the posts, and suspended the student from the team for the upcoming year. The U.S. Supreme Court affirmed the decision of the Third Circuit Court of Appeals, which held the high school had no authority to interfere with student speech which occurs off-campus, but disagreed with its reasoning. The U.S. Supreme Court noted that the Third Circuit's dichotomy between off-campus and on-campus speech wrongfully restricts the school's "special need" to prevent certain types of off-campus behavior which disrupts educational activities or injures members of the school community. Notably, the Court emphasized, while the school's license to

regulate student speech does not "disappear" when that speech takes place off-campus, three features of off-campus speech diminish the authority of the school to regulate off-campus speech: the loss of the school's *in loco parentis* standing off-campus; the imposition of a "heavy burden" on the schools to justify intervention; and the responsibility of schools to instill in students the need to protect both popular and unpopular ideas. Thus, high schools have significantly diminished authority to discipline students for off-campus speech which criticizes school rules or procedures, does not contain fighting words or obscene language, is posted from a location outside the school and outside of school hours, and does not identify the school or target any particular member of the school community with vulgar or offensive language. Likewise, the high school must identify and advance a substantial interest when it disciplines a student for vulgar off-campus speech, and, the U.S. Supreme Court ruled, the interests advanced by the school – discouraging the use of vulgar language, preventing disruption of a school's extracurricular activity, and maintaining good morale among students engaged in that extracurricular activity – are insufficient to justify the interference with the student's right to freedom of expression. Hence, the Court decided that the high school officials lacked authority to remove the student from the cheerleading team for posting a photo and captions containing vulgar language to a social media website.

CRISIS MANAGEMENT IN LEGAL ENVIRONMENT COURSES

EVAN A. PETERSON*

Gone are the days of the legal department operating in an insulated silo from the rest of the organization. In-house counsel, in step with growing recognition of legal strategy as an organizational value creator, are serving as strategic planners in greater numbers.[1] These functions necessitate an

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[1] David Orozco, *Strategic Legal Bullying*, 13 N.Y.U. J. L. & BUS. 137 (2016); Constance E. Bagley & Mark Roellig, *The Transformation of General Counsel: Setting the Strategic*

enhanced understanding of organizational strategic objectives and solutions that align best with those objectives.[2] Organizational crisis management represents an area of focus where in-house counsel must apply such enhanced understandings to resolve critical challenges for the organization. In-house counsel, as key members of any crisis management team, provide expertise concerning relevant business lines/products and historical perspectives on company policies/procedures, alongside litigation and regulatory experience.[3] Responses to organizational crises require the simultaneous consideration of the legal, ethical, and business strategy consequences of an extensive range of decisions affecting both short-term and long-term perspectives.[4] The issues and challenges facing in-house counsel as members of crisis management teams underscore a blunt truth regarding legal study in business law and legal environment courses: preparation for real-world business practice must extend beyond the traditional Socratic delivery of

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Legal Agenda,
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2201246.

[2] Bjarne P. Tellmann & Susan R. Sneider, *The Relationship Between the Legal Department and the Corporation*, § 16:13, The Company's Strategic Objectives, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[3] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:7, Assembling the Crisis Team—In-house Counsel, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[4] *Id.*

black letter law to include real-world applications highlighting the integration of legal strategy and business strategy.

To prepare today's business students to face such real-world practice, there is a growing need for active learning course assignments that foster the holistic examination of the legal, ethical, and business strategy consequences in the crisis management context. Active learning techniques support the development of students' communication skills and their ability to manage uncertainty.[5] The problem-based learning approach of using real-world problems to provide relevant context for the learning process enhances students' critical thinking skills, collaboration skills, communication skills, information evaluation skills, and creativity.[6] Problem-based scenarios provide students with a lens through which they can relate critical issues to the real-world context, bridging the gap between theory and practice.[7] The crisis management project, a semester-long project for legal environment courses, sets up one possible means for instructors to promote a holistic examination of the varied issues

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[5] *See* Alan L. Neville, *Problem-Based Learning and Medical Education Forty Years In: A Review of its Effects on Knowledge and Clinical Performance*, 18 MED. PRINC. & PRACT. 1, 7 (2009).

[6] Michael Prince, *Does Active Learning Work? A Review of the Research*, 93 J. ENGINEERING. EDUC. 223, 223 (2004).

[7] Lamar Odom & Analco Gonzalez, *Kelo v. City of New London: An Ideal Case to Teach Ethical and Legal Principles*, 25 J. LEGAL STUD. EDUC. 343, 347 (2008).

connected to legal crisis management among students in their courses.

The discussion in this Article proceeds in three parts. Part I includes an introduction to the crisis management project and an overview of the concepts and student tasks comprising the project's four modules. Part II contains information on the pedagogical benefits of the crisis management project as evidenced by students' post-project reflections. Part III concludes with a summary of the implications addressed by this paper.

I. CRISIS MANAGEMENT PROJECT

This section encompasses an overview of how to incorporate the crisis management project into a legal environment courses. To provide a more holistic explanation of the project and proper contextual guidance to readers, the discussion in this section will include a detailed examination of the crisis management project administered in a summer section of Legal Issues in Organizational Strategy at the University of Detroit Mercy. As this section will also incorporate recommendations on how instructors may adapt the crisis management project to suit individual course needs and preferences, the sample project is for illustrative purposes only. The four assignment modules were based on the four phases of the crisis management process as outlined by Waterman and Yannett: (1) assembling a team; (2) developing a plan; (3) executing the plan; and (4)

resolving the crisis.[8] The project is not intended to cover all possible issues crisis management teams will face in these four phases, but rather is intended to help students analyze some of the key issues and considerations that crisis managers face in designing optimal crisis management response strategies. The project is equally suitable as an end-of-term project or as a module-by-module project throughout the semester.

A. Introducing the Crisis Management Project

An organizational crisis "may be sparked by all manner of developments—from a New York Times article about bribery allegations that were improperly investigated, to a massive recall of a best-selling product linked to consumer deaths, to the reporting by nonprofit researchers regarding deceptive conduct."[9] Any legal crisis, regardless of the facts or allegations involved, is at its core an organizational crisis. It is a crisis for the entire organization, not just the legal department. Crisis management aims at preventing or lessening

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[8] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:1, Scope Note, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[9] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:2, Objectives, Concerns, Preliminary Considerations, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

organizational threats, including those of public safety, financial loss, and reputation loss.[10]

For the crisis management project, student teams were presented with a factual scenario involving drugs prescribed to treat migraines. The instructor introduced the project by providing an overview of the required tasks and the four stages of the crisis management process. As the project may differ from what students expect in a final project, a foundational overview is an important first step in contextualizing the assignment and connecting it to course materials. Students were also provided with a list of supplemental reference materials on diverse topics ranging from crisis management, organizational change, organizational conflict, and legal strategy to provide enough background for completing each of the project modules. A brief primer on the pharmaceutical industry was also provided. Students were further instructed that the project was not intended to cover all possible issues crisis teams must consider, but rather was intended to help them consider how crisis managers must analyze legal, ethical, and business issues in designing responses to organizational crises. A key goal of the exercise is to help students recognize that analysis of legal causes of action in connection with an organizational crisis is only one component of the crisis management process.

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[10] Timothy Coombs, *Crisis Management and Communications*, INST. FOR PUB. REL. (Sept. 23, 2014), https://instituteforpr.org/crisis-management-communications/.

B. Crisis Management Project Scenario Facts

The crisis management project provided students with a hypothetical scenario involving a fictional company, ACME Pharmaceuticals (ACME). ACME, headquartered in the United States, is one of the world's largest pharmaceutical companies. ACME's newest pharmaceutical drug, Ropidope, is used in the treatment of migraines. ACME outsources the commercial manufacturing of one of Ropidope's key ingredients, Haymaker, to ABC Chemical Corporation (ABC Chemical). To amplify consumer dependence on Ropidope, ACME provided ABC Chemical executives with large cash payments, vacations, and automobiles. In exchange, ABC Chemical added an unnecessary chemical compound to select batches of the Haymaker ingredient. The resulting additional chemical compound made Ropidope highly addictive and habit-forming. Package labeling did not contain any information, warnings, or precautions related to the fact that patients taking Ropidope with the unnecessary chemical compound could experience: (a) intense urges to gamble; (b) intense urges to spend money; and (c) intense urges to engage in binge or compulsive eating. ACME knew the chemical compound added by ABC Chemical would cause patients to become addicted to Ropidope but did not know about the undisclosed adverse effects of exposure. ACME encouraged pharmaceutical sales representatives to lie to physicians about Ropidope's addictive nature and provided physicians

with cash payments to incentivize prescriptions of the drug.

It is impossible to track which batches of Ropidope contain the added chemical compound. Identification of the added chemical compound in a dosage of Ropidope is only possible through extensive and expensive chemical testing. The issues with Ropidope came to light when internal ACME documents describing the addictive nature of Ropidope, and the company's efforts to push the drug were uncovered by hackers and posted to social media. The company is now facing inquiries and investigations by state attorneys general, the DOJ, and the FDA, as well as numerous class action lawsuits. Only 20% of the Ropidope on the market contains the added chemical compound. There is only a 10% chance that patients taking Ropidope with the added chemical compound will experience the intense urges to gamble, spend money, and engage in binge or compulsive eating noted above. There is a 5% chance that prolonged exposure to the added chemical compound could lead to increased blood pressure, heart attacks, and fatal swelling of the brain.

Students were given a series of tasks within each of four modules, corresponding to the four phases of the crisis management process identified by Waterman and Yannett.[11] The four sub-sections that follow describe each of the four project modules and are organized in the following fashion to assist

[11] Waterman & Yannett, *supra* note 8.

with readability: (a) context for the module; and (b) information and tasks provided to students.

C. Module 1 - Assembling the Crisis Team

Early steps in response to an organizational crisis include assembling a crisis management team comprised of individuals with relevant, on-point knowledge, experience, and familiarity with the crisis. While the composition of the team will hinge on the facts and circumstances surrounding the organizational crisis, crisis management teams routinely include:

- **Corporate management:** Key managers and executives help provide the subject matter expertise and institutional knowledge concerning the relevant business lines or products.[12]
- **Board of directors:** Directors have a distinct role in navigating an organizational crisis resulting from their risk management responsibilities as set forth in their fiduciary duties of loyalty, care, and good faith.[13]

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[12] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:5, Assembling the Crisis Team—Corporate Management, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[13] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:6, Assembling the Crisis Team—Board of Directors, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

- **In-house counsel:** In-house counsel provide expertise concerning the relevant business lines or products, a historical perspective on how company policies and procedures operate, as well as more generalized litigation and regulatory experience.[14]
- **Public relations firms:** Experienced public relations firms assist in providing clear, consistent messaging to an ever-expanding universe of media outlets (newspapers, news magazines, trade publications, both traditional and 24-hour television news, and the various blogs and news sources on the Internet).[15]
- **Outside counsel:** Outside counsel often play a leading role in managing the crisis.[16]

Such a diverse composition of crisis team members is critical, as the team will face a broad array of challenges, issues, and questions in responding to the crisis, including:

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[14] Waterman & Yannett, *supra* note 3.
[15] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:10, Assembling the Crisis Team—Public and Investor Relations, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).
[16] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:8, Assembling the Crisis Team—Outside Counsel, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

- What level of factual investigation is most appropriate considering possible disruptions to daily business operations?[17]
- What information should be conveyed to organizational employees?[18]
- What strategy is best suited to communicating with government regulators and investigative agencies?[19]
- How to determine when (and how) to self-report misconduct to regulators and investigating agencies?[20]
- What strategy to pursue in settlement negotiations?[21]

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[17] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:17, Executing the Plan—Conducting the Fact Investigation, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[18] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:14, Developing a Plan—Opening the Lines of Communication within the Company, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[19] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:15, Developing a plan—Opening the Lines of Communication with Regulators and Investigative Agencies, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[20] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:27, Crisis Resolution—Self-Reporting—Should a Company Self-Report?, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[21] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:30, Crisis Resolution—Settlement Options for Regulators and Investigative Agencies, SUCCESSFUL PARTNERING

Participation by in-house counsel on crisis management teams, alongside providing opportunities for counsel to share their knowledge, perspectives, and experience with the team, also provides the legal department with the chance to showcase its commitment to organizational goals and develop networking relationships with other key players throughout the organization.[22]

1. <u>Student Tasks and Responses</u>

For module 1, students were provided with a list and description of the key individuals (described above) who often take part on crisis management teams. Students were encouraged to consider differences in education, training, experience, personal pressures, career aspirations, and other factors that each team member brings to the crisis management planning table. These differences lead to inevitable interpersonal conflict between team members. As noted by Galinsky et al., conflict arises from a team's drawing together of individuals with different backgrounds, skills, and perspectives.[23] The instructions for module 1 included contextual information describing the expectation of such

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BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[22] Tellmann & Sneider, *supra* note 2.

[23] Adam D. Galinsky et al., *Maximizing the Gains and Minimizing the Pains of Diversity: A Policy Perspective*, 10 PERSP. ON PSYCHOL. SCI. 742 (2015).

conflict between in-house counsel and other members of the crisis management team. Students were asked to consider, for example, the possibility that managers' perceptions of in-house counsel contain views that attorneys are unable to formulate imaginative solutions to complex problems, are not team players, and are a necessary evil within the business environment.[24]

For the first task in module 1, students were placed into the role of ACME's Chief Legal Officer (CLO) and asked to select another member of the in-house legal department who would join them on the crisis management team. Four individual profiles were provided based on the approaches to legal decision-making as described by Ronit Dinovitzer et al.[25] Students were asked to choose from the following four individuals:

- **Rebecca** – places priority on legal knowledge in decision-making. Business considerations are secondary to legal considerations

[24] Chuck Barry & Kristin Kunz, *In-House Counsel Should Implement Servant Leadership to Help Clients make Values-Based Decisions*, 37 HAMLINE L. REV. 501, 519 (2014); Robert L. Nelson & Laura B. Nielsen, *Cops, Counsel, and Entrepreneurs: Constructing the Role of Inside Counsel in Large Corporations*, 34 L. & SOC. REV. 457, 468 (2000).

[25] Ronit Dinovitzer et al., *Corporate Lawyers and Their Clients: Walking the Line Between Law and Business*, 21 INT'L J. L. PROF. 3, 7 (2014).

- **Karam** – places principal weight on legal considerations in decision-making but gives greater consideration to personal experience
- **Dennis** – prioritizes personal experience in decision-making
- **Victoria** – places greater weight on experience over legal knowledge while signifying an appreciation of collective needs

Students were encouraged to consider that as each individual reflected a different approach to legal decision-making, each individual would function differently as a member of the Ropidope crisis management team. Students were encouraged to consider, in conjunction with the supplemental reference materials, how their decisions could affect the legal department along the following dimensions: (a) broadening knowledge of product lines and market segments; (b) exposure to new ideas and perspectives; (c) developing networking relationships with key organizational players; and (d) individual and/or departmental morale and career development factors.

All student teams selected Victoria as the best choice among the individuals listed to join the crisis management team. While all student teams recognized the advantages and potential contributions that Rebecca, Karam, and Dennis could bring to the team, they emphasized the importance of Victoria's attention to collective needs over individual needs. Victoria's ability to rely on her experience in such a context was noted by most

of the teams. One student team, viewing Rebecca and Dennis as occupying completely different ends of the spectrum on legal decision-making, dismissed them from consideration outright.

For the second task in module 1, students were asked to select a hypothetical firm to serve as outside counsel liaison to the crisis management team from a list of four possible candidate firms. Students were required to consider several factors[26] and firm ratings[27] (both reflected in Table 1) in support of their decisions. Students were also asked to reflect on potential sources of interpersonal conflict between members of the crisis team, especially in-house counsel and counsel from the outside firm.

- Experience with: (a) type of crisis at issue; (b) industry involved; (c) anticipated claims; and (d) likely forums (civil, criminal, regulatory, or congressional)
- Infrastructure and resources needed for the representation
- Scale of crisis faced by the company
- Outside firm's perceived credibility

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[26] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:8, Assembling the Crisis Team—Outside Counsel, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[27] The ratings were assigned at random by the course instructor based on the following 5-point Likert scale: (1) very low (2) low (3) moderate (4) high (5) very high.

- Outside firm's familiarity with expected or existing regulators and investigative agencies

2. Table 1

Criteria	**Firm 1**	**Firm 2**	**Firm 3**	**Firm 4**
Experience (criminal cases)	4	3	2	2
Experience (civil cases)	5	4	1	4
Experience (regulatory proceedings)	4	3	5	4
Experience (dealing w/ Congress)	3	4	3	4
Cost	5	4	2	3
Infrastructure and Resources	4	1	3	2
Credibility	1	2	4	5
Familiarity w/ Regulators or Agencies	4	3	5	2

Most student teams in the course selected Firm 4 as the best choice for outside counsel. One student team selected Firm 1. The student team that selected Firm 1 noted the firm's low credibility but cited its blend of experience and resources as the primary reasons for selection. One student team noted that as Firms 1 and 4 possessed similar cost

structures, resources and familiarity with regulatory agencies, the biggest deciding factor for them was credibility. Another student team focused on credibility as the most important factor at the start of its analysis. The team cited that a firm lacking in credibility, "invalidates any of the work it is connected to." One team cited Firm 4's deficiency in infrastructure and resources as a cause for concern, but made the decision to "overlook the inadequacy," reasoning that the infrastructure and resources provided by ACME's internal legal department could bridge any gaps. Firm 2 was not selected by any team, with teams citing high costs, low credibility, and limited resources as reasons for eliminating it from consideration. Firm 3, despite possessing higher credibility and the greatest level of familiarity with regulators and administrative agencies, was not selected due to its minimal experience with civil and criminal cases.

D. Module 2 – Developing the Plan

Upon assembling the crisis management team, the next phase of the crisis management process involves cultivating a plan of action in response to the crisis. An initial, and critical consideration facing the team involves determining the best approach for investigating the factual basis for the crisis within the organization.[28] Internal

[28] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:12, Developing a Plan—Determining the Kind of the

factual investigations enable the team to gain a comprehensive picture of the crisis and lead to more informed decision-making in response efforts. Given the potential financial cost, disruption to business operations, and impact on morale that internal investigations bring, the crisis team must weigh the tradeoffs between a narrower, targeted investigation and a broader, widescale investigation.[29] With the level of investigation established, the crisis team may then turn to creating an appropriate public relations strategy in response to the crisis. Teams must pursue a public relations strategy that considers the myriad of ways in which the crisis, and the company's response, will be perceived by the media, investors, and the public.[30] Organizations often hire public relations firms to assist in this regard, by developing talking points, working with media outlets to disseminate the company's side of the story, and correcting false reports concerning the crisis or the company's response to the crisis. Numerous factors and considerations are critical to developing a suitable public relations strategy, including:

Investigation to Conduct, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[29] *Id.*

[30] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:13, Developing a Plan—Crafting a Public Relations Strategy, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

- Effects of media coverage on whether governmental regulators and agencies begin investigations[31]
- Effects of proactive and clear messaging early in crisis on shaping media coverage[32]
- Effects of media coverage on whether shareholders or private plaintiffs initiate lawsuits[33]
- Suitable aggressiveness of company's message given allegations and degree to which allegations involve company's core business model[34]
- Consistency between known facts and public statements[35]
- Ensuring public statements do not tie company to a position that may change upon completion of factual investigation[36]
- Balancing of content and timing connected to release of public statements[37]

1. Student Tasks and Responses

The instructor introduced module 2 by asking students to contemplate how corporations in crisis mode need to consider the ways in which the crisis,

[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*

and response to the crisis, can be perceived by the media, investors, and the public. Students were provided with links to supplemental resources describing the connection between the media's coverage of the crisis and decisions by the government to commence investigations (or decisions by shareholders whether to file lawsuits). The instructor noted the importance of corporate efforts to develop clear messaging early in the crisis management process to proactively shape coverage of the crisis and to portray a message that the company is responding with all possible speed and diligence. Students were asked to consider likely competing pressures to defend the company on the one hand and to ensure a thorough investigation into the crisis on the other.

For module 2, students' first task was to assess whether ACME's crisis management team should, considering the crisis facts, conduct a small or large internal investigation into the facts surrounding the Ropidope incident. Students were reminded that, to do their jobs, teams must possess reliable information on what caused the crisis, and that decisions regarding the type and scale of internal investigations are critical to the response process. Students were asked to consider the following dimensions in their responses: (a) parameters of an appropriate internal investigation plan; and (b) tradeoffs between smaller investigations and larger investigations.[38]

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[38] Waterman & Yannett, *supra* note 28.

2. Table 2

Smaller Internal Investigation	
Pros	• Less potential to: (1) disrupt day-to-day business operations; (2) make employees suspicious of management; (3) create animosity between and among business units; and (4) otherwise negatively impact morale of employees who must participate in investigation • Less likely to broadcast unwarranted message that wrongdoing occurred in event allegations prove false • Far less costly than full-blown internal investigation
Cons	• More likely to develop narrow understanding of facts giving rise to the crisis • Decisions made about appropriate response to crisis will be less informed • Potentially demonstrates reduced willingness to resolve the crisis in eyes of government regulators and the general public
Larger Internal Investigation	
Pros	• Permits crisis management team to develop broader understanding of facts giving rise to crisis • Decisions made about appropriate response to crisis will be better informed • Potentially demonstrates greater willingness to resolve the crisis in the eyes of government regulators and the general public

Larger Internal Investigation (cont'd)	
Cons	• Greater potential to: (1) disrupt day-to-day business operations; (2) make employees suspicious of management; (3) create animosity between and among business units; and (4) otherwise negatively impact morale of employees who must participate in investigation • Far more costly than smaller internal investigation • More likely to broadcast unwarranted message that wrongdoing occurred in event allegations prove false

Most teams opted for a larger investigation. The reasoning supplied by the teams in support of their decisions largely focused on the need to gather enough information to understand the full scope of the crisis. The teams expressed concerns that smaller investigations could fail to uncover critical facts. Teams also referenced the fact that a larger internal investigation could help demonstrate publicly ACME's willingness to resolve the "entirety of the crisis, rather than provide a small-scale solution that looks good but fails in practice." Another team noted that "disruptions to daily operations are acceptable as a large investigation highlights transparency over profits." One team that chose to conduct a smaller internal investigation cited, as one of its chief justifications, that a larger investigation could broadcast an unwarranted message that wrongdoing occurred in the event the allegations are proven false.

The second task in module 2 involved the creation of a mock public relations statement that ACME could distribute to the media, investors, and

the public in response to the Ropidope crisis. Students were further instructed to draft a separate paragraph alongside the public relations statement explaining their reasoning. Both the public relations statement and the paragraph explaining students' reasoning had to reflect the following: (a) whether the public relations statement would take an aggressive or less-aggressive posture; (b) whether the posture taken would need to change upon completion of any internal factual investigation (students were asked to assume the investigation conducted will uncover wrongdoing within ACME); and (c) the timing of the statement's launch (before, during, or after completion of the factual investigation). Students were also encouraged to discuss any pros/cons of immediately releasing the statement, versus delaying in releasing the statement, that they felt were materially relevant to the decision.

To begin class discussion on the importance of a carefully drafted public relations statement, the instructor distributed copies of the public relations statements submitted by all student teams in the course. The instructor then asked students to consider the differences and nuances of content, word choice, length, and tone among the submitted statements. Select items from teams' submitted statements included:

- *We would like to apologize for the unfortunate event that was associated with the adverse effects of one of our strongest brands.*

- *ACME Pharmaceuticals will continue to provide our clients the same ethical and moral service standing from our incredibly proud long history in strong brands.*
- *These errors are inexcusable, and the offending party will be held responsible to the fullest degree by the company.*
- *ACME is a company who vows to help its patients and holds itself to nothing but the highest standard.*
- *ACME officials are working tirelessly to navigate the course of falsehoods that hinder its reputation.*
- *ACME Pharmaceuticals will take the necessary action against any employees or supplier that was involved in such an event.*
- *It is our duty to formulate our stance on a foundation of facts, rather than reformulate a stance continuously every time new facts come to light.*

One topic discussed in detail among the students centered on the potential legal ramifications of including language referencing public apologies for self-identified unethical behavior and promises of transparency through the investigation process. All student teams agreed that ACME's media position, regardless of the initial position taken, would be subject to potential modification and amendment as the factual investigation unfolded. Most student teams chose an aggressive posture in their public relations statements to help control the narrative

considering the severity of the allegations. The student team that adopted a less aggressive posture in its statement identified a need for a humble tone, fearing the unknown effects of media scrutiny and potential mischaracterization of the company's statements. One student team recommended that ACME launch a public relations statement before beginning the factual investigation, with all other teams recommending a delayed release of any statement until more information could be gathered.

E. Module 3 – Executing the Plan

Once the crisis management team is assembled and the response plan is formulated, the next phase of the crisis management process rests on the team's measured execution of that plan. Executing the crisis management plan encompasses a broad array of major tasks (which must be performed alongside the regular daily operations of the business), including: (a) conducting an internal factual investigation (narrow or widescale); (b) disseminating the results of the internal factual investigation to appropriate parties within the organization; and (c) fielding any inquiries sent by regulators, investigative agencies, and Congress.[39]

The internal factual investigation is the cornerstone of crisis management, as the facts it

[39] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:16, Executing the Plan, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

reveals will guide and determine the crisis management team's responses throughout the process. As investigations commonly include key employee interviews and document collection, the crisis team must weigh numerous cost and intrusion considerations against the need to ensure enough depth and breadth in the investigation's coverage.[40] Should the team, for example, attempt to include past employees in the fact-finding process? Past employees may be reluctant or opposed to participating in fact-finding interviews but can serve as sources of critical information.[41] With respect to disseminating the investigation results within the organization, the crisis management team must strike a delicate balance between transparency and candor to organizational members (to help mitigate anxiety and quell rumors) and the need to keep select, sensitive pieces of information on a need-to-know basis.[42] Outside counsel often takes the lead in managing requests from regulators, investigative agencies, and Congress, which may entail participating in off-the-record discussions and the rolling production of documents and progress reports.[43] Regardless of the approaches taken by outside counsel, candor and credibility are paramount as they will play a role in determining overall penalties imposed by the government.[44]

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[40] Waterman & Yannett, *supra* note 17.
[41] Waterman & Yannett, *supra* note 18.
[42] *Id.*
[43] Waterman & Yannett, *supra* note 19.
[44] *Id.*

1. Student Tasks and Responses

The instructor introduced module 3 by giving students a general overview of the major tasks involved in executing a crisis management plan. Given the sheer volume of possible topics, the instructor noted to students that module 3 would focus on a specific task and topic, product recall, to avoid overwhelming students. Students were given a brief introduction to the practice of product recalls in connection with crisis management involving product safety concerns. The instructions asked students to assume that the crisis management team has determined a product recall is necessary and to develop an effective product recall strategy for ACME given the facts presented by the Ropidope crisis. Students were instructed to draft a detailed plan of action for the recall (with explanation of their reasoning) for presentation to the ACME board of directors. Students were asked to incorporate, in detail, two sets of factors (reflected in Table 3) into their action plans: (a) factors for assessing the need for recall; and (b) factors for determining recall strategies.[45] Given the scrutiny applied to planned recall strategies by the Food and Drug Administration (FDA), students were advised to account for the possibility of needed changes in their

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[45] Anne Baker et al., *Food & Drug Administration Regulated Institutions: Drug and Medical Device Companies*, § 77A:34.50, Recalls, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (2021).

reports. To assist in identifying potential appropriate action steps and processes for students' action plans, the instructions also required students to conduct outside research on drug company product recalls and incorporate at least five current (published within the last three years) outside sources. At least two of the outside sources had to come from scholarly, peer-reviewed journal articles.

2. Table 3

Factors for Assessing Need for Recall
• Whether injuries have occurred already as result of product's use • Whether use of product could expose humans or animals to health hazard(s) • Degree of risks/hazards to different segments of population (children, surgical patient, elderly, livestock, pets, etc. • Estimations regarding severity of health hazards • Estimations regarding likelihood of hazard(s) occurring • Estimations regarding consequences if hazard(s) were to occur
Factors for Determining Recall Strategy
• Assessments and appraisals of the degree/extent of posed health hazard • Degree to which manufacturer can easily identify defective product • Extent to which product defect is clearly ascertainable by consumers • Prevalence of the product in the marketplace (providers, hospitals, retailers) • Whether other products are available to treat the health issue in question

While all student teams condemned ACME's actions and recognized that the use of Ropidope could expose humans to health hazards, their assessments of the need for (and process for) recalling Ropidope varied greatly. One team indicated that a complete recall of all batches of Ropidope would be inappropriate given the "rare possibility of serious health consequences," suggesting instead that patients contact their physicians if they experience potential symptoms. This same team also cited the availability of other products used in the treatment of migraines in further support of its opposition to a complete recall. Another student team, in contrast, argued that ACME should recall all batches of Ropidope on the market. The team, citing ACME's inability to track batches containing the added chemical compound and the potential for serious, life-threating consequences, felt such a response was necessary despite the low likelihood of patients experiencing symptoms from an affected batch.

F. Module 4 – Resolving the Crisis

Crisis resolution encapsulates the final major phase of the crisis management process. The crisis management team, in determining the best means for resolving the crisis, must make a variety of decisions related to self-reporting of misconduct, approaches to governmental negotiations, and the collateral

consequences associated with settlement.[46] A key consideration faced by the crisis team at this stage of the crisis management process centers on whether self-reporting is in the best interest of the organization. The benefits of self-reporting can include reductions to penalties imposed by the government or the possible avoidance of charges altogether. The DOJ and SEC, for instance, consider self-reporting in assessing whether to charge an organization in response to a crisis.[47] Crisis teams may determine that not self-reporting is the desirable option in a situation where the external fees and penalties may far exceed the internal costs needed to resolve the issue and implement measures to avoid future incidences. Defensible, legitimate justifications supporting decisions not to self-report include assurances that the company (1) conducted a thorough investigation of the crisis; (2) uncovered no evidence of misconduct or determined that any misconduct was narrow in scope; and (3) implemented a suitable response with control measures as a consequence of the crisis.[48]

Crisis management teams must also evaluate and assess the potential positive and negative

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[46] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:25, Crisis Resolution, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[47] Robert Waterman & Bruce E. Yannett, *Crisis Management*, § 85:27, Crisis Resolution—Self-Reporting—Should a Company Self-Report?, SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL (ROBERT HAIG ED., 2021).

[48] *Id.*

consequences attendant to any settlement with the government. Agreeing to a statement of facts as part of a non-prosecution agreement or deferred prosecution agreement can yield estoppel concerns in the defense of any civil lawsuits related to the alleged misconduct. The effects on company reputation and stock price in connection with any settlement strategy must also be considered.[49]

1. Student Tasks and Responses

The instructor introduced students to the final project module by leading a discussion connecting the media's coverage of a crisis and decisions by the government to commence investigations (or decisions by shareholders whether to file lawsuits). The instructor noted the importance of corporate efforts to develop clear messaging early in the crisis management process to proactively shape coverage of the crisis and to portray a message that the company is responding with all possible speed and diligence. Students were asked to consider possible competing pressures to defend the company on the one hand and to ensure a thorough investigation into the crisis on the other. Students' first task was to draft a one-page memorandum outlining their perspectives on whether ACME should self-report misconduct. Students were then asked to draft a professional memorandum to the board of directors discussing

[49] *Id.*

whether ACME should settle or fight impending charges by the government**.**

All student teams recommended that ACME self-report its misconduct in connection with Ropidope. Teams cited the presence of official ACME company documents (as opposed to rumors), the widespread prevalence of efforts to push the drug, and the callous disregard for public safety and trust among their chief justifications in support of self-reporting. One team questioned whether, given the circumstances through which ACME's internal documents were leaked by hackers, the company still had the option to self-report in the first place. To one degree or another, all teams discussed how ACME's best course of action would be to cooperate with the government to the greatest extent possible in the hope of establishing a degree of good will in connection with any settlements. It should come as little surprise, therefore, that all student teams recommended settlement to the ACME board of directors. Justifications provided in support of this course of action focused on the potential lengthy (and costly) legal battle that would ensue were ACME to fight the charges by the government, as well as the prolonged negative press and potential ramifications to the company's stock prices. Several of the student teams referenced how settlement would impact the company's ability to combat class-action lawsuits but indicated this to be an acceptable consequence given the company's need to begin the long-term process of repairing its reputation.

II. POST EXERCISE STUDENT REFLECTIONS

After completing the final module, all students submitted a short critical reflections paper discussing what they learned from the crisis management project. Given that this was the first application of the project to my Legal Issues in Organizational Strategy course, students' opinions and comments were critical to improving the project. Student comments that spoke directly to the pedagogical benefits and impact of the project included:

- *The crisis management project was something that, yet again, really took me outside of my comfort zone. As mentioned, having no real legal background and also no real business background, this assignment really made me open my mind up.*
- *It was interesting to determine the best legal path to take when maneuvering through such a debilitating legal issue.*
- *I knew that legal counsel participate in managing and minimizing litigation but I was unfamiliar with the complexities of the process and the many moving parts that construct a functional legal team. Part of this ignorance is due to the portrayal of legal counsel in film and literature: a role that does not commonly capture the reality and evolution of this job.*

- *The most interesting part of the project was seeing the nuances that make up the early stages of the crisis management process.*
- *It is easy to jump to the conclusion of a crisis, but this project demonstrated the importance of all of the prior steps: from evaluating personnel to determine who is best suited to benefit the team, to choosing public relations representation, to even critiquing the written communications a company transmits.*
- *What I found to be the most difficult aspect of this project was the collaboration and teamwork with others. Differences in opinions pushed me to evaluate both sides of every argument and benefitted my outlook on the concepts being challenged by this project.*
- *It was very beneficial to collaborate with different minds and gain new perspectives on how each part of the crisis management project could be completed.*
- *It is a good thought-provoking exercise and makes you think about the pros and cons of a decision.*
- *Through this project I discovered new areas in my personality that I never thought I had, such as my analytical thinking talent and patience.*
- *Through the crisis management project, I learned never to make a quick decision without conducting an in-depth analysis.*

III. CONCLUSION

Organizational crisis management brings together parties from across the organization in pursuit of a common goal: resolution of the crisis in line with the organization's strategic objectives. Crisis management teams face a diverse array of issues and decisions related to conducting investigations, communicating with employees and governmental agencies, self-reporting misconduct, engaging in settlement negotiations, and crisis prevention planning. In-house counsel play a critical role in this endeavor, highlighting the breadth and depth of the legal department's importance to the organization. As the needs of the business landscape continue to evolve at a rapid pace, the approaches taken by business law and legal environment faculty must keep pace by incorporating engaging, practical, real-world exercises alongside the delivery of course concepts. Preparation for real-world business practice must extend beyond the traditional Socratic delivery of black letter law to include real-world applications highlighting the integration of legal strategy and business strategy. The crisis management project constitutes one such means for faculty to engage and educate their students. Students not only gain valuable insight into the diverse roles and responsibilities of in-house counsel, but also see how the legal, ethical, and business strategy aspects of organizational decision-making come together in the context of crisis management.

POLITICS AND EMPLOYMENT DISCRIMINATION

KONRAD S. LEE*
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I. INTRODUCTION

On May 25, 2020, Minneapolis police officers arrested George Floyd, a 46-year-old Black man, after a convenience store clerk claimed he used a counterfeit $20 bill to buy cigarettes. Mr. Floyd died after Derek Chauvin, one of the police officers, handcuffed him and pinned him to the ground with a knee, an episode that was captured on video and widely disseminated. Mr. Floyd's death set off a series of nationwide protests against police brutality, including those sponsored by Black Lives Matter (BLM).[1]

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[1] Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis and Robin Stein, *How George Floyd Was Killed in Police Custody*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html.

In the wake of BLM protests, a police detective in Springfield, Massachusetts, Florrisa Fuentes, said she was fired after sharing a photo of her niece at a BLM protest on Instagram. Fuentes, reposted her niece's photo, which featured two people holding signs. One sign read, "Who do we call when the murderer wears the badge." The other sign implied that people should shoot back at the police.[2] Ms. Fuentes stated she shared the Instagram post to support her niece and the movement as a whole, not as an endorsement of violence against the police.

But after she shared the post as an Instagram story late one evening, Ms. Fuentes woke up to messages from colleagues warning her about possible consequences. She deleted the post and issued an apology to her co-workers in a private Facebook group. "I did not share the photo with any malicious intent and I should have thought about how others might perceive it," she wrote.[3] Ms. Fuentes said she met with supervisors at the department, including the police commissioner. She said they expressed disappointment at the Instagram post but understood that she regretted sharing it.

Though Ms. Fuentes said the workplace was hostile, with colleagues shunning her after sharing

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[2] Stephanie Barry, *Former Springfield Police Detective Florissa Fuentes, Fired Over Black Lives Matter Social Media Post, Files Lawsuit Against City*, MASS LIVE (Sep 28, 2020), https://www.masslive.com/police-fire/2020/09/former-springfield-police-detective-florissa-fuentes-fired-over-black-lives-matter-social-media-post-files-lawsuit-against-city.html.

[3] *Id.*

their criticisms in the Facebook group, she thought the episode was behind her. She soon heard that the mayor, Domenic Sarno, was upset about the post. Joseph Gentile, a national vice president of the National Association of Government Employees, which represents police officers and other public employees, posted to the Facebook group that he hoped "people will judge her by what she does going forward," and asked the department to "please focus on staying united so we can stay safe!"

Fuentes said she received a call on June 19, 2020, from Mr. Gentile, who told her she could resign or be fired, and that she needed to decide that day. Hours later, she turned in her badge and gun after being fired.[4]

In sum, Fuentes was fired for a political belief as her posts were unquestionably an revelation of a held political belief.[5] Discrimination regarding an

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[4] Bryan Pietsch, *Massachusetts Detective Is Fired Over Black Lives Matter* Post, N.Y. TIMES (July 5, 2020); https://www.nytimes.com/2020/07/05/us/Black-lives-matter-detective-fired-Springfield.html.

[5] There were likely other factors at play in Fuentes' termination. Indeed, her posting a political view may have violated police policy and was, therefore, a conflict between political expression and workplace rules. However, this manuscript works from the premise that implicit in Fuentes termination was a political view which her employer – a police department – did not support. Other examples of employees being terminated or discouraged from holding political views contrary to the boss is extant in the media. See e.g., Wisconsin Woman Claims She was Fired for Supporting President Trump on Social Media, FOXNEWS.COM (Jan. 16, 2020), https://fox8.com/news/

employee's political beliefs are not currently protected under the Civil Rights Act.[6] Instead, Title VII prohibits discrimination against an employee only "because of such individual's race, color, religion, sex, or national origin."[7] Moreover, several courts have suggested that political beliefs are excluded from Title VII employment discrimination protections.[8] This is an error.

The question raised by this paper is whether it is fair and a proper limitation on employment discrimination law protections for secular beliefs – those which are wholly without a religious component – including political beliefs, to be

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Wisconsin-woman-claims-she-was-fired-for-supporting-president-trump-on-social-media/); Meg Graham and Amina Elahi, Grubhub Faces Backlash After CEO's Anti-Trump Email to Employees, (Nov. 11, 2016) https://www.chicagotribune.com/business/blue-sky/ct-matt-maloney-grubhub-email-resign-bsi-20161110-story.html (noting the chill the CEO's tirade placed on worker political speech).

[6] *See* 28 U.S.C. § 2000e *et seq.* (2018).

[7] *Id.* § 200e-2(a)(1).

[8] *See, e.g.*, EEOC v. Abercrombie & Fitch Stores, Inc., 731 F.3d 1106, 1117 (10th Cir. 2013) (confirming "social, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs protected by Title VII"); Telfair v. Fed. Exp. Corp., 934 F. Supp. 2d 1368, 1383 (noting "beliefs and practices grounded in tenets or precepts of groups or entities that are more social and political than religious do not qualify as religious within Title VII"); Fallon v. Mercy Catholic Med. Ctr. Of Se. Pa, 200 F. Supp. 3d 553, 563 (E.D. Pa. 2016) (finding beliefs that are "personal, political, sociological and economic—the very definition of secular philosophy as opposed to religious orientation" are not protected).

excluded. The answer to the question is no, it is not fair or right. This work explores, in Part II, the criteria that is currently used for Title VII protections. In Part III, the manuscript argues for the development of a new model under Title VII for employee workplace discrimination protection premised on an employee's secular beliefs. Part IV, the conclusion, summarizes the case for Title VII expansion.

II. THE CRITERIA FOR ESTABLISHING TITLE VII EMPLOYMENT PROTECTIONS BASED UPON BELIEF

Unlike federal legislation that prohibits employment discrimination on the basis of age or disability,[9] the United States Code does not explain the purpose behind Title VII's employment protections outside of race. When Title VII was enacted during the civil rights movement, congressional discussion focused primarily on race. Because they are often correlated, the additional protected classes of color and national origin can be seen to support and strengthen racial protections. Creed encompassed religion, and often accompanied race and color in anti-discriminatory efforts prior to the Civil Rights Act of 1965.[10] Sex, as a protected

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[9] *See* Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602, 602; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29.

[10] *See, e.g.*, Steele v. Louisville & N. R. Co., 323 U.S. 192, 209 (1944) (Murphy J., concurring) (expressing disapproval

class, was a late addition to Title VII, included without much debate and according to some scholars, with intention to stymie the law's enactment.[11]

In this history, the lack of established congressional findings or a defined purpose for Title VII complicates an evaluation of how well the current statute achieves its goals. Similarly, the text and structure of Title VII are of limited use in arguments for expanding or reinterpreting the discrimination protections for employees. However, the Supreme Court explicitly found a congressional intent "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of [one class

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"whenever economic discrimination is applied under authority of law against any race, creed or color"); Ry. Mail Ass'n v. Corsi, 326 U.S. 88, 94 (1945) (establishing that a state may "protect workers from exclusion solely on the basis of race, color or creed by an organization"); Estep v. United States, 327 U.S. 114, 121 (1946) (forbidding discriminatory classification because of "race, creed, or color").

[11] *See* Louis Menand, *How Women Got in on the Civil Rights Act*, THE NEW YORKER (July 14, 2014) (stating that legislators viewed the addition "as either a prank intended to expose the limits of liberal egalitarianism or a poison pill that would make the bill more difficult to pass"), https://www.newyorker.com/magazine/2014/07/21/sex-amendment. *But see* Joe Freeman, *How Sex Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQUALITY: J. OF THEORY & PRACTICE 163-64 (1991) (relating the factors suggesting an attempt to influence the legislation and concluding that the addition was not an "accidental breakthrough").

of] employees over other employees."[12] The sections that follow reexamine the currently protected classes against this stated intention, in light of modern circumstances and particularly in the area of personal *political belief*.

A. Current Protections Already Include Mutable Characteristics

The protected classes of race, color, sex, and national origin are considered immutable characteristics. Immutable means not capable of or susceptible to change.[13] Each one is established and identified the moment a baby is born, and barring extraordinary effort, an individual retains those characteristics until death. Religion stands alone as a class characteristic that can be changed, and, therefore, is *mutable*. In her[14] lifetime, an individual

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[12] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971). This foundational case established the rule that a facially neutral policy could have the invidious discrimination effects against a particular protected class. While this case dealt only with race its application is to all protected classes under Title VII.

[13] Immutable, MERRIAM-WEBSTER, (https://www.merriam-webster.com/dictionary/immutable?utm_campaign=sd&utm_medium=serp&utm_source=jsonld (last visited Jul. 16, 2021).

[14] The authors acknowledge and respect pronoun choices for all persons and eschew any practice that would alienate or exclude transgendered persons. However, for ease of writing, we adopt the convention of referring to non-identified individuals as "her" or "she."

can adopt, change, or abandon her religion, and many Americans do so.[15] Based on the inclusion of religion as a protected class, immutability is not a prerequisite for trait or class to be protected from unlawful employment discrimination. In fact, even protections because of sex now include a mutable characteristic: pregnancy.[16] That is, a non-pregnant person is as robustly protected from employment discrimination as a pregnant one. The increasing expansion of immutable classes to include mutable traits -- race, and gender identity -- establishes the flexibility within the concept of which traits ought to be protected. It dispels the idea that religion is a mutable characteristic uniquely meritorious of protection.[17] Consequently, it opens the door to consideration of other mutable traits to determine whether they also deserve protection. However, the

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[15] *See America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[16] 42 U.S.C. § 2000e(k) (2018). *See also* Julie Manning Magid, *Cloaking: Public Policy and Pregnancy*, 53 AM. BUS. L.J. 439, 444 (2016) (exploring pregnancy as a protected class).

[17] John Tehranian, Is Kim Kardashian White (And Why Does it Matter Anyway?) Racial Fluidity, Identity Mutability & the Future of Civil Rights Jurisprudence, 58 Hous. L. Rev. 151 (Fall 2020)(Previous notions of race and gender are being upended by efforts to keep the state out of defining a person's characteristic) See, e.g., ROGERS BRUBAKER, TRANS: GENDER AND RACE IN AN AGE OF UNSETTLED IDENTITIES 135 (2016) ("[I]t is more socially legitimate to choose and change one's sex (and gender) than to choose and change one's race.").

question remains of how to make such a determination for a particular mutable characteristic.

One factor suggested by the examples of both religion and pregnancy is their connection to other immutable traits. Although pregnancy may be a chosen and temporary condition, Congress has recognized that it is inexorably linked to sex, a protected immutable class. Likewise, religion is often connected to a person's race and national origin. For example, the majority religion in American is Christian, the majority religion of Indian is Hindu, and the majority religion of Saudi Arabian is Muslim.[18] Consequently, the Equal Employment Opportunity Commission (EEOC) has addressed this linkage between employment discrimination based on national origin and religion.[19] Such actions by legislators and administrative agencies indicate that protection of the immutable characteristic by itself is not sufficient when a corresponding mutable trait can be the basis of employment discrimination.

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[18] Religious Landscape Study, PEW RESEARCH CENTER (2020) https://www.pewforum.org/religious-landscape-study/. See, e.g. World Population Review, Religion by Country 2022, https://worldpopulationreview.com/country-rankings/religion-by-country (last visited Feb. 9, 2022).

[19] What You Should Know: Religious and National Origin Discrimination Against Those Who Are, or Are Perceived to Be, Muslim or Middle Eastern, EEOC-NVTA-0000-24 EEOC (Feb. 11, 2016), https://www.eeoc.gov /laws/guidance/what-you-should-know-religious-and-national-origin-discrimination-against-those-who.

B. Justifications for Excluding Certain Characteristics Are Unsupported

Specific to religion, the definition of unlawful discrimination has been extended to include "all aspects of religious observance and practice, as well as belief, unless" the employer cannot reasonably accommodate the observance or practice.[20] The exception that allows non-accommodation by the employer is only for *observance or practice*, not for the employee's religious beliefs.[21] These important distinctions inform the discussion regarding excluded beliefs.

1. Borrowed definitions

Case law defining belief under Title VII is confined to definitions of belief in cases involving religious discrimination or conscientious objector claims. Therefore, they do provide an implicit rationale for *excluding* political belief from protection under Title VII. That is, there is nothing in cases describing and defining employment law protections surround *belief* which would exclude *political beliefs* from inclusion under Title VII.

United States v. Seeger,[22] the Supreme Court interpreted the meaning of religious training and belief in the context of the Universal Military

[20] 42 U.S.C. § 2000e(j).
[21] *Id.*
[22] United States v. Seeger, 380 U.S. 163 (1965).

Training and Service Act.[23] The Court declared that the test of religious belief is "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God" for a traditionally religious person.[24] However, the Court noted that the statute in question excluded "essentially political, sociological, or philosophical views."[25]

In *Welsh v. United States*,[26] another case concerning the Military Training and Service Act, the Court affirmed the exclusion of essentially *political* beliefs, but only if it did "not rest at all upon moral, ethical, or religious principle."[27] It noted that "Welsh's conscientious objection to war was undeniably based in part on his perception of world politics," but qualified because it was not solely based "upon considerations of policy, pragmatism, or expediency."[28]

Shortly thereafter, in *Wisconsin v. Yoder*,[29] the Court determined that "philosophical and personal rather than religious" beliefs did "not rise to

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[23] *See* Universal Military Training and Service Act, 50 U.S.C. § 3806 (2018).
[24] Seeger, 380 U.S. at 166.
[25] *Id.* at 165; 50 U.S.C. § 3806(j) ("As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code.").
[26] Welsh v. United States, 398 U.S. 333 (1970).
[27] *Id.* at 342–343.
[28] *Id.*
[29] Wisconsin v. Yoder, 406 U.S. 205 (1972).

the demands of the Religion Clauses."[30] Where *Seeger* and *Welsh* dealt with exclusions from military service, *Yoder* considered exclusion from compulsory school attendance based on free exercise of religious beliefs. None of these three cases related to employment discrimination.[31] Moreover, the relevant code for the military cases limited the exclusions specifically to usage in that subsection.[32] Yet each has been cited in subsequent employment cases as establishing precedent for the exclusion of political or philosophical beliefs from Title VII protected beliefs.[33]

Ultimately, administrative agencies incorporated the standard developed by these cases, implicitly excluding political beliefs from the umbrella of religious beliefs. For example, the Code

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[30] *Id.* at 216.

[31] The rationale for the exclusionary language in Seeger and Welsh was the fundamental conflict between the interest of the individual in answering a higher duty and the interest of the state in requiring military service during a time of war. Seeger, 380 U.S. at 173–76; Welsh, 398 U.S. at 335–44. Yoder posed a similar conflict between the state's right to impose generally applicable laws in furtherance of its interests and the free exercise right of parents to practice their religion. Yoder, 406 U.S. at 215–219. In all three cases, the conflicting interests gave the Court reason to draw the definition of belief as narrowly as possible.

[32] 50 U.S.C. § 3806(j) ("*As used in this subsection*, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code.") (emphasis added).

[33] *See e.g.*, Friedman v. S. Cal. Permanente Med. Grp., 102 Cal. App. 4th 39, 50-55 (2002) (quoting all three cases).

of Federal Regulations references *Seeger* and *Welsh* when defining the religious nature of a practice or belief.[34] Similarly, the EEOC guidelines specifically exclude "social, political, or economic philosophies" from "'religious' beliefs protected by Title VII."[35] The EEOC cites cases related to the Ku Klux Klan (KKK), determining that the philosophy of the KKK "has a narrow, temporal, and political character" and is "political and social in nature."[36]

Returning to the distinction made in the introduction of this section, political and philosophical beliefs are not *required* to be excluded from protection simply because they are not religious in nature.[37] The government's interest, as confirmed

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[34] 29 C.F.R § 1605.1 (2020). ("[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. This standard was developed in . . . Seeger . . . and Welsh . . ..").

[35] U.S. Equal Emp't Opportunity Comm'n, EEOC Compliance Manual: Section 12: Religious Discrimination, § 12-I(A)(1) (2008), (Social, political, or economic philosophies, as well as mere personal preferences, are not "religious" beliefs protected by Title VII.) www.eeoc.gov/policy/docs/religion.html.

[36] *Id.* at n. 28 (citing Commission Decision No. 79-06, CCH EEOC Decisions ¶ 6737 (1983); Bellamy v. Mason's Stores, Inc., 368 F. Supp. 1025, 1026 (E.D. Va. 1973), aff'd, 508 F.2d 504 (4th Cir. 1974); Slater v. King Soopers, 809 F. Supp. 809, 810 (D. Colo. 1992)).

[37] The Supreme Court found that a lack of religious beliefs must also be protected. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961) (affirming that the government cannot constitutionally "impose requirements which aid all religions as against non-believers, and neither can aid those religions

by the Supreme Court, is focused on eliminating employment discrimination against an identifiable class,[38] and therefore, it *aligns* with the interests of an employee who seeks to avoid discrimination based on her political beliefs. Thus, the Courts could define protected belief more broadly to encompass non-religious or secular beliefs. Furthermore, it is very unlikely that the observances or practices stemming from KKK beliefs could be reasonably accommodated without infringing on the rights of other employees. In other words, even if the KKK were included as a belief under religion, an employer would be allowed to lawfully discriminate against the employee for objectionable behavior that creates a hardship or disruption.

In short, case law does not establish a rationale for excluding secular beliefs specifically from employment discrimination protection. Admittedly, political and philosophical beliefs do not naturally fall into the category of "all aspects of religious observance and practice, as well as belief" under the definition of religion.[39] Both the statute and congressional intent would be clearer if the term belief were added as a separate class from religion and applied similarly in the employment field.

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based on a belief in the existence of God as against those religions founded on different beliefs"). Courts have interpreted this to mean that Title VII protects those who hold and "refuse to hold . . . specific religious beliefs." Shapolia v. Los Alamos Nat'l Lab., 992 F.2d 1033, 1036 (10th Cir. 1993).

[38] Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971).

[39] 50 U.S.C. § 3806(j) (2018).

However, by borrowing definitions from non-employment applications, the government has narrowed the scope of protected beliefs without advancing any state interest and simultaneously rendering employees vulnerable to discrimination.

2. Questionable Applicability of Case Law

The problem with applying definitions from military or educational applications to the field of employment law is that the objectives and concerns are often different. There may be valid reasons for courts to define belief and religion more narrowly in the context of prisons or schools, [40] for example, where discrimination or lack of religious accommodation would not impact a person's livelihood. Unfortunately, the case law often draws across these fields, straying from instances of employment and muddying the precedent. For purposes of this paper, we examine statute and case law which applies specifically to employment discrimination.

Even where the topic is employment, employees who work for the government may be treated differently from employees who work for

[40] Cases concerning schools, for example, often involve determining whether religious activities are impermissibly supported by public funding and thereby violate the establishment clause. In such cases, courts seek to clearly distinguish religious from non-religious behavior or intent, but the reasoning might not apply to employment law where establishment clause issues do not exist. *See, e.g.*, Louisiana Creationism Act case.

private industry. For example, the Civil Rights Act of 1991 specifically allows the Senate to discriminate on political affiliations in its hiring decisions.[41] The unspoken assumption is that political affiliation may be a bona fide job qualification for work in a political office. Similarly, government may regulate its own behavior to prevent discriminatory action that violates the Equal Protection clause, while preserving greater freedoms for commercial enterprises.

Because of the potential for additional regulations or constraints that apply outside of the field of employment, each analysis must carefully separate the rationale for the resulting holdings to ensure that only those factors relevant to employment discrimination are given weight.

C. Public Policy Considerations Support Expanding Protections

From its inception, the Civil Rights Act was intended to eliminate discrimination against identifiable groups whose employment opportunities were limited because of a protected class characteristic unrelated to job performance.[42] Within

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[41] Civil Rights Act of 1991, Pub. L. No. 102-166, §316, 105 Stat. 1071, 1095–96 (1991) ("It shall not be a violation with respect to an employee [on the staff of a Senate member or committee] . . . to consider the (1) party affiliation . . . or (3) political compatibility with the employing office, of such an employee with respect to employment decisions.").

[42] *See* Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (finding congressional intent was to "was to achieve

a decade, the Supreme Court stated that "[t]he broad, overriding interest, shared by employer, employee, and consumer, is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions."[43] The shared interest in efficient and trustworthy production supports a goal of prohibiting and preventing employment discrimination on the basis of any protected class, including age and disability.[44]

1. Rationale for Protecting the Individual

Congress included a description of the negative impact on the employees, commerce, and the public in its statutory acts addressing sex discrimination in pay, age discrimination, and discrimination against Americans with disabilities.[45]

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equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group" of employees).

[43] McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).

[44] *See e.g.* Age Discrimination Act of 1967, 29 U.S.C. §§ 621–634 ("It is therefore the purpose of this Act . . . to prohibit arbitrary age discrimination in employment . . . ."); Americans with Disabilities Act of 1990, 42 U.S.C.S. §§ 12101–12213 ("It is the purpose of this Act [] to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; . . . .").

[45] *See* Equal Pay Act of 1963, Pub. L. No. 88-38, § 2, 77 Stat. 56, 56; Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 2, 81 Stat. 602, 602; Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2, 104 Stat. 327, 328–29.

For employees, the impacts included depressed wages, lower living standards, disadvantages in retaining and regaining employment, and limited chance "to pursue those opportunities for which our free society is justifiably famous."[46] To avoid these negative consequences, Congress explicitly declared that adverse employment decisions discriminating on the basis of certain protected traits were unlawful employment practices.[47]

While all states have some form of at-will employment, meaning that an employee can generally be dismissed at any moment and for any reason, [48] Congress specifically prohibited terminations when based on discrimination. The

[46] Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2.

[47] 42 U.S.C. § 2000e(j)

[48] *See* H.G. Wood, A TREATISE ON THE LAW OF MASTER AND SERVANT 272 (1877) ("With us [in America] the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will . . . . [U]nless their understanding was mutual that the service was to extend for a certain fixed and definite period, it is an indefinite hiring and is determinable at the will of either party . . . ."). *See also* At Will Employment States 2020, WORLD POPULATION REVIEW, https://worldpopulationreview.com/state-rankings/at-will-employment-states (last visited June 13, 2020). Currently, 42 states have a public policy exemption to at-will employment, 36 states have an implied contract exemption, and 11 states have an implied-in-law or covenant of good faith exemption. The only states where no exemptions apply to at-will employment are Florida, Georgia, Louisiana, and Rhode Island. In contrast, Alaska, Arizona, California, Idaho, Utah, and Wyoming allow all three exemptions, even if some may be difficult to prove under their statutes.

arguments against employment discrimination were sufficiently strong to prompt Congress to add to the list of protected traits over time and to broaden the definition of some.[49] As justification for enacting the Americans with Disabilities Act, for example, Congress found that Americans who have disabilities had "no legal recourse to redress" the discrimination they faced.[50] Courts followed suit, broadening the scope of employment protections after 1964 and reducing the opportunities for employers to lawfully discriminate.[51]

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[49] The Equal Pay Act of 1963 prohibited discriminatory wage differentials based on sex and predated the Civil Rights Act. *See* Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56. In 1967, Congress created additional protections against age discrimination. *See* Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967). In 1978, Congress expanded the term "sex" in Title VII to include "pregnancy, childbirth, or related medical conditions." 42 U.S.C. §2000e(k); *see also* Pub. L. No. 95-555, 92 Stat. 2076 (1978). In 1990, Congress passed the Americans with Disabilities Act to prohibit discrimination based on disability. *See* Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327. (1990).

[50] *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 2(a)(4), 104 Stat. 327, 329 (1990).

[51] For example, Supreme Court decisions expanded the definition of "sex" to include sexual harassment, sexual harassment when both parties are the same sex, gender stereotypes, and most recently, homosexual and transgender individuals. *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64–67 (1986); Oncale v. Sundowner Offshore Servs., Inc. 523 U.S. 75, 76–80 (1998); Price Waterhouse v. Hopkins, 490 U.S. 228, 233–44 (1989) (superseded by statute); Bostock v. Clayton Cty., 140 S. Ct. 1731, 1744–54 (2020).

Each of these moves demonstrates that, as a matter of public policy, both Congress and the courts have seen merit in protecting an increasingly broad group of employees from workplace discrimination. Americans are now protected based on characteristics with which they are born and those they acquire during their lives. Yet, employees can currently be discriminated in employment because of their political beliefs, even when that discrimination results in the same recognized harms which flow from employment discrimination against a protected class.

2. Rationale for Eliminating Discrimination

The federal law holds that employment discrimination "burdens commerce and the free flow of goods in commerce."[52] Regarding societal or public findings, federal employment protection acts note that discriminatory practices are unfair, prevent "the maximum utilization of the available labor resources,"[53] and cause unnecessary expense to the country when its citizens are dependent or nonproductive. General recognition of the public

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[52] Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202 § 2, 81 Stat. 602 (1967). Similar wording appears in other anti-discrimination acts and was likely intended to establish congressional authority to prohibit discrimination utilizing the enumerated congressional power to regulate commerce granted under Article I, Section 8 of the Constitution.

[53] Equal Pay Act of 1963, Pub. L. No. 88-38 § 2, 77 Stat. 56 (1963).

benefits of full employment supports governmental efforts to remove artificial barriers that prevent qualified people from working.

The case of *Rutan v. Republican Party*[54] provides a useful example of the rationale for protecting employees from discrimination based on political belief. Although political affiliation is sometimes a valid basis for employment decisions related to political positions, public employees are, nevertheless, generally protected from political discrimination. In *Rutan*, the Supreme Court affirmed that "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so."[55]

The *Rutan* Court noted that the "government has a significant interest in ensuring that it has effective and efficient employees."[56] However, the Court doubted "that 'mere difference of political persuasion motivates poor performance.'"[57]

[54] Rutan v. Republican Party, 497 U.S. 62 (1990).
[55] *Id.* at 78. The government may have a vital interest in confirming political alignment when the employee is in a policy-making position. The Court found that the government's "interest in securing employees who will loyally implement its policies can be adequately served by choosing or dismissing certain high-level employees on the basis of their political views." *Id.* at 74.
[56] *Id.* at 69 (referencing its plurality opinion in Elrod v. Burns, 427 U.S. 347, 365–66 (1976)).
[57] *Id*. at 70 (quoting its plurality opinion in Elrod, 427 U.S. at 365–66).

Emphasizing its conclusion in *Elrod v. Burns*,[58] the Court stated that the government could protect its interest "through the less drastic means of discharging staff members whose work is inadequate."[59]

The Supreme Court also highlighted the effect of political discrimination on government employees: "Employees who find themselves in dead-end positions due to their political backgrounds *are* adversely affected. They will feel a significant obligation to support political positions held by their superiors, and to refrain from acting on the political views they hold, to progress up the career ladder. An employee denied transfers to workplaces reasonably close to their homes, unless and until she joins and works for the Republican Party will feel a daily pressure by long commutes to do so. And employees who have been laid off may well feel compelled to engage in whatever political activity is necessary to regain regular paychecks and positions corresponding to their skill and experience.[60] Consequently, the Court held that "promotion, transfer, recall, and hiring decisions involving low-level public employees" was not constitutional "based on party affiliation and support."[61] In short, political patronage did not provide sufficient employer advantages to overcome the resulting constitutional issues for employees who did not hold

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[58] Elrod v. Burns, 427 U.S. 347 (1976).

[59] *Id*.

[60] Rutan v. Republican Party, 497 U.S. 62, 73 (1990).

[61] *Id.* at 65.

policy-making positions. Instead, public policy supported protecting those employees from discrimination based on political beliefs.[62]

Like the government, any private employer has an interest in "effective and efficient employees."[63] If differences of political persuasion do not motivate poor performance for public employees, it is equally doubtful that such political differences would cause poor performance in the private sector. Arguably, because private employers typically focus on commercial endeavors and profit-making, in contrast to the political agenda of a government, differences in political beliefs are less relevant to the private sector. While an employee may hold political or philosophical beliefs that are abhorrent to her employer, and vice versa, there is no evidence that the beliefs themselves cause poor performance in the professional sphere.

Additionally, each of the real effects suffered by a government employee would also apply to a private sector employee who experiences employment discrimination based on her political beliefs. Employee discrimination that affects opportunities, such as promotions and transfers, harms employees whether those employees work for the government or for a private company. The coercive effect of the discrimination, causing employees to compromise their beliefs, support the

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[62] Again, the issue is about an employee suffering adverse consequences for holding a political view which her employer found abhorrent.

[63] Rutan v. Republican Party, 497 U.S. 62, 69 (1990).

company position, and refrain from acting on their political views would be identical. The rationale developed in *Rutan* for protecting public employees from political discrimination applies equally to private sector employees.

3. Societal and Judicial Considerations

Anti-discrimination policies provide benefits beyond the interests of the employer and the employee. In its congressional report for the Glass Ceiling Act, the Committee on Education and Labor endorsed the goal of "eradicating discrimination," stating that "[s]trong protections against employment discrimination are the keys to unlock the human resources of creativity, productivity and loyalty prized by employers."[64]

Diversity in the workplace, increasingly valued by American companies,[65] encourages

[64] Civil Rights and Women's Equity in Employment Act of 1991, H.R. Rep. No. 102-40 (Apr. 24, 1991). ("America is a better country because we as a people have moved forward toward the goal of eradicating discrimination. Nowhere is that more important than in the workplace. Of almost any sector of American life, the progress toward equality has been greatest in the workplace precisely because of strong federal equal employment opportunity laws. Together we can make a significant contribution to the advancement of equal employment opportunity in our nation. Strong protections against employment discrimination are the keys to unlock the human resources of creativity, productivity and loyalty prized by employers.").

[65] Glass Ceiling Act of 1991, Pub. L. No. 102-166, § 202, 105 Stat. 1071, 1081 (1991) ("United States corporations . . . are

innovation, which has traditionally been an important driver of the American economy. Such innovation and creativity are prized American values that Congress could foster by protecting diversity of belief within the workplace.

III. A NEW MODEL OF EMPLOYEE POLITICAL BELIEF PROTECTION SUPPORTED BY SOCIETAL TRENDS

The preceding exploration demonstrates three points: 1) public policy supports eliminating employment discrimination against immutable characteristic, 2) political belief, like religious belief under Title VII, is an immutable characteristic, and 3) the mutable characteristic of political belief is unnecessarily constrained resulting in employment discrimination. This conflict between the public policy goals and the protections the law currently delivers prompts the offering of a new model of belief discrimination in the workplace.

A. The New Standard

Title VII is flawed in that it currently does not protect an employee from discrimination at work because of a worker's political views. A better model for providing comprehensive protection from employment discrimination is to extend Title VII to include all belief – be it religious or political.

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increasingly aware of the advantages derived from a diverse work force . . . .").

Employees should be protected from intentional or disparate impact discrimination based upon their political views, unless the particular belief were a bona fide job qualification or the employer qualified for a special exemption.[66] The term *political belief* needs to be inserted into the Title VII list of characteristics protected.

B. Pertinent to Modern Society

Protection for a broader category of belief, separated from religion, is in keeping with modern American society. Religion is a waning influence in the United States, reflected in a decreasing percentage of Americans who identify with a particular religion.[67] Currently, more than 25% of the population describes its religious identity as atheist, agnostic, or nothing in particular, and there is no majority religion in the United States.[68] Although Americans believe that religion generally has a positive impact on society, most Americans believe that it is a private concern to be "kept out of political matters."[69] In other words, although Americans

[66] *See* 42 U.S.C. §§ 2000e–2000e-3.

[67] *See America's Changing Religious Landscape*, PEW RESEARCH CENTER (May 12, 2015), https://www.pewforum.org/2015/05/12/americas-changing-religious-landscape/.

[68] *In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RESEARCH CENTER (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/.

[69] *Americans Have Positive Views About Religion's Role in Society, but Want It Out of Politics*, PEW RESEARCH CENTER

support protection from religious discrimination, religion now has a smaller role in the life of the average Americans than in previous decades.[70]

Science, on the other hand, is a growing influence. Almost three quarters of Americans believe that science has had a mostly positive effect on society. Indeed, 60% of U.S. adults believe that scientists should take an active role in policy debates about scientific issues.[71] Americans generally see the value of scientific contribution and do not want scientific voices silenced. Yet scientists are not currently protected from adverse employment decisions based on their scientific beliefs, resulting in some scientists experiencing employment discrimination practices that hinder their ability to add to public discourse.[72] Specific court decisions

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(Nov. 15, 2019), https://www.pewforum.org/2019/11/15/americans-have-positive-views-about-religions-role-in-society-but-want-it-out-of-politics/.

[70] *Supra*, note 68.

[71] Cary Funk, *Key Findings About Americans' Confidence in Science and Their Views on Scientists' Role in Society*, PEW RESEARCH CENTER (Feb. 12, 2020), https://www.pewresearch.org/fact-tank/2020/02/12/key-findings-about-americans-confidence-in-science-and-their-views-on-scientists-role-in-society/.

[72] *See, e.g.*, Dr. Maria Caffrey, Opinion, *I was a Climate Scientist in a Climate-denying Administration and It Cost Me My Job,* THE GUARDIAN (July 25, 2019 02:00 EDT), https://www.theguardian.com/commentisfree/2019/jul/25 /trump-administration-climate-crisis-denying-scientist (referencing her own situation, as well as two other federal employees, climate staffer Joel Clement and intelligence aide

holding that scientific beliefs do not qualify for protection because they are not part of a larger religious-like belief system seem contrary to the wishes of Americans.[73] If Congress or the courts had offered an explanation for including religion alone as a mutable protected class, it might provide criteria to evaluate why scientific belief should be excluded. However, since no justification was provided, it is difficult to understand the justification for excluding a belief system which is arguably as important to Americans as religion.

Similarly, many Americans now hold strong political beliefs at both ends of the political spectrum. In 2017, a study showed that "[t]he self-defining characteristics that Americans hold dear include their racial and cultural heritage, the language they speak and their choice of worship," but "the strongest attachment . . . is Americans' connection to their political party."[74] These trends appear to be stronger today, as the country has

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Rod Schoonover, who resigned in protest after experiencing censorship and reassignment due to climate change beliefs).

[73] *See, e.g.*, Seshadri v. Kasraian, 130 F.3d 798, 800 (7th Cir. 1997) (finding that a "creed that requires scrupulous honesty ... in the scholarly pursuit of scientific knowledge" does not constitute religion absent a more complete belief system).

[74] Milenko Martinovich, *Americans' Partisan Identities Are Stronger Than Race and Ethnicity, Stanford Scholar Finds,* STANFORD NEWS (Aug. 31, 2017) https://news.stanford.edu/2017/08/31/political-party-identities-stronger-race-religion/.

become increasingly polarized.[75] The researcher's concerning explanation was that "unlike race, religion and gender, where social norms dictate behavior – there are few, if any, constraints on the expression of hostility toward people who adhere to opposing political ideologies."[76] Enforced protections that prevent discrimination of persons on the basis of known political views would help bridge the divide, ending a type of political apartheid that is currently permitted in the workplace.[77]

Again, given that some beliefs are important to Americans and define their identity to a greater degree than religion, it is surprising that the protection of religious beliefs is unquestioned while social, political and scientific beliefs are excluded.

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[75] Amina Dunn, *White Evangelicals See Trump as Fighting for Their Beliefs, Though Many Have Mixed Feelings About His Personal Conduct*, PEW RESEARCH CENTER (Aug 24, 2020) (showing average presidential approval by the other political party shifting from 49% in 1953 to a low of 6% over the Trump presidency), https://www. pewresearch.org/fact-tank/2020/08/24/trumps-approval-ratings-so-far-are-unusually-stable-and-deeply-partisan/.

[76] Martinovich, *supra*, note 74.

[77] A worker may be discriminated against regardless of whether the employee seeks an accommodation for a religious practice which conflicts with work. That is, mere knowledge, by co-workers of a worker's political belief can give rise to discrimination in opportunities provided by the employer or in harassment. For example, a manager's knowledge that an employee worker for an identified political candidate prior to employment may serve as a basis for political belief discrimination, even if the employee remains silent in the workplace regarding any political issue.

This legacy of American notions of religious freedom as not just a fundamental right but also a *raison d'être* for the nation, creates a dichotomy in treatment of belief that does not match the values of most Americans today. This is not to suggest that religious beliefs should not be protected, but rather that the concept of belief should be expanded to protect both the sacred and the secular, in alignment with modern American society.

C. Recognizing New Workplace Realities

Professionalism requires employees to act according to the interests of their employers, which may require employees to suppress personal behaviors contrary to those interests.[78] For example, an employee might regularly yell at other drivers who frustrate her during her morning commute but refrain from yelling at customers or colleagues who similarly annoy her once she is at work. Likewise, an employer might require employees to wear a company uniform at work, which the employee would never choose to wear at home. Where the

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[78] Some training program specifically speak to the interests of the employer. *See, e.g.*, Importance of Professionalism, TEXAS TECH UNIVERSITY HEALTH SCIENCES CENTER ("A professional works in her employer's or client's interests. She may not always agree with decisions or enjoy what she's doing but in order to do right by the person engaging her services, she does her job ably.") https://www.ttuhsc.edu/pharmacy/documents/administration/professional-affairs/Importance_of_Professionalism.pdf (last visited Sept. 3, 2020).

separation of work and private lives is clear, these behavior modifications in the workforce are accepted by employees as an explicit or implicit contractual obligation in return for their employment.[79] However, two modern trends, social media and work-at-home initiatives, have increasingly blurred this separation.

As the example of Florissa Fuentes in the introduction to this paper shows, an employee may be fired for political belief associated with social media posts, even when those posts are made during personal time. Social media, including Facebook, Instagram, or Twitter, afford the employer a glimpse into the employee's private life and an opportunity to discriminate based on the views the employee expresses. This is true even when, as with Fuentes, the employee's professionalism and effectiveness at work are unquestioned. Moreover, with the advent of COVID-19, many employees are suddenly working from home, joining online meetings and conferences with a video feed that offers a literal glimpse into their home lives.[80] Elements of their

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[79] *See* Leora Eisenstadt, *Data Analytics and the Erosion of the Work/Nonwork Divide*, 56 Am. Bus. L.J. 445, 449–58 (2019) (discussing the origins and consequences of the work and nonwork divide).

[80] *See, e.g.*, Sara Morrison, *Just Because You're Working from Home Doesn't Mean Your Boss Isn't Watching You*, VOX (Apr. 2, 2020) (explaining ways that employers are able to monitor and track employees' activities through software tools), https://www.vox.com/recode/2020/4/2/21195584/coronavirus-remote-work-from-home-employee-monitoring.

personal lives and situations that the employees wished to keep private are now revealed to their employers. The law does not prohibit employers from using such information obtained outside the workplace setting as a basis for adverse employment decisions that harm the employee.

In her article, *Data Analytics and the Erosion of the Work/Nonwork Divide*, Leora Eisenstadt assessed the ramifications of having the strict separation between Americans' work and personal lives relax over time.[81] Telecommuting employees, are unable to maintain a work/nonwork divide because their work is performed in a nonwork environment, increasing the odds of spillover between the formerly separate realms. The inability to keep private matters out of the eyesight of employers, whether because of digital media or online meetings, leaves American employees more vulnerable to discrimination if their beliefs and lifestyles are different from their employers.[82] Thus, a new standard that protects all beliefs helps prevent discrimination based on personal factors that are

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[81] Eisenstadt, *supra*, note 79, 4. See also *id.*at 458–65 for a discussion of the benefits both employers and employees receive from the work/nonwork divide.

[82] *Id.* at 469–70 ("Millennials are cognizant of their reputational vulnerability on digital media but are not willing to sacrifice Internet participation to segregate their multiple life performances. Lacking the technological or legal ability to shield performances, Millennials rely on others, including employers, to refrain from judging them across contexts.).

unrelated to employee performance or job qualifications, just as Congress intended.[83]

D. Acknowledging Historical Linkages

Congress enacted the Civil Rights Act of 1964 in response to an international human rights movement followed by a national civil rights movement.[84] The political beliefs and pressure of a group of Americans incensed by incidents of racial discrimination provided the impetus for the employment protections of the Civil Rights Act. The

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[83] This article provides no rubric for limiting political beliefs which may be generally anathema to the common citizen. That would be a question which Congress would have to answer. This work, however, should not been seen promoting a safe harbor for repugnant political views.

[84] *See, e.g.*, Universal Declaration of Human Rights, Article 2, U.N. DOC (1948) (stating that each person is "entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."); Establishing the President's Committee on Equality of Treatment and Opportunity in the Armed Services, 13 Fed. Reg. 4313, 4313 (July 26, 1948) (declaring it the President's policy that "there shall be equality of treatment and opportunity for all persons in the armed services without regard to race, color, religion or national origin"); *JFK and Civil Rights,* PBS, (recounting President John F. Kennedy's efforts to address civil rights and particularly racial inequities) https://www.pbs.org/wgbh/americanexperience/features/jfk-domestic-politics/ (last visited July 17, 2020). *See also* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241, 241 (centering much of its discussion on racial discrimination).

civil rights movement illustrates the linkage between race, color, and political belief because the individuals holding strong political beliefs and protesting discrimination were often people of color who had experienced discrimination themselves.[85] In light of this historical linkage and the crucial role of political beliefs in bringing about the Civil Rights Act, the exclusion of secular beliefs from anti-discrimination employment protections is puzzling.

A more consistent policy would recognize the correlation between the protected classes under Title VII and sincerely held beliefs. The law recognizes disparate impacts on a protected class, and the Supreme Court finds discrimination even when the protected trait was not the motive or cause of the employer's action.[86] However, an employer who can show that lawful discriminatory practices were applied equally against all employees, regardless of their status in a protected class, is likely to prevail.[87] In other words, an employer can

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[85] *See* TOMIKO BROWN-NAGIN, COURAGE TO DISSENT: ATLANTA AND THE LONG HISTORY OF THE CIVIL RIGHTS MOVEMENT 283 (2011).
[86] *See* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1744 (2020) (providing two lessons from employment discrimination cases: 1) "'t's irrelevant what an employer might call its discriminatory practice" and 2) the protected class "need not be the sole or primary cause of the employer's adverse action.").
[87] *Id.* at 1743 ("For an employer to discriminate against employees for [an unprotected trait], the employer must intentionally discriminate against individual [employees] in part because of [a protected trait]. That has always been

discriminate against a black employee because of her political belief, as long as the employer would also discriminate against a white employee with that political belief.

While linkages between Title VII protected characteristics and political beliefs change over time, they are strong at present and will likely continue to strengthen going forward. For example, currently black voters are much more likely to be Democrats (81%) than Republican (10%), and non-white voters comprise a much larger percentage of those who vote Democratic (40%) compared to those who vote Republican (17%).[88] Most women identify with or lean toward the Democratic Party (56%), while a minority of men do (42%), and this gap of 14% is among the largest gender divides in party affiliation in history.[89] Similarly, correlations emerge in religion, where Jews and religiously-unaffiliated voters lean toward the Democratic Party (68% and 67 % respectively), while members of The Church of Jesus Christ of Latter-day Saints lean predominantly Republican (74%).[90] These correlations become more pronounced when protected classes are combined, particularly race and religion. For

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prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'").

[88] *In Changing U.S. Electorate, Race and Education Remain Stark Dividing Lines,* PEW RESEARCH CENTER 2 (Jun. 2, 2020) https://www.pewresearch.org/politics/2020/06/02/in-changing-u-s-electorate-race-and-education-remain-stark-dividing-lines/.

[89] *Id.*

[90] *Id.*

example, 84% of black Protestants lean toward the Democratic Party, while 78% of white evangelical Protestants lean toward the Republican Party, and a significant discrepancy also exists between Hispanic Catholics and white Catholics.[91]

Beyond simple party affiliation reflective of political beliefs, political action by Americans also tends to be identified with protected classes. Images of BLM protesters depict a diverse American population, including people of color, women, and individuals of all ages.[92] In fact, 67% of all Americans indicate at least some support for the BLM movement, and a full 86% of black Americans are supportive of it.[93] In contrast, the anti-BLM and

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[91] *Id.* Party affiliation provides a measure of political beliefs supported by studies of the reasons that evangelicals support the Republican Party. *See White Evangelicals See Trump as Fighting for Their Beliefs, Though Many Have Mixed Feelings About His Personal Conduct*, PEW RESEARCH CENTER (Mar. 12, 2020) (finding that 59% of white evangelical Protestants overwhelmingly feel that the Trump administration has helped rather than hurt the interests of evangelical Christians, and thus, 83% of white evangelicals identify with or lean toward the Republican Party), https://www.pewforum.org/2020/03/12/white-evangelicals-see-trump-as-fighting-for-their-beliefs-though-many-have-mixed-feelings-about-his-personal-conduct/.

[92] Kim Parker, Juliana Menasce Horowitz, & Monica Anderson, *Amid Protests, Majorities Across Racial and Ethnic Groups Express Support for the Black Lives Matter Movement*, PEW RESEARCH CENTER (June 12 ,2020), https://www.pewsocialtrends.org/2020/06/12/amid-protests-majorities-across-racial-and-ethnic-groups-express-support-for-the-black-lives-matter-movement/.

[93] *Id.*

pro-police activists are primarily white, middle-aged men.[94] Incensed by discriminatory practices in law enforcement, it is possible that BLM protesters are creating a modern-day version of the civil rights movement, focused on police brutality and systemic racism.[95] If so, all the more reason for the participants in the movement to be protected from discrimination based on their beliefs.

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[94] *See e.g.*, Tony Marrero & Diana C. Nearhus, *Tense Moments at Back the Blue Rally as Cop Supporters, Protesters Come Together in Tampa*, Tampa Bay Times (June 13, 2020) ("The rally crowd ranged in age from kids to seniors, but skewed older, and was almost entirely white."); Jason Wilson, Breadth of Rightwing Portland Protest Network Reveals Energized Trump base, THE GUARDIAN (Sept. 3, 2020) ("One of those is Alan Swinney, a 50-year-old Midland, Texas, resident and Proud Boy with a long history of attending and organizing politicized street confrontations around the country."). The Proud Boys are identified by Southern Poverty Law Center as a hate group with bigoted racist, anti-Muslim and misogynist political views. Proud Boys, SOUTHERN POVERTY LAW CENTER, https://www.splcenter.org/fighting-hate/extremist-files/group/proud-boys (last visited Sept. 3, 2020).

[95] Parker, *supra* note 92. *See also* Emily Guskin, Scott Glement & Dan Baiz, *Americans Support Black Lives Matter But Resist Shifts of Police Funds or Removal of Statues of Confederate Generals or Presidents Who Were Enslavers*, Washington Post (July 21, 2020) (exploring attitudes among different demographic groups toward ongoing racial discrimination and support for measures to address it) https://www.washingtonpost.com/politics/americans-support-black-lives-matter-but-resist-shifts-of-police-funds-or-removal-of-statues-of-confederate-generals-or-presidents-who-were-enslavers/2020/07/21/02d22468-cab0-11ea-91f1-28aca4d833a0_story.html.

Finally, nearly a hundred years before the Civil Rights Act, the Supreme Court, speaking on civil rights, affirmed that our political institutions rest on the theory that individuals hold inalienable rights, including liberty and the pursuit of happiness.[96] Further, the Court declared that "in the pursuit of happiness all avocations, all honors, all positions, are alike open to everyone, and that in the protection of these rights all are equal before the law."[97] The case in question, *Cummings v. Missouri*, dealt with a punitive state action against individuals who participated in the rebellion during the American Civil War.[98] Specifically, the state of Missouri attempted to deprive clergymen of their right to practice their vocation unless they declared by oath that they had previously been politically neutral. Although the case regarded a state action, the principle behind the Court's holding may be applied to political beliefs and activities today: an individual should not be punished by deprivation of her profession for an act not punishable when it was committed.[99] Likewise, an employee today should not be deprived of her livelihood for beliefs and related actions that are neither illegal nor applicable to the workplace.

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[96] Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 321 (1867).
[97] *Id.* at 321–22.
[98] *Id.* at 316–19.
[99] *Id.* at 316–32. This principle is outlined as an argument prior to the opinion of the Court and is supported by the final rationale and holding found in the Court's opinion.

E. Protections Based Upon Political Belief

As the Supreme Court noted in *Cantwell v. Connecticut*: "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to her view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy."[100]

As the Supreme Court explained, these liberties provide a shield under which "many types of life, character, opinion and belief can develop unmolested and unobstructed" and that "[n]owhere is this shield more necessary than in our own country for a people composed of many races and of many creeds."[101]

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[100] Cantwell v. Connecticut, 310 U.S. 296, 310, 60 S. Ct. 900, 906 (1940).

[101] *Id.* The Supreme Court also provides a warning: "There are limits to the exercise of these liberties. The danger in these times from the coercive activities of those who in the delusion of racial or religious conceit would incite violence and breaches of the peace in order to deprive others of their equal right to the exercise of their liberties, is emphasized by events familiar to all. These and other transgressions of those limits the States appropriately may punish." *Id.* As noted in this

F. Political Beliefs Merit Protection

This paper has argued that, despite case law explicitly excluding beliefs that are political from Title VII protections, the exclusion is unjustified. In this section, it takes the argument a step further to contend that inclusion is justified. The importance of political belief and political movements throughout the history of this nation is undeniable, continuing today with the BLM movement. The Supreme Court has observed that "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" is "crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."[102] The liberty to hold political beliefs, discuss and debate them, and show support for favored political ideas is a cherished and fundamental American freedom which contributes to the strength of the nation.

However, in this moment of history, the work life of Americans extends into their homes and into personal hours, limiting the ability of employees to exercise this important right without their employers observing. If their livelihood is threatened by their political beliefs and activities, American employees cannot freely participate in the political realm. Worse, they are vulnerable to pressure by their

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paper, belief-based practices that create harm to others may be curtailed and punished.

[102] Boy Scouts of Am. v. Dale, 530 U.S. 640, 647-48 (2000).

employer to conform to their employer's political interests at the expense of their own, allowing the minority to potentially impose its views on the majority. Although Americans now identify more strongly with political positions than with religion or other traditional characteristics of identification, their political beliefs are not protected. Moreover, as explored earlier in this work, since many protected classes under Title VII are linked,[103] employees in currently protected classes may experience disproportionate discrimination when their political beliefs are used as a basis for discrimination.[104]

An expansion of employment protections to include political beliefs serves each of the policy goals originally outlined for the Title VII protected classes: it eliminates employment discrimination based on a class that is irrelevant to job performance, reduces unemployment and other detrimental effects to employees, and increases diversity, innovation, and loyalty in the workplace to the benefit of the country. Further, the political divisions of the

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[103] See Louis DeSipio, Hispanics and the Future of America, 11 Latino Civic and Political Participation, https://www.ncbi.nlm.nih.gov/books/NBK19906/ (last visited, Feb. 7, 2022)(discussing the role of Latinos in American politics.)

[104] It might be possible for an employee to bring a disparate impact case based on an already protected characteristic, however, the case would be difficult to win unless sufficient evidence exists to establish a pattern. Small employers might not have enough employees to demonstrate a pattern and could argue that it is currently legal and permissible to discriminate on the bases of political belief.

country may be lessened if employers are required to hire and promote regardless of their employee's political beliefs. When nonburdensome political practices are accommodated in the workplace, employees with different political beliefs working together may develop a tolerance or even an appreciation for other viewpoints.

As shown in the introduction of this paper, discrimination based on political beliefs does exist and can be damaging to a community; anti-discriminatory policies may conversely be healing to a community and to the country. Justice Brandeis noted that those who fought for American independence "believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government." [105] Thus, American government should support the exercise of its people's freedom by protecting employees from adverse employment decisions based on political belief.

G. Political Beliefs Meet Qualifying Criteria Under the New Model

The determination of which political beliefs qualify under Title VII relies on the criteria

[105] Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

developed earlier. First, the belief must be sincerely held, and an employee who claims a political belief simply to be controversial, promote discord, or as a joke would not be protected. Second, there must be a strength to the conviction. The standard under the Code of Federal Regulations is that the belief must be held with "the strength of traditional religious views."[106] While this may not be the best description for employees with secular beliefs who are not religiously affiliated, it is easily understood as a measure of a deep and abiding belief, rather than a whim or light-hearted stance. Finally, the belief must have an ethical or moral component, which is satisfied if the employee's political beliefs reflect her sense of right and wrong. Many people who identify strongly with one set of political views do so because they believe it is right and they reject opposing views or positions as morally wrong.

Under this criteria, frivolous beliefs and passing fancies would be excluded. However, given the passion with which Americans currently hold their political beliefs, most political beliefs are likely to qualify for protection under Title VII. Evaluated against these criteria, Fuentes from the introduction of this paper would have protected beliefs; there is nothing to suggest her political beliefs are not sincerely and strongly held, and they appear to reflect her view of right and wrong. She should not have faced employment discrimination because of those political beliefs.

[106] 9 C.F.R. § 1605.1 (2020).

IV. CONCLUSION

In summary, a new standard for *political belief* under Title VII's employment protections creates a workable solution that aligns better with both modern societal trends and with modern employment conditions than case law's present interpretation. The solution does not require a wholesale change of the currently protected classes, so much as a removal of artificial constraints on existing classes. The classes themselves already include both mutable and immutable traits, but they unnecessarily exclude secular, and specifically political, beliefs. The exclusion is based on a rationale that applied to a different set of circumstances where state interests conflicted with the interests of the individual.

By removing the artificial constraint, the protected category of *belief* can be interpreted more broadly to include all beliefs, religious and nonreligious, that are worthy of protection. The broader protection serves the interest of both the employee, who may currently experience legal employment discrimination based on her secular beliefs, and society where the government's interest in eliminating discrimination is synergistic. The inclusion of nonreligious belief is harmonious with modern societal trends, where Americans increasingly identify with political affiliation more than religious affiliation and where workplaces are increasingly fluid, extending into employees' homes

and personal lives. The historical linkages between protected employment classes provide further support for a broader interpretation of belief, to avoid unintentional discrimination against a protected class where there are correlations with secular belief.

The model for protecting secular belief follows the model developed for religious belief, where the belief itself and the resulting observance or practice are treated distinctly. The criteria that determines a protectable belief is the same as the criteria established in the Code of Federal Regulations for religious belief. However, the additional indicia or factors that attempt to distinguish religion from nonreligion, are irrelevant and inapplicable. An examination of the practical implications of the new standard for *belief* reveals little disruption to existing procedures in the workplace compared with clear gains in the protections provided to vulnerable employees with heartfelt nonreligious beliefs. In addition, the new standard eliminates judicial inefficiency and inconsistencies caused by the current requirement to draw a distinct line between the sacred and the secular in an increasingly blurry field of beliefs.

The importance of political beliefs, both in the history of America and in current times, underscores the reason that political beliefs are worthy of protection from employer discrimination. The fundamental right to participate fully in the political process of the country, without fear of recrimination, is instrumental to our functioning democracy. Under the new standard, an employee's

political belief qualifies for protection from invidious discrimination under Title VII.

- END OF ARTICLES -

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