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Articles

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Letter from the Editor

Dear Reader,

On behalf of the executive and editorial boards, I am proud to present the Fall 2015 issue of the Columbia Undergraduate Law Review. This semester our board had the difficult task of publishing only four papers out of the many high-quality submissions, and we have decided to publish the following papers.

The first article in our issue is Susan Huang's "Constitutional Disability Law in the United States." Her paper explores the implications of establishing a stronger and more transparent framework between the U.S. Constitution and disability law.

Habib Olapade's "Affirmative Inattention: A Closer Examination of Justice Powell's Strict Scrutiny Analysis in Bakke" critically analyzes Justice Lewis Powell's majority opinion in the 1978 Bakke Supreme Court case invalidating strict quotas in college admissions decisions.

"What's It To You? Separation of Powers, Access to the Courts, and The Consequences of Restricting Standing," written by Jason Clayton, examines and challenges the current Supreme Court's use of standing to dismiss suits from certain individuals.

Lastly, Andy Kim examines the Department of Justice's affirmation of workplace protections for transgender individuals under the Title VII of the Civil Rights Act of 1964 in his piece, "In the Language of "Because of": The Inherence of Title VII Protections for Transgender Individuals."

With each continuing publication, the Columbia Undergraduate Law Review strives to increase intellectual debate and discussion of legal issues, especially among undergraduates. To achieve this goal, we highly recommend visiting our online journal with shorter legal articles on our website – written by current Columbia students on our online staff. We hope that you enjoy reading the following submissions and our online articles.

Sincerely,
Saaket Pradhan, Editor-in-Chief

MISSION STATEMENT

The goal of the Columbia Undergraduate Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

i) Provide the necessary resources by which all undergraduate students who are interested in scholarly debate can express their views in an outlet that reaches the Columbia community.

ii) Be an organization that uplifts each of its individual members through communal support. Our editorial process is collaborative and encourages all members to explore the fullest extent of their ideas in writing.

iii) Encourage submissions of articles, research papers, and essays that embrace a wide range of topics and viewpoints related to the field of law. When appropriate, interesting diversions into related fields such as sociology, economics, philosophy, history, and political science will also be considered.

iv) Uphold the spirit of intellectual discourse, scholarly research, and academic integrity in the finest traditions of our alma mater, Columbia University.

SUBMISSIONS

The submissions of articles must adhere to the following guidelines:

i) All work must be original.

ii) We will consider submissions of any length. Quantity is never a substitute for quality.

iii) All work must inclde a title and author biography (including name, college, year of graduation, and major).

iv) We accept articles on a continuing basis.

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Constitional Disability Law in the United States

Susan Huang | George Washington University

Abstract

Existing federal disability law in the United States has been largely successful in shielding individuals with disabilities from different forms of discrimination- legally, socially, and economically. Prior to the civil rights movement, the marginalization of the disability community created significant stereotypical biases and deep-rooted societal assumptions that imposed harsh restrictions on the group's ability to access employment opportunities, schools/education programs, public accommodations, voting rights, and affordable health care. However, due to effective civil rights legislation and strong advocacy from the disability rights movement, huge strides have been made towards granting equal treatment for Americans living with disabilities. Still, there is room for a greater degree of judicial protection from the courts to ensure that the rights of people with disabilities are not only fully recognized by the law, but also enforced on both a state and federal level. This article discusses the implications of creating a more transparent legal framework between the U.S. Constitution and disability law, which involves holding disability cases to a higher scrutiny standard and adopting the Equal Protection Clause in a more nuanced manner than the courts have done so in the past.

I. Introduction: Historical and Legislative Context of U.S. Disability Law

Existing federal disability law in the United States has made largely successful efforts in shielding individuals with disabilities from different forms of discrimination. Prior to the civil rights movement, the marginalization of people with disabilities created stereotypical biases and deep-rooted societal prejudices, resulting in the imposition of harsh restrictions on the group's ability to access employment opportunities, education programs, public accommodations, affordable health care, and to exercise voting rights. Effective civil rights legislation coupled with strong advocacy from the disability rights movement, however, has lead to the advancement towards equal treatment for Americans living with disabilities. While the law is still ahead of social attitudes in many ways, it falls short of offering appropriate constitutional protections for individuals living with disabilities.

People with disabilities comprise a minority group that continues to expand in size every year. Of all the minority groups in the country, individuals with developmental disabilities are among the most vulnerable to violations of their basic civil and human rights. Their reduced ability to understand and effectively communicate with others often places them in precarious situations. Similarly, individuals living with physical disabilities or impairments are subject to different forms of discrimination, including social, economic, and legal disadvantage such as harassment, the denial of (or limited) access to public accommodations, buildings, transportation, and health care services, or unequal treatment of an individual in education programs and the workplace. Thus, the rights to equal protection and due process for citizens with physical as well as developmental disabilities have generated significant discussions in both an academic setting and among the legal community.

Due to widespread national attention and strong advocacy, policy

makers have been largely successful in passing federal legislation that protects people with disabilities from discrimination in many areas of life, including equal opportunities in education and employment, patients' rights, and freedom from abuse and neglect.[1] Nevertheless, there should be a push for a greater degree of protection from the courts to ensure that the rights of people with disabilities are not only fully recognized by the law, but also vigorously protected on both a state and federal level. Currently, there are very few arguments that directly utilize the U.S. Constitution to protect the rights of the disabled. Instead of using constitutional strategies, lawyers have taken the Supreme Court's decision in City of Cleburne v. Cleburne Living Center,[2] which holds that discrimination against people with disabilities only requires rational basis review under the Equal Protection Clause, as an insurmountable doctrine. Rational basis review is considered a lower level of scrutiny in comparison to strict and intermediate scrutiny, requiring only that the policy in question be rationally related to a legitimate governmental interest. This low standard of constitutional review has subsequently led to "deconstitutionalization" of disability protections, and has allowed state laws to continue to discriminate against the disabled. Therefore, at the federal level, national legislation serves as an incomplete legal tool to challenge the discrimination that stems from these laws.

In light of these concerns, this paper explores the implications of establishing a stronger and more transparent framework between the U.S. Constitution and disability law. It will do so by comparing federal protection of people with disabilities to protections surrounding the lesbian, gay, bisexual, and transgender (LGBT) community, namely in terms of the level of scrutiny that is applied to discrimination on the basis of sexual orientation. In addition, this paper will assert that the courts should exercise a more rigid application of the Equal Protection Clause and implement a higher level of judicial scrutiny in future disability cases.

II. Judicial History: Courts' Interpretations of the Constitution in Disability Cases

The disability rights movement has secured significant victories in preventing discrimination against individuals with disabilities, but there remain critical gaps in the protections currently afforded by disability law. The framework of disability policy involves key federal legislation that protects the civil rights of people with disabilities and their families, which was a starting point in the advancement of the disability rights movement.

Millions of Americans with disabilities rely on state and federal laws to protect their civil rights. The United States Census Bureau Report reveals that 56.7 million people had a disability in 2010, with over half of them reporting a severe disability.[3] According to these statistics, nearly one in every five Americans lives with a disability. The ADA defines a disability as "a physical or mental impairment that substantially limits one or more activities of such individual; a record of such an impairment; or being regarded as having such an impairment."[4] Section III of the ADA specifically elaborates major life activities to include but not limited to "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[5] The ADA prohibits discrimination against people with disabilities in five major areas: employment, public accommodations, telecommunications, state and local government services, and transportation. The act also offers similar protections to disabled Americans as those provided in the Civil Rights Act of 1964 with respect to discrimination based on race, sex, national origin, and religion.[6] Prior to the signing and enforcement of the ADA in 1990, the history of disability legislation reflects patterns of exclusion, segregation, and denial of services. Such discrimination can be seen in the forms of harassment, victimization, failure to make reasonable adjustments to accommo-

date a disability, and the denial of access to services and programs (i.e. transportation, education, public accommodation, employment, etc.). As such, the ADA is considered a milestone achievement because for the first time, people living with disabilities had a legal recourse against different types of discrimination.

In addition to the ADA, there are several other important laws, which affect the lives of people with disabilities. The Developmental Disabilities Assistance & Bill of Rights Act (DD Act) addresses the changing needs and expectations of more than 4.7 million individuals with developmental disabilities.[7] Under the DD Act, Congress began to establish a series of programs that would improve the lives of people with intellectual disabilities, protect their civil and human rights, and promote their maximum potential through "increased independence, productivity, and integration into the community."[8] Through the DD Act, federal funds support the operation and management of State and Territorial Councils on Developmental Disabilities (DD Councils), Protection and Advocacy for People with Developmental Disabilities (PADD), University Centers of Excellence in Developmental Disabilities (UCEDDs), and Programs of National Significance (PNS).[9] These initiatives use an interdisciplinary approach to identify needs and deliver support services to individuals with developmental disabilities and their families. The DD Act has led to further national legislation in support of all people with disabilities, marking a legislative achievement for the modern disability rights movement.

The Rehabilitation Act of 1973 (Rehab Act) was the first major legislative effort to secure an equal platform for individuals with physical and cognitive disabilities in the area of employment. This act prohibits discrimination on the basis of disability in federal employment, employment practices of federal contractors, programs that are conducted by federal agencies, and programs that receive federal financial assistance.[10] Section 504 of the Rehab Act contains legislation that specifically forbids organizations and employers

from excluding or denying qualified individuals with disabilities an equal opportunity to receive program benefits and services.[11] This section is widely regarded as the first civil rights statute for persons with disabilities regarding employment. Due to its successful implementation and operation across the nation, Section 504 of the Rehabilitation Act set up the stage for future federal disability policies, including the Virginians with Disabilities Act of 1985 and the Americans with Disabilities Act of 1990.

The integration of people with disabilities into mainstream American society is fundamental to the most significant disability laws implemented across the United States. The aforementioned disability policies are critical pieces of legislation that helped to initiate and establish the modern disability rights movement. The key tool for disability rights is effective litigation under specific federal statutes, as noted with the success of the Americans with Disabilities Act, the Developmental Disabilities Assistance & Bill of Rights Act, and the Rehabilitation Act. In addition to these federal disability policies, a wide variety of discrimination is covered piecemeal in other pieces of legislation. For instance, the Fair Housing Act strictly prohibits discrimination in housing to individuals with disabilities[12] and the Individuals with Disabilities in Education Act provides a right to education for young children with disabilities.[13] Yet despite the success of both historic and current disability laws, disability rights are frequently overlooked as a civil rights issue by legal scholars and members of the general public.

In order to further advance the goals of the disability advocacy movement, lawyers should appeal to the U.S. Constitution. Pursuing advances under constitutional law should be an integral part of the modern disability rights movement. Advocacy from the legal community has the ability to establish effective reform on a federal level. Since this movement has grown to attract nation-wide lobbying and support across multiple levels of government, it is essential to address the constitutional rights of the disability commu-

nity. In his article, "Disability Constitutional Law," author Michael Waterstone points out that statutory claims are fundamentally different from constitutional claims. Waterstone writes, "Claims brought under the ADA often turn on technical issues of statutory interpretation: which individuals are covered under the ADA's definition of disability, where the line between reasonable and unreasonable accommodation lies, and what exactly an employer must offer to prove defenses under the Act."[14] Such issues are of paramount value to people living with disabilities, especially in bringing discrimination claims against state and local governments under Title II of the ADA. However, utilizing the U.S. Constitution in disability cases would force the courts to fully engage in constitutional law, namely the Equal Protection Clause, to establish a stronger legal framework for future disability cases, and to steer the disability rights movement in a more protective direction.

When examining statutes regarding the rights of minorities under the 14th Amendment and determining their constitutionality, the Supreme Court categorizes cases into three judicial scrutiny levels: strict, intermediate, and rational basis scrutiny. The level of scrutiny that is applied to each case determines the ways in which a court examines the constitutionality of a law and determines which party holds the burden of proof. Strict scrutiny is the highest level of scrutiny that courts apply to government actions or laws, and is typically used when a "fundamental right" is being threatened by a law (i.e. the right to marriage).[15] Strict scrutiny requires the government to prove that there is a compelling state interest behind the challenged policy, and that the law is narrowly tailored to achieve its legislative effect. Suspect classifications that fall under strict scrutiny include race, religion, national origin, poverty, and alienage—classes that have been historically discriminated against and are thus in need of stronger constitutional protection.[16]

Intermediate scrutiny is the second level of judicial focus and is slightly less demanding than strict scrutiny, requiring the challenged

law to serve an important government interest and for such policy or regulation to be substantially related to achieving that interest. Under the Equal Protection Clause, classifications such as gender, sex, and legitimacy would receive intermediate scrutiny. As such, intermediate scrutiny is typically used in equal protection challenges to address gender classifications and 1st Amendment issues.

Rational basis review, the lowest level of scrutiny that can be applied to challenged laws, is the most lenient form of judicial review. Under the rational basis test, the person challenging the law must prove either that the government has no legitimate interest in the challenged law or that there is no reasonable, rational link between the government interest and the challenged law.[17] In other words, the challenged law must only be rationally related to a legitimate government interest in order for it to pass rational basis review. Rational basis is often applied to cases where no suspect classifications or fundamental rights are at hand. When the constitutionality of a certain law or regulation is challenged, both state and federal courts will apply one of the three aforementioned levels of judicial scrutiny.

Former judicial rulings in disability cases have influenced the growth of deconstitutionalization in disabilities case law, making it difficult to defend the civil rights of the disabled. Codes and statutes for people with disabilities are currently viewed under rational basis scrutiny, a precedent that was set by City of Cleburne v. Cleburne Living Center. Based on a law regarding special zoning permits that the city required from Cleburne Living Center, an appellate court ruled that the law was unconstitutional because it infringed upon the rights of residents with developmental disabilities to live in Cleburne.[18] The U.S. Supreme Court later agreed with this ruling, striking down the zoning ordinance as infringing upon the Equal Protection rights of people living with "mental retardation."[19] However, the Court's decision held that individuals with mental disabilities were only entitled to rational basis scrutiny under the Equal

Protection Clause, despite the appellate court's suggestion to review disability law under immediate scrutiny.[20] Since the Supreme Court did not believe that equal protection was truly at stake in Cleburne v. CLC, it dismissed the appellate court's constitutional claims. Instead, the Court ruled that because people with developmental disabilities lack a history of discrimination and are not politically powerless, they do not qualify as a "quasi-suspect" class, and therefore do not require a heightened sense of judicial review.[21]

In the aftermath of the Cleburne decision, there was an open question of whether traditional rational basis applied to individuals with disabilities, or whether they should receive a heightened form of judicial review. Eight years later, in Heller v. Doe, the U.S. Supreme Court used rational basis scrutiny to analyze a statutory scheme that governed the involuntary commitment of people with mental disabilities to state institutions.[22] In this case, the Court failed to state that strict scrutiny was the correct standard of review that should be applied to individuals with disabilities. Specifically, the Heller court ruled that a person facing involuntary civil commitment can legally be treated differently, depending on whether the person is "mentally retarded" or "mentally ill."[23] By failing to establish an appropriate legal framework for analyzing the interests and rights of people with mental disabilities, the Supreme Court essentially denied equal protection to the whole class of people with mental. As noted in the 1993 decision, the Heller majority did not "purport to apply a different standard of rational basis review" to disability cases that involved individuals with developmental disabilities.[24] Moreover, Justice Souter stated in his dissent that "while the Courts cite Cleburne once, and does not purport to overrule it, neither does the Court apply it, and at the end of the day Cleburne's status is left uncertain."[25]

It seems disability rights have been violated on constitutional grounds, as the Court's interpretation of the Constitution in the aforementioned disability cases has failed to offer sufficient pro-

tection to disability rights. In "Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification," Silvers and Stein argue that society's static underlying assumptions about the disability community have caused the courts to assess disability as a classification that relies on outdated notions and unsubstantiated social conventions. They link this phenomenon with "categories which cast people with disabilities in the role of social incompetents who are characteristically dependent upon public assistance."[26]

Silvers and Stein further explain that in City of Cleburne v. Cleburne Living Center, the Supreme Court depended exclusively on "custom and an existing welfarist statute"[27] to characterize the disability classification. In doing so, the Court failed to recognize that the law in question was based on unsubstantiated assumptions about the restrictions that people with disabilities have. Furthermore, the Court found it unnecessary to form a decision whether or not Cleburne City's permit requirement was invalid when individuals with developmental disabilities were involved. Silvers and Stein explain that the most significant effect of associating biological anomalies with generalized limitations is "the imposition of disability classification that presupposes incompetence."[28] Justice White's majority opinion that "took mentally retarded people to be a class of naturally inferior people"[29] has been highly criticized by many legal scholars who argue that it is objectionable to merely assume that society contains "normal" and "abnormal" people.

The Supreme Court's legal precedent set forth in Cleburne is problematic in the sense that it sets limitations for the disability rights movement by holding the presumption that men and women with developmental disabilities are "abnormal," or are more like one another than they are to the rest of the community. Silvers and Stein further reveal that the Court's constitutional pronouncement fails to take into account the ways in which social prejudice significantly exacerbates disability and how different medical techniques or ed-

ucational programs can change one's experience with disability.[30] Moreover, the Cleburne decision automatically presumed a causal relationship between impairment and difference, which has severely influenced legal thinking and hindered legislation reform for the modern disability rights movement.

The Court's Cleburne decision has heavily influenced the establishment of a more elaborate Equal Protection review of discriminatory state action. However, the judicial history of disability cases continues to significantly restrict the disability rights movement. Due to the legal precedents set forth by former case rulings, namely Cleburne v. CLC and Heller v. Doe, the country's top disability rights lawyers have taken the Supreme Court's decision as an automatic given, with a vast majority of them claiming that there is currently no short or long-term strategy to challenge such cases.[31] The lack of constitutional strategies utilized in court contributes to deconstitutionalization, making it increasingly difficult for disability cause attorneys to defend the civil rights of their clients.

The deconstitutionalization that stems from Cleburne translates into legal costs for the disability rights movement. Today, states still enforce discriminatory laws against individuals with disabilities, especially the developmentally disabled. These policies discriminate in areas such as marriage, family law, voting, commitment proceedings, and benefit provision. For instance, a Tennessee law states "no [marriage] license shall be issued when it appears that the applications of either of them is at the time drunk, insane or an imbecile."[32] Similarly, a Kentucky law provides that any individual who attempts to marry or is engaged in the marriage of "any person who has been adjudged mentally disabled" is immediately guilty of a misdemeanor.[33]

In regards to family law, California has a state statute that authorizes the superior court to enforce a decree of adoption if a child displays a mental illness or disability as a result of pre-existing conditions prior to the adoption, which the adoptive parents had

no knowledge or notice.[34] A different California statute specifically requires reunification services for biological parents and their adopted children, but denies these services to parents who have developmental disabilities.[35] Likewise, Nevada's statute on termination of parental rights states, "In determining neglect or unfitness by a parent, the court shall consider, without limitation… emotional illness, mental illness, or mental deficiency of the parent which renders the parent inconsistently unable to care for the immediate and continuing physical or psychological needs of the child for extended periods of time".[36] Due to restrictive laws such as these, parents with disabilities, especially those with mental impairments, often have their children removed from them during state proceedings. According to The National Council on Disability, parents who have disabilities are the "only distinct communities of Americans who must struggle to retain custody of their children… Clearly, the legal system is not protecting the rights of parents with disabilities and their children."[37]

Discriminatory state laws allow for disparate treatment to take place against individuals with disabilities, all within the law. Under these state policies, people with developmental disabilities are highly subject to severe burdens that prohibit them from activities such as marrying, voting, and receiving certain government benefits. At the state level, many of the current challenges faced by citizens with disabilities involve states not being able to meet their needs, rather than outright exclusions from activities and services. The growth of deconstitutionalization proposes many limitations in meeting the needs of the disabled. Today, discriminatory state laws pose significant constitutional challenges in disability cases, causing a backlash against the disability rights movement. Thus, federal legislation essentially serves as an incomplete tool to effectively challenge the exclusions that stem from such laws, allowing discrimination to continue to take place against people with disabilities.

III. Current Implications for People with Disabilities: Legislation and Precedents

Legislation and precedents at both state and federal levels have created significant discriminatory legal implications for people with disabilities. The Cleburne decision, which was made seven years before the enforcement of the ADA, contains language that suggests Congress' intention for persons with disabilities to fall into an equal protection class higher than rational basis scrutiny.

Through its enactment of the Americans with Disabilities Act of 1990, Congress has statutorily challenged Cleburne's holding of rational basis review for individuals with disabilities. This is largely due to the scope of congressional powers as defined by the Court. In other words, the U.S. Supreme Court currently affords Congress "substantial deference in both its fact-finding capacity and in its lawmaking capacity in constitutional matters,"[38] especially within the legal context of the 14th Amendment's Equal Protection Clause. Because the Court has acknowledged Congress's power to create and pass legislation that have overturned prior Supreme Court decisions, a rule exists that an intervening law must be applied unless it would result in an injustice.[39]

The Court's decision during Cleburne v. CLC suggests that the disability case should have been given higher scrutiny under judicial review. At the time, the Supreme Court claimed that it used rational basis to find that a group home for persons with "mental retardation" had a right to be located wherever it wanted.[40] However, unlike most cases involving rational basis scrutiny, the Cleburne court engaged in an extensive legal discussion of the discrimination faced by people with developmental disabilities, and later threw the restriction out. In his dissent, Justice Marshall offered a clearer description of the Cleburne case that included "intermediate review decision masquerading in rational basis language."[41] Despite the Court's assertion that it had used the rational basis standard in deter-

mining its final ruling, it is more accurate to note that Cleburne was viewed as a "rational basis plus" case, rather than simple rational basis.

The Cleburne decision came down five years before George H.W. Bush signed the Americans with Disabilities Act in 1990, and seven years before the act officially went into effect in 1992. As such, the original context behind the decision contains problematic and outdated language. In United States v. Watson, a case involving an arrest without an issued warrant, the Court cited language from the 1985 Cleburne decision where the Cleburne court referred to and singled out the "mentally retarded" for special treatment.[42] This notion reflected the real and undeniable biases between individuals with mental disabilities and others. However, the U.S. Supreme Court declined to presume that any classification drawn on the basis of disability was the result of unconstitutional discrimination.[43] The citation of the language of the Cleburne opinion contains what is now considered to be inappropriate and jarring language to persons with disabilities. Specifically, the Court used the phrase "mentally retarded" in issuing its ruling,[44] which has not been used in more recent decades due to the sensitivity of terminology regarding people with disabilities. Such legal implications fail to keep up with the modern achievements of the disability rights movement. Similarly, even with the ADA in place, citizens with mental disabilities still remain highly vulnerable to thoughtless and outdated state statutes and public policies that preclude their social and economic independence.

The Americans with Disabilities Act contains language within it that suggests that Congress had intended for people with disabilities to fall into an equal protection class higher than traditional rational basis. Congressional findings in the ADA state that when "a suspect class, or a class of individuals have been historically subject to discrimination (i.e. alienage, race),[45] they should be entitled to receive strict scrutiny review under the Court's prior decisions."[46] In

doing so, members of Congress have ultimately rejected Cleburne's factual reasoning, and thus, its holding. Based upon the findings that the legislative branch has placed in the ADA, Congress has determined that people with disabilities are members of a suspect class. Upon determining this, Congress has simultaneously reached the conclusion that another standard of review may have been applicable in previous court cases, and that strict scrutiny is the proper standard of review for this specific class of citizens. Therefore, the strict scrutiny standard of review must be applied due to "deference to Congress in its fact-finding capacity and in the exercise of its plenary powers under section 5 of the 14th Amendment"[47] in enacting legislation to protect the individual rights of people with disabilities, especially given their minority status.

However, the Supreme Court has declined to treat people with disabilities as a suspect class, allowing states to ignore the conditions of Title II of the ADA and the Rehabilitation Act of 1973. During U.S. v. Watson, the Supreme Court revealed that it has declined to treat people with disabilities as a suspect class because they recognized the reality that some states may have a legitimate reason for "treating differently persons with reduced ability to perform certain functions."[48] While the Equal Protection Clause only requires that the classification drawn by the statute needs to be rationally related to a legitimate state interest, the Court argued that when social or economic laws are at stake, the Equal Protection Clause gives states a wide range of latitude.[49] Moreover, the Court held that people with mental disabilities are different from other people due to their reduced abilities to cope with and function in the everyday world, and as such, a state's interest in dealing with and providing with them is "plainly a legitimate one."[50]

The Court's notion in Watson, however, directly ignores the reality behind Title II of the ADA and the Rehabilitation Act of 1973, which demands that governmental entities make reasonable modifications to their programs and activities so that individuals

with disabilities can reach the same starting line as those without disabilities. Title II of the ADA specifically requires state and local governments to "ensure that all of their programs, services, and activities, when viewed in their entity, are accessible to people with disabilities."[51] The Court's rejection of treating the disabled as a suspect class leaves room for, and even encourages, state governments and localities to ignore the conditions listed under the ADA and the Rehabilitation Act. This legal notion, in turn, will further perpetuate the establishment of deconstitutionalization in future disability cases.

IV. Looking Ahead: A More Progressive Future for Disability Rights in the U.S.

The comparison of federal protection based on disability and sexual orientation may provide a better framework for disability rights in the U.S. In order to enforce an appropriate level of constitutional protection for people with disabilities, the legal community should establish a stronger and more transparent relationship between disability law and the Constitution.

Over the past three decades, social movements in both the disability community and in the LGBT community have established a stronger presence in American society.[52] Although the groups may initially seem distinct and incomparable, they both share a similar history of discrimination and oppression. Simply put, both groups have been "victims of violence based purely on their status as lesbians and gay men or as persons with disabilities."[53] Thus, when looking ahead to establish a stronger relationship between disability law and the Constitution, it is beneficial to analyze the federal protections provided to people based on sexual orientation.

In Gay Marriage: Accommodationist Demands Expand the Conception of Human Dignity, Professor Zachary Wolfe reveals, "One of the biggest open questions in law is the level of scrutiny to

be applied to discrimination on the basis of sexual orientation." The Equal Protection Clause serves as an important tool for persons with disabilities and the LGBT community to secure equal civil rights and to end discrimination. Particularly in LGBT litigation, states and federal courts have been willing to engage in a more contextualized review of discriminatory state classifications, an achievement that has yet to be reached by individuals with disabilities. Through Defense of Marriage (DOMA) cases, LGBT advocates have used and developed a more nuanced analysis of equal protection in ways that can, and should be, utilized by disability rights litigators.

For instance, in Commonwealth of Massachusetts v. U.S. Department of Health and Human Services, a lawsuit that challenged section 3 of DOMA, the Court found that no matter the "bare desire to harm a politically unpopular group,"[54] the definition does not require a finding of actual legislative hostility to homosexuality. While there is no distinct parallel between DOMA laws and laws that seek to regulate the behavior of people with disabilities, legislation based on stereotypical and outdated assumptions about ability should be viewed as detrimental for the court's purposes of offering an analysis of Equal Protection. Advocates and lawyers who defend state marriage laws believe that certain rights should not be denied to gays and lesbians based on their understandings of what is fair, cutting through views on how the LGBT community interacts with other members of society. Likewise, certain laws that prevent people with disabilities from gaining access to certain activities and services (i.e. voting, community living, government benefits) are solely based on legislative understandings of how people with various disabilities encounter the rest of the world, instead of what is considered fair under the law.

During the pendency of the DOMA cases, the U.S. Department of Justice released a letter written by Eric Holder to express the view that classification based on sexual orientation should be subject to a heightened standard of scrutiny.[55] This marked a notable victory

for members of the LGBT community, who in the past, were victims of prejudice and unable to protect themselves throughout the political process, and thus did not experience legal protection from the courts. Given that individuals with disabilities share a common history of discrimination, unequal treatment, and various patterns of oppression from society based solely on their disability status, the courts should seek to establish a more transparent relationship between disability law and the U.S. Constitution when interpreting the civil rights of individuals with disabilities by advocating for a higher standard of constitutional scrutiny.

LGBT advocates have created and utilized a more contextualized legal analysis of the Equal Protection Clause in ways that disability rights supporters have not. On June 26, 2015, the Supreme Court issued a 5-4 decision in Obergefell v. Hodges, holding that same-sex couples have a constitutional right to marry across all 50 states.[56] Specifically, the Court held that the 14th Amendment requires a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.[57] In legal theory, a state's refusal to recognize same-sex marriages lawfully performed out-of-state on marriage certificates violates both the due process and Equal Protection Clause of the 14th Amendment. The legal argument was made that the right to have one's marriage recognized by the state is a fundamental liberty protected by due process—an analysis that applies to same-sex couples in the same manner as it does to opposite-sex couples—and that a state cannot infringe on this right without substantial justification.[58] Furthermore, Ohio's refusal to recognize same-sex marriages and its inconsistent treatment of recognizing marriages performed in other states directly violates the Equal Protection Clause because the state cannot justify its unequal treatment by any rational or legitimate basis.[59] The Obergefell decision is a strong example of linking a challenge to government action (i.e. issuing marriage licenses)

with the Equal Protection Clause in a way that intensifies a justified level of scrutiny that minorities are subject to when dealing with inconsistent or unequal treatment. Although this landmark decision solely regarded discrimination on the basis of sexual orientation (i.e. same-sex marriage), it sheds new light to the Court's holding in Cleburne by creating important legal implications for the disability community. The Obergefell decision offers disability advocates new ways to confront laws through a constitutional lens in which attorneys and legislators can push the courts to be more responsive to new legal challenges. These challenges often question state and local statutes that explicitly discriminate on the basis of a person's disability (physical or mental), and they should be applied to future disability cases in a more nuanced manner involving the principles of equal protection. In doing so, the disability rights movement may achieve similar landmark results like the ones secured in both MA v. DOHHS and Obergefell v. Hodges.

Moving forward, the courts should exercise a more contextualized application of Equal Protection and hold a higher level of judicial scrutiny in disability cases. Given that many individuals with disabilities, especially developmental disabilities, suffer from immutable characteristics, are isolated from mainstream American society, and have been victims of abuse and neglect based purely on their disability status, this class requires heightened judicial protection on both the state and federal level. Specifically, the courts should enforce a more comprehensive and refined adoption of Equal Protection than they have done in the past when reviewing state laws and policies that discriminate against citizens with disabilities. Pushed forward by legislators, attorneys, and advocates of the disability rights movement, courts should be more attentive to constitutional provisions and state laws that distinctly discriminate on the pure basis of disability, especially when addresses those with developmental disabilities.

Although disability advocates have been successful in

achieving meaningful reform for individuals with disabilities, members of this minority group are still unable to fully participate in society. Like LGBT Americans, individuals with disabilities share common characteristics of a discrete and insular minority. First, the disability community has encountered a distinct history of discrimination by being subject to different types of hostility, prejudice, negative stigma, and societal stereotypes. In the past, people with disabilities received unequal treatment and unequal access to public accommodation, education, employment opportunities, housing, and health care. Additionally, individuals with disabilities are often relegated to a position of political futility in society, as they are grossly underrepresented in our nation's legislative bodies and unable to fully protect themselves in the political process. Moreover, their needs and preferences are not thoroughly protected by current legislation or fully respected by judicial and legislative institutions as seen in the previous landmark cases, such as Cleburne.

Lastly, citizens with disabilities possess immutable characteristics or highly visible traits that cannot be simply changed over time that is similar to a person's race or ethnicity. For these distinct reasons, the disability community requires greater judicial protection from the nation's outdated, stereotypical, and discriminatory state laws. In doing so, the modern disability rights movement can achieve more progressive results in society and a greater notion of constitutional justice in the future.

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Affirmative Inattention: A Closer Examination of Justice Powell's Strict Scrutiny Analysis in Bakke

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Abstract

In Bakke v. Regents of the University of California, the United States Supreme Court invalidated the University of California at Davis Medical School's affirmative action program. This paper conducts a critical analysis of Justice Lewis Powell's majority opinion in Bakke. In the case, the lone wolf was Justice Powell. In his opinion, Powell held that affirmative action could only be justified by a college's interest in crafting a diverse student body. In reaching this conclusion, Powell rejected the notion that affirmative action could justify a government interest to counter the effects of societal discrimination or to increase the number of disadvantaged minorities in the medical profession. Later rulings made Justice Powell's centrist opinion the Court's official position. Accordingly, the current legal controversy surrounding affirmative action is almost completely preoccupied with whether the state's interest in promoting diversity on college campuses is compelling enough to justify race-based preferences. But does this obsessive focus cause us to ignore bigger issues? In this paper, I will do three things. First, I will examine the justifications that Justice Powell rejected. Second, I will conclude that his acceptance of the diversity rationale but rejection of societal discrimination rationale was circular. Finally, I will urge reconceptualization of the Court's equal protection jurisprudence as it pertains to affirmative action.

Affirmative action in higher education or, the consideration of an applicant's race by undergraduate and graduate college admissions, has been a furiously contested issue in early twenty-first century American politics.[1] While the position of affirmative action proponents and detractors can be quite sophisticated and nuanced, the core of their disagreement concerns their conflicting interpretations of the Fourteenth Amendment's equal protection clause which provides that, "no state shall… deny to any person within its jurisdiction the equal protection of the laws."[2]

Proponents of affirmative action, in general, prefer to read the clause as enshrining a general principle of anti-racial subordination. Affirmative action proponents believe that this reading of the equal protection clause only precludes state actions that harm disadvantaged racial groups. In this view, the harm of racial discrimination is not that it treats individuals differently on account of race, but that it subordinates a racial group. Thus, practices that disadvantage historically disfavored groups may be disallowed, even if they do not treat any individual differently on account of race, and even if there was no intent to produce the complained of outcome. Discrimination against an individual, under this approach, is only objectionable insofar as it contributes to the subjugation of a racial group. One extension of this reasoning is that even practices that overtly treat individuals differently on account of race are permissible, or even desirable, if they are designed to undermine longstanding patterns of racial hierarchy.

On the other hand, critics of affirmative action usually interpret the equal protection clause as preventing the government from formally classifying individuals on the basis of race for the purposes of preferential treatment in a state-administered program. This initial divergence among affirmative action supporters and antagonists is critical because state and federal judges, as products of the society in which they live, often divide themselves along similar lines. Moreover, these jurists' interpretations of the equal protection

clause regularly determine whether they will assess the constitutionality of an affirmative action program by applying strict or intermediate scrutiny.

In order for an affirmative action plan to pass constitutional muster with strict scrutiny, it must, among other things, promote a compelling government interest.[3] In theory, one might be able to conceive of a policy that could meet this rigorous test, but in practice, laws that are evaluated under strict scrutiny are almost always invalidated.[4] Conversely, under intermediate scrutiny an affirmative action policy that advances an important governmental interest would be considered constitutional – assuming that it is appropriately tailored to meet its purported goal. Strict scrutiny and intermediate scrutiny are alike in the sense that they pose similar questions: both standards inquire into the government's asserted purpose for a particular affirmative action plan. However, these tests differ in terms of the type of governmental interests and in that the requirements for intermediate scrutiny are less stringent than those for strict scrutiny.

Nonetheless, while the decision to evaluate an affirmative action plan under strict or intermediate scrutiny will certainly influence a court's decision to sustain or invalidate the program, such a decision does not settle the inquiry writ large. Indeed, there have been cases where courts have held affirmative action plans to be constitutional even while subjecting them to strict scrutiny because the programs in question were found to serve a compelling state interest.[5] In this particular approach, the state's asserted interest for an affirmative action program is found to be just, according to the standard of review that courts employ to evaluate the policy.

However, this trend also raises a difficult and multifaceted question: which of affirmative action's rationales have the judiciary accepted or rejected to be compelling, and why? Several potential state interests for affirmative action programs will be examined in order to answer this question, using the majority opinion written by

Supreme Court Justice Lewis F. Powell in Regents of the University of California v. Bakke. This piece concludes that Justice Powell was far too myopic when evaluating most of the UC Davis' potential justifications for affirmative action and that his formalistic interpretation of the Fourteenth Amendment's equal protection clause prevented him from acknowledging the true underlying rationale for affirmative action programs: mitigating societal discrimination.

In October of 1978, the U.S. Supreme Court agreed to hear a case presenting a Fourteenth Amendment equal protection challenge to an affirmative action program when it granted a writ of certiorari in case number 76-811: Regents of the University of California v. Bakke. Allan Bakke, a white male, applied twice to the University of California Davis Medical School (UC Davis) in 1973 and 1974, but was summarily rejected both times. In 1970, the medical school began to implement an affirmative action program in order to increase the number of "economically and/or educationally disadvantaged" individuals enrolled at the school. Consequently, the Davis affirmative action policy reserved sixteen of the one hundred seats in the medical school's entering class for the "most qualified" economically and/or educationally disadvantaged candidates.

In order to be evaluated under the special program, candidates had to check a box on their application indicating that they were economically or educationally disadvantaged, or a member of a historically disadvantaged racial minority group.[6] If a candidate checked any of these boxes, then his or her application was separated from the regular applicant pool, referred to a special admissions committee, and evaluated under GPA and MCAT (Medical College Admissions Test) standards that were laxer than corresponding standards applied to regular applicants.[7] While several prospective Caucasian students indicated their desire to be evaluated under the program, only economically and/or educationally disadvantaged Blacks, Asians, Hispanics, and Native Americans were admitted through the special admissions program.[8]

By the summer of 1974, the UC Davis plan had three clear effects. First, it denied regular applicants the opportunity to compete with disadvantaged applicants for the sixteen reserved seats because "the special committee…did not compare general applicants against their counterparts in the special admissions pool."[9] In the words of Justice Powell during oral argument, this policy design "essentially limited the number of Caucasian students that could be admitted to UC Davis to eighty-four."[10] Second, the policy created a situation in which admitted applicants from the disadvantaged pool boasted undergraduate GPAs and test scores that were significantly lower than those of admitted applicants from the regular pool.[11] Indeed as figures 1 and 2 demonstrate below, in the 1973 and 1974 admission cycles, the average regular pool admit had a GPA and MCAT score that was nearly 0.65 and 171 points higher, respectively, than his colleague in the disadvantaged pool. Finally, the UC Davis policy nearly quadrupled the percentage of enrolled racial minorities at the medical school from six percent in 1968 to twenty-three percent in 1974.[12] Following the receipt of his second rejection letter in the spring of 1974, Bakke filed a lawsuit in the Yolo County California Superior Courthouse alleging that UC Davis' special admissions program discriminated against him on the basis of race and thus violated the Fourteenth Amendment's equal protection clause.[13] The Supreme Court granted a writ of certiorari to hear the case after two lower state courts ruled in Allan Bakke's favor.

In its merits brief, UC Davis offered four justifications for the affirmative action program, three of which will be examined in closer detail below. The program, according to UC Davis, was designed to "counter the effects of societal discrimination, reduce the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession, and obtain the educational benefits that flowed from an ethnically diverse student body."[14] In the course of oral argument, the discussion between Archibald Cox (counsel for UC Davis), Wade McCree (U.S. Solicitor General

arguing as amicus), Reynold Colvin (counsel for Bakke), and the nine justices focused on the first two rationales, and only Associate Justices Rehnquist and Stevens appeared to be openly hostile to the UC Davis plan.[15]

But appearances can be deceiving. In a 4-1-4 decision handed down nine months later, the Supreme Court invalidated the UC Davis program. While Associate Justices William Brennan, Thurgood Marshall, Byron White, and Harry Blackmun were wholly receptive to an affirmative action program seeking to better the effects of societal discrimination, Chief Justice Warren Burger and Associate Justices Potter Stewart, William Rehnquist, and John Paul Stevens declined to rule on the constitutional merits of the case and would instead have ruled in favor of Bakke on statutory grounds.[16] The lone individual to separate himself from both extremes was Justice Lewis Powell whose opinion, in light of the Court's even split, became the governing precedent.

I. Powell's Majority Opinion

Justice Powell's majority opinion was noteworthy for several reasons. One must first consider the fact that his opinion rejected the notion that the Fourteenth Amendment's equal protection clause allowed courts to distinguish among laws that discriminated against whites and laws that discriminated against ethnic minorities. On the contrary, Powell argued that for the purposes of any Fourteenth Amendment equal protection claim, a law that employed a formal racial or ethnic classification, regardless of which racial group was the subject of the classification, was to be subject to strict scrutiny. For Powell declared that "the guarantee of equal protection [could] not mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal."[17] Justice Powell felt that this strict scrutiny requirement was justified because he believed that legal "distinctions between citizens solely because

of their ancestry [were] by their very nature odious to a free people whose institutions [were] founded upon a doctrine of equality."[18] This odiousness, Powell dictated, made "all legal restrictions which curtail the civil rights of a single racial group immediately suspect," and meant that they would have to be narrowly tailored to promote a compelling government interest," or to survive strict scrutiny.[19]

Justice Powell then moved to apply strict scrutiny to the Bakke plan because he concluded that the California legislature and UC Davis had not discriminated against ethnic minorities in higher education prior to the enactment of Bakke scheme and, the Bakke plan prevented some individuals from being admitted to UC Davis solely because of their race.[20] During his analysis, Powell rejected UC Davis' purported interest in countering the effects of societal discrimination. This objective, Powell contended, was indeed a "legitimate, substantial," and compelling state interest but only when the state sought to correct "specific and identified instances of discrimination."[21] But because the Bakke plan did not seek to remedy identifiable past instances of discrimination but rather to "aid persons perceived as members of…victimized groups at the expense of…innocent individuals in the absence of legislative statutory violations,"[22] Powell argued that the state could not justify the plan under a societal discrimination rationale. Powell then transitioned to consider UC Davis' interest in "reduc[ing] the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession" – but swiftly dismissed this justification in less than four sentences.[23] To Powell, any vested interest in assuring a particular percentage of Blacks, Native Americans, Asians, and Hispanics in the student body "was discrimination for its own sake."[24] In short, Powell refused to accept the above rationale because he thought that a desire to have a certain amount of minorities in a professional school for no reason other than proportional representation of the minority group was just as irrational as the old, condemned regime of preferring the admission of white applicants over their

black counterparts. In Powell's estimate "this the constitution forb[ade]."[25]

However, Powell did believe that the constitution allowed UC Davis to implement a race-based affirmative action program in order to "obtain the educational benefits that flowed from an ethnically diverse student body."[26] Powell saw this interest as compelling because he viewed educational diversity to be a protected value under the First Amendment. Indeed, in the words of the late Justice Felix Frankfurter, whom Powell referenced in support of his conclusion, the right "of the university to make its own judgments as to education [was] one of the four essential components of "academic freedom."[27] Despite this finding, Powell joined Chief Justice Burger and Justices Stewart, Rehnquist, and Stevens in overturning the Davis plan since he felt it unduly focused on race by setting aside a fixed number of seats rather than simply considering race as one of many factors. Powell conceived diversity "not…[as] ethnic pluralism but rather, a concept that encompassed a broad array of qualifications and characteristics of which racial and ethnic origin [was] but a single though important element."[28] Therefore, while Powell's immediate decision struck down the UC Davis plan as unconstitutional, it did indicate that a bare majority of the Court did not believe that affirmative action programs were unconstitutional per se and would tolerate them if they holistically considered race in conjunction with other pertinent factors.

In contemporary legal literature Powell's Bakke opinion has been praised as a prudent compromise between the excesses of liberal social engineering and the tone deafness of conservative inertia. However, several liberal and conservative observers found Powell's compromise decision lacking because his analysis of UC Davis' various interests in employing an affirmative action program was seemingly unaware of its practical policy implications. If only Justice Powell would have discerned the true nature of UC Davis' purported interests, these observers exclaim, he would have reached a different

result. One would be ill-advised to engage in counterfactual inquires but, this precaution does not apply with equal force to a measured reassessment of the proffered state rationales at issue in Bakke. It is to these interests that we now turn.

II. Countering the Effects of Societal Discrimination

For reasons that should be readily apparent, the mitigation of pervasive societal discrimination against members of historically disadvantaged minority groups appears, prima facie, to be the most compelling justification for a race based affirmative action program. In the words of Stanford Law School Professor Lawrence Friedman, "the story of race relations in the [United States] has been bloody and dismal."[29] One need only conduct a cursory examination of U.S. history to find records candidly disclosing horrid events such as the initial importation of "twenty [enslaved] n----rs" in Jamestown during the early seventeenth century, the dehumanization of blacks in the constitution's three-fifths clause, and the repugnant prevalence of racialized lynch law in the post Civil War South. These past injustices are rendered all the more pertinent because their unsavory effects are still felt in contemporary American society. Despite the formal overhaul of state-sanctioned discrimination in the mid-twentieth century, many members of historically disadvantaged racial groups still lag behind their Caucasian peers in educational achievement,[30] access to social services,[31] and earned income.[32] In several respects, the trite but cogent assessment of Harvard College Professor Robert G. McCloskey in 1960 remains uncomfortably true today: most of "America's racial minorities lag so patently and woefully behind the rest of the nation."[34] Therefore, given America's horrendous record on race relations and its well-intentioned but unsatisfactory past attempts to craft a post-racial society, some might contend that countering the effects of societal discrimination might be the most compelling interest a state could offer – perhaps short of national security.

But some critics, among them Justice Powell, beg to differ from the aforementioned conclusion. These observers argue that this rationale is not compelling, too vague, lacks specific legislative findings to warrant its validity, and harms individuals who are in no sense responsible for the plight of disadvantaged groups that benefit from the program. Indeed, in his Bakke opinion, Powell contends that the UC Davis program's design to counter societal discrimination is too "amorphous and [bore] an ageless reach into the past."[34] When Powell couples this analysis of UC Davis' interest with his opinion that the medical school could not assess the pervasive nature of societal discrimination to implement a race-based affirmative action policy without an explicit command from the state legislature, he concludes that societal discrimination rationale "could not warrant judicial approbation."[35] However, from a pure policy perspective, Powell's objections are not convincing.

A. The Tailoring Means-Fit Requirement

While countering the detrimental consequences of societal discrimination may be somewhat imprecise, this imprecision does not automatically discredit the objective. In fact, it may serve to underscore the enormous nature of the problem and the need to take affirmative steps to mitigate it. Societal discrimination against individuals of color comes in innumerable forms and combinations, and can include but is certainly not limited to: disparate treatment in education, housing, employment, healthcare, social services, law-enforcement, voting, commercial exchange, and personal interaction with individuals harboring overt or implicit racial bias. In other words, societal discrimination is a multi-headed hydra, not a one-trick pony. When one further considers the fact that every person of color will most likely have a unique but nonetheless invidious discriminatory experience, then a meticulously defined goal aiming to help victims of only a specific type of racial discrimination becomes impractical because it may neglect applicants that the program, at

least in theory, is contrived to help. This concern is not unwarranted. As Archibald Cox contends during oral argument, a more narrowly focused program simply would not "enroll more than a trickle of minority students"[36] in the UC Davis program and is thus functionally inept for the desired task. Moreover, even if one was discomfited by the seemingly open-ended societal discrimination rationale, the affirmative action plan in Bakke is not a carte blanche allowing admissions officers to engage in boundless discrimination. Rather, it only helps those minorities who share their history of economic and educational disadvantage through their applications, and in this sense is only tailored to help victims of the most 'relevant' forms of societal discrimination. In this respect the Bakke plan may not have been progressive enough, but if Powell were truly sincere in seeking greater specificity, this failure should have worked to the benefit rather than the detriment of the UC Davis policy.

Nevertheless, Powell asserts that even if the analysis provided above were true, it would not resolve the fundamental vagueness dilemma because other governmental institutions subordinate to the legislature might use the same goal to remedy the effects of past societal discrimination that has long since subsided. In short, these conservative critics worry that if one were to accept the societal discrimination rationale, then affirmative action programs benefiting the ancestors of African slaves today may soon be used to benefit any group that can muster up evidence of past discrimination tomorrow, such as Hispanics, women, Jews, or Irish Americans.[37] There are two flaws with this slippery slope argument. First, the proliferation of remedial programs aiding more historically disadvantaged groups as a matter of social policy may not be normatively bad, especially if the group in question faces documented and persistent barriers in society, such as group-based pay gap or educational disparity. Affirmative action programs that help more of these historically disadvantaged groups would draw much needed attention to unaddressed historical injustices and take direct action to stamp out

their current effects. In short, reluctance to accept the Bakke plan for fear of its potential to include other marginalized groups into mainstream American society is no valid objection to the plan at all. Second, remedial programs do not occur in a vacuum and their purpose must be evaluated in their particular context. One would be hard pressed to argue that affirmative action policies should blindly help groups that have been discriminated against in the past without examining the group's current status, but the Bakke plan does not do this. Rather, it simply uses history as a partial explanation for the current under-representation of historically disadvantaged minorities and modestly attempts to correct that under-representation without fundamentally altering the prevailing social structure.

It should be entirely acceptable for policymakers and judges to take note of their surroundings to distinguish between affirmative action programs that help historically underprivileged groups that are currently disadvantaged and programs that aid groups that have suffered past discrimination but are currently successful in aggregate. This is the case because one of the major practical reasons why racial progressives care about slavery in the Deep South, the Trail of Tears, or the Chinese Exclusion Act of 1882 is because of the self-perpetuating effects that these institutions, events, and laws continue have on American society. This comment is not intended to diminish the historical and instructive significance of these events. It only seeks to identify the most common functional purpose for the deployment of historical arguments in the context of contemporary affirmative action debates. Under this framework, one could accept affirmative action programs helping groups that have been and currently are disadvantaged such as African-Americans, while also rejecting similar programs for groups that have been discriminated against in the past but are faring exceptionally well now, such as Irish Americans. In truth, the slope of societal discrimination is not as slippery as Powell fears. Therefore, the refusal of Justice Powell to accept this more expansive interpretation of the societal discrim-

ination rationale suggests that his analysis prioritized narrow legalistic reasoning over a more socially conscious approach.

B. The Legislative Evidence Requirement

Turning to the legislative evidence argument, there is much to be said for compiling an immense corpus of evidence demonstrating societal discrimination against a certain group before attempting to counter that discrimination by instituting a system of remedial race based preferences. As a matter of prudence, the judiciary should be able to demand that the government have a strong evidentiary basis for any rationale sanctioning the formal use of race in state policy because laws that overtly employ racial classifications need to address actual problems. But prior to 1978, both the United States Congress and the California state legislature had compiled vast evidence documenting pervasive societal discrimination against historically disadvantaged minority groups on the national and state level.[38] Powell may reasonably have retorted that even publicly funded institutions of higher education may not rely on legislative findings and use racial preferences without compiling their own information. Yet, this counter-argument completely overlooks the fact that the UC Davis medical school is a public institution created by the California state legislature. In theory, the California state assembly could restructure, reform, expand, contract, or abolish UC Davis whenever it saw fit to do so, as long as it respected the university's First Amendment rights. In a very concrete sense, the UC Davis medical school is simply a subordinate and distant branch of the state.[39] Thus, if the medical school is subject to obey every directive from the state legislature – so long as the order is within the confines of the constitution – then, it does not follow that the school cannot use evidence compiled by the legislature especially when one considers the fact that the two institutions are essentially the same entity. Furthermore, a mandate that all public institutions of higher learning, irrespective of what their state legislatures have

already found, must engage in their own evidentiary searches before employing remedial racial preferences, would be fiscally wasteful and redundant. This is the case because such a rule would force public colleges to devote finite financial and human capital towards unearthing evidence that in some cases has already been revealed to, and reported by, the state legislature.

In essence, if one takes the legislative evidence counterargument to its logical conclusion, then state taxpayers would have to finance an investigation revealing pervasive societal discrimination against a historically disadvantaged group every time the government wanted to institute a remedial program. Moreover, citizens would have to assume this obligation—even when a coordinate or superior branch in the same governmental system already released findings that documented existing discrimination. It is more than conceivable that Justice Powell was conscious of the policy implications of his legislative-evidence counterargument and wanted to make it difficult for the states to institute race based affirmative action programs because he felt that they were ill-advised. Yet, his opinion makes no effort to grapple with these potential aftereffects and thus at the very least suggests ambivalence towards these policy concerns. One might suppose that Powell was deeply suspicious of states using racial remedial programs, and trusted Congress instead. The onerous legislative requirement he penned above would have had the practical effect of encouraging Congress rather than the states to assume the task of rectifying racial inequality. But if this was the intended effect, then Powell's opinion does not acknowledge the fact that a congressional effort to effectively rectify racial discrimination across the entire nation would have required the same type of broad language and statements of purpose that he harangued against above. At the very least, this deafening silence supports the conclusion that Justice Powell's reading of the legislative evidence criterion prevented him from seeing UC Davis as an arm of the state legislature and recognizing the practicality of the medical school's

evidentiary basis for providing an affirmative action program.

C. The Culpability Requirement

Finally, cynics claim that as a fundamental principle of equity one cannot operate a remedial scheme such as a race based affirmative action program that 'punishes' parties who are not directly responsible for causing the disputed injury.[40] These conservative observers assert that past discrimination against historically disadvantaged groups was certainly a fatal mistake.[41] But, they also maintain that the state would be morally unjustified in punishing a living individual for the actions of her or his misguided forbearers because the current generation is not responsible for past racial atrocities. To "punish" living citizens, these skeptics argue, for acts that were beyond their own control would be to justify racial discrimination against another class of citizens.

This argument however, is a red herring because it proceeds to evaluate affirmative action policies on an individual rather than a group basis, perverting the intent and purposes of the Fourteenth Amendment. More significantly, this interpretation contradicts the original understanding of the Fourteenth Amendment's provisions, as understood in the mid-nineteenth century, when the post bellum amendment was drafted and ratified. Indeed, as Columbia University American history professor Eric Foner writes, the Fourteenth Amendment's mandate for "the equal protection of the life, liberty, and property of all citizens" was clearly not intended to outlaw all forms of narrowly tailored state assistance to particular racial groups because it was promulgated exclusively in redress to liberated African-American slaves.[42] Congress, in determination of its competencies in light of passage of the Fourteenth Amendment, sought to distribute benefits, burdens, and duties along strict racial lines without regard to the individual. Wayne University history professor Alfred Kelly concurred with this group-based interpretation of the Fourteenth Amendment, and added that the amendment "pre-

sumably gave constitutional sanction to the federal government's determination to protect the private and civil rights of negros."[43] In order to realize the true spirit and intention of the amendment, any inquiry into the fundamental fairness of a race-based remedial policy challenging its provisions must be conducted at a group rather than individual level.

In proceeding to the question of liability and causation, while Caucasian citizens may not immediately be responsible for the actions of their ancestors—the economic, social, and political benefits of which they have inherited—it could be argued that the benefits were not justly acquired. To be sure, a substantial share of America's vast wealth generated during the 19th century continues to remain concentrated among Caucasians, accompanied by the historical baggage of African slave labor and Chinese railroad workers. Even if the current generation may not be directly responsible for past wrongs, as a matter of social justice, the current advantages they reap from these past wrongs may be grounds for attenuated liability. In addition, affirmative action programs are not punitive assessments levied against Caucasian applicants because whites, as a group, are not flatly denied the chance to pursue an education solely on the basis of their race. Indeed, from 1970 to 1974, 74 percent of all students admitted to the UC Davis medical school were Caucasian, which suggests that the Bakke program was a far cry from anything remotely retributive. Quite the contrary, affirmative action programs, such as the Bakke plan, are compensatory in that they seek to offset the negative effects of pervasive societal discrimination in a minimally intrusive way without unduly burdening any specific group. The Bakke program was minimally intrusive because it did not simply take an asset from one group and give it to another. However, in the interest of achieving social and economic equality the affirmative action plan extended a prospective opportunity to eligible minority candidates without an absolute guarantee of academic or professional reward.

Admittedly, there are a litany of more efficient ways to bring about equality among different racial groups in the United States, including radical tax reform; enhancing the fungibility of local school board funds; and widespread socialization of vital industries. It would be a mistake to confound the modest Bakke initiative with these policies and label it punitive. However, Powell's rejection of the societal discrimination rationale and the modest measure it undergirded not only frustrated more moderate attempts to combat societal discrimination but may have encouraged state governments to try even more radical measures, which may certainly would not have fit Powell's rather conservative approach. Given that Supreme Court jurisprudence is anything but apolitical, one would logically presume that Powell, a Nixon appointee, whether consciously or unconsciously would have preferred a more conservative decision.[44] Yet, this was not the case in Bakke which leads to two possible inferences that could explain this anomalous result. Powell may have been engaging in a grand act of judicial statesmanship by appealing to the Court's liberal wing—or the equal protection clause in his analysis may have lead him to a conclusion to side with the liberal justices in which he simply did not anticipate. These two deductions are not mutually exclusive and in light of Powell's reasoning above one might embrace both possibilities. Unfortunately, Powell's inattention to the social and political implications of his decision in Bakke was reflected in his evaluation of UC Davis' attempt to increase its number of disadvantaged minorities in the medical school.

III. Increasing the Number of Disadvantaged Minorities in the Medical Profession

The majority of legal scholars and jurists tend to perceive affirmative action programs that seek to increase the number of disadvantaged minorities in the practice of medicine, merely for the sake of proportional representation, as running afoul of the Fourteenth Amendment's equal protection clause. They often dismiss propor-

tional representation because the Supreme Court has never ruled it to be a legitimate interest to justify the government's use of race-based preferences. In his Bakke opinion, Justice Powell summarily dismissed the proportional representation provision, arguing that its premise was simply a cover for "preferring members of one group for no reason other than race, [which is] forbidden by the Constitution."[45] Yet, the refusal to accept proportional representation as a credible state interest does not discredit this goal from a policy perspective. As a matter of fact, in nations such as the United States where economic and social disparities among racial groups remain persistent, racial equity and integration in competitive professions is critical if the government is to maintain any semblance of an equal playing field, particularly for underrepresented citizens. In a racially diverse society and globalized economy, the ability to interact effectively with individuals of different ethnic and racial backgrounds among exclusive institutions is a necessity, not a convenience.

This need for diversity is not theoretical but practical, as major American businesses, the US military, and institutions of higher learning have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people of various backgrounds, encompassing different cultures, ideas, and viewpoints.[46] From a medical perspective, if doctors, surgeons, and government officials craft public health policies with inattention to how these programs may affect different racial and cultural groups, they risk alienating a class of citizens by not taking account of their experience and needs. Moreover, a government's repeated inattention to structural inequalities can make members of racial groups, and especially those that are disadvantaged, feel like second class-citizens. In order to mitigate these effects, the proportional representation of social groups in institutions of higher learning combats these problems, warranting a legitimate state interest.

The realization of a more equitable representation of whites

and disadvantaged minorities in positions of influence would foreseeably ease racial tension on the specific issue of social mobility. While skeptics may reply that it might have been more palatable for UC Davis to attempt to mitigate racial tension by employing an affirmative action program that did not seek to achieve proportionate representation, the Bakke plan never intended to achieve such an outcome. The plan never prescribed a fixed percentage of Blacks, Asians, or Hispanics who would be accepted by UC Davis, and thus was not nearly as inflexible as the term 'proportional representation' would suggest.[47]

IV. Obtaining Educational Benefits from an Ethnically Diverse Student Body

Justice Powell rejected every rationale for the UC Davis program except its purpose of advancing educational advantages resulting from a racially diverse student population. Powell's acceptance of this rationale shocked his colleagues on the Supreme Court bench, in addition to the attorneys arguing the case. Indeed, not even the brief prepared by UC Davis afforded more than a few pages expounding the educational benefits of an ethnically diverse student body. Likewise, the amicus brief for the United States Solicitor General neglected to mention educational benefits in toto.

Presumably, the predominant reason that the admission of more minority medical students would enrich the learning environment at UC Davis was because underrepresented students would be able to contribute something of great value, such as their life experiences, rich cultural backgrounds, and intellectual perspectives—which a more homogenous group could not. One of the defining differences between the life experience of a Caucasian student and that of a student from a historically disadvantaged racial group is that the latter has quite possibly encountered significant societal and racial barriers, while the former has most likely not.

Thus, when Justice Powell held that only the benefits ob-

tained from educational diversity could justify affirmative action programs, most observers were confused because diversity is only significant insofar as individual students are different from one another in non-specific contexts. But in 1978, the core reason why Black, Hispanic, Native-American, or Asian-American students were seen as different from their Caucasian colleagues was because they were the subjects of systematic societal discrimination and were currently underrepresented in respected professions, such as the medical field.[48] Hence, even when Justice Powell did acknowledge that diversity in education was a credible interest for the Bakke plan, he overlooked the fact that the rationale he preferred was closely situated in the two justifications he would later reject.

This critique should not be viewed as a condemnation of Powell's opinion—his well-intentioned effort to broker a compromise between liberal and conservative thought had somewhat left in tact affirmative action in higher education. Furthermore, Powell's choice not to acknowledge the wider social ramifications may have been a conscious attempt to use legal reasoning as a means of maintaining impartiality, and most importantly, avoiding difficult social questions. Pundits may oppose the legal convention that prescribes such a mode of analysis. But if that is the case, then perhaps we ought to reexamine our conventions because avoidance of wider implications is not a panacea for resolving difficult issues – especially in a nation where the judiciary is called upon to resolve pressing political issues, such as affirmative action in promotion of equity and fairer representation in higher education.

Appendix

Figure 1: UC Davis Class of 1973 Admissions Cycle Statistics

	MCAT (Percentiles Quantitative)					
	Science GPA	Overall GPA	MCAT – Verbal	MCAT - Quantitative	MCAT - Science	MCAT – General Information
Bakke	3.44	3.46	96	94	97	72
Average of Regular Admits	3.51	3.49	81	76	83	69
Average of Special Admits	2.62	2.88	46	24	35	33

Figure 2: UC Davis Class of 1974 Admissions Cycle Statistics

	MCAT (Percentiles Quantitative)					
	Science GPA	Overall GPA	MCAT – Verbal	MCAT - Quantitative	MCAT - Science	MCAT – General Information
Bakke	3.44	3.46	96	94	97	72
Average of Regular Admits	3.36	3.29	69	67	82	72
Average of Special Admits	2.42	2.62	34	30	37	18

	Special Admissions Program				General Admissions				
	Blacks	Hispanics	Asians	Total	Blacks	Hispanics	Asians	Total	Overall totals from both programs
1970	5	3	0	8	0	0	4	4	12
1971	4	9	2	15	1	0	8	9	24
1972	5	6	5	16	0	0	11	11	27
1973	6	8	2	16	0	2	13	15	31
1974	6	7	3	16	0	4	5	9	25

1 Beyond this point any future reference to affirmative action only concerns higher education programs unless stated otherwise.

2 U.S. Const. amend. XIV Sec. I.

3 In order for a law to survive strict scrutiny it not only must promote a compelling government interest but also, must be narrowly tailored to promote the asserted interest. Moreover short of national security, a state's proffered interest for a policy that is being subjected to strict scrutiny is almost always found not to be compelling.

4 Hence, the popular saying that strict scrutiny is "strict in theory but fatal in fact."

5 Grutter v. Bollinger, 539 U.S. 306 (2003).

6 Regents of the University of California v. Bakke , 438 U.S. 265 (1978). http://www.lexisnexis.com/us/lnacademic/ (accessed December 6, 2014).

7 The special subcommittee was composed entirely of faculty and medical students from minority groups. The official admission policy of the medical school stated that the special programs was indeed to "identify and recruit potential candidates for admission to medical school in the near future and [promote] the stimulat[ion] of career interest in the health professions among junior high and high school students." Applications in the regular admissions pool were screened in order to narrow the potential number of admits to a manageable number. Under this system, an applicant to with a GPA below 2.5 on a 4.0 scale was automatically rejected. The remaining candidates were then invited for a personal interview. At the conclusion of this process, candidates were given a benchmark score which attempted to provide a single metric encompassing his or hers overall GPA, GPA in science courses, MCAT, letters of recommendation, extracurricular activities, and other biographical data. However, candidates in the special admissions pool did not have to meet the 2.5 GPA cutoff. Ibid.

8 Record 171 from the Yolo Superior Court Trial demonstrated that in 1974 the special admissions committee explicitly considered

only special applicants who were members of one of the designated minority groups. The chairman of the special admissions committee also attempted to verify the economic disadvantage of an applicant be checking if the "applicant had been granted a waiver of the school's application fee, whether the applicant had worked during college or interrupted his or her education to support their family." Ibid.

9 Ibid.

10 Oral Argument, Regents of the University of California v. Bakke , 438 U.S. 265 (1978). http://www.oyez.org/cases/1970-1979/1977/1977_76_811 (accessed December 9, 2014).

11 See Figure 1 and 2 in Appendix.

12 Regents of the University of California v. Bakke , 438 U.S. 265 (1978). http://www.lexisnexis.com/us/lnacademic/ (accessed December 6, 2014).

13 Following the receipt of his first rejection letter in the summer of 1973, Bakke became aware of UC Davis' affirmative action program and wrote a strongly-worded letter of protest to the medical school's admissions office shortly thereafter. Nonetheless, he applied for admission again the next year and was promptly turned down after he had a substandard interview with an admissions officer, who read his letter of protest, and wanted to give Bakke a second chance. Prior to filing the suit, Bakke discussed his intentions with an assistant in the UC Davis admissions office. The assistant, reportedly, expressed sympathy with Bakke's situation and even offered advice on a potential litigation strategy.

14 Regents of the University of California v. Bakke , 438 U.S. 265 (1978). http://www.lexisnexis.com/us/lnacademic/ (accessed December 6, 2014).

15 Oral Argument, Regents of the University of California v. Bakke , 438 U.S. 265 (1978).

16 These Justices actually chose to decide the issue on separate statutory grounds. But, with the exception of Stevens, their jurispruden-

tial philosophies were not receptive to affirmative action programs.

17 Regents of the University of California v. Bakke , 438 U.S. 265 (1978). http://www.lexisnexis.com/us/lnacademic/ (accessed December 6, 2014).

18 Ibid.

19 Ibid.

20 Ibid.

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27 Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957).

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cember 6, 2014). Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996). Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

38 The evidence collected by these two assemblies later culminated in passage of the Civil Rights Act of 1964, the Voting Rights Act of 1965, the Fair Housing Act of 1968, and the Unruh Act of 1959.

39 Some readers may be skeptical of this argument and insist that I would not be as deferential if the subordinate entity in question were a rouge county. They would be correct in this inference but in reality UC Davis was more akin to a state department than a minute provincial subdivision. When viewed in this light, the closeness of the medical school to the legislature would entitle it to more deference.

40 Glenn Loury, The Anatomy of Racial Inequality (Cambridge: Harvard University, 2003) see Appendix.

41 Ibid. Abigail M. Thernstrom and Stephan Thernstrom, No Excuses: Closing the Racial Gap In Learning (New York: Simon & Schuster, 2003).

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46 Grutter v. Bollinger, 438 U.S. 265 (1978). http://www.lexisnexis.com/us/lnacademic/ (accessed December 6, 2014).

47 The number of white students that could have been admitted to the school was not fixed by quota because presumably, if less than sixteen minority individuals applied to be considered under the special program, the reserved seats would have gone to individuals considered in the regular applicant pool.

48 Racial Preferences in Higher Education: Political Responsibility and the Judicial Role (1975) 42 U.Chi.L.Rev. 653.

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What's it to You? Separation of Powers, Access to the Courts, and the Consequences of Restricting Standing

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Abstract

In the last half century, the Supreme Court has increasingly relied on a procedural rule 'standing' as a means to dismiss lawsuits of critical importance. At its core, standing requires that the person bringing suit be the one to have suffered harm as a direct result of the action in question. Although this concept has some merit in the abstract, in practice in recent decades the conservative majority on the Court has employed this doctrine to deny individuals and groups access to the judicial process, even when they have nowhere else to turn. This paper seeks to challenge the modern doctrine of standing as both overly restrictive and arbitrarily applied according to partisan or ideological interests. At the same time that the Court has refused to allow conservation groups to sue on behalf of endangered animals or taxpayers to challenge government funding of religion, it has also drastically loosened the requirements to bring suit for those challenging affirmative action programs. Using extensive case law as well as academic writings from scholars of Environmental Law and the Establishment Clause, I argue that standing both constitutionally can and should be considerably less restrictive to benefit those seeking to challenge abuses of the environment and potential violations of the Establishment Clause.

Ease of access to the courts must play a fundamental role in any fair and functioning judicial system. Judges have tremendous power to right wrongs, to overturn legislation or enforce it, but this power is meaningless if people are not given the opportunity to argue their cases in court. Often, individuals have no other avenues to pursue their claims apart from the courts. Yet many barriers remain between citizens seeking aid and the judges and justices who can provide it. This paper will focus on one such barrier, known as standing. Before any case can be judged on its merits, judges must determine whether the plaintiff has a legal right to bring his or her case before the court. This basic principle seems straightforward: the person who brings a suit must show that he or she suffered some degree of harm—otherwise, a wide range of third parties could sue manipulatively on their behalf. However, in practice this principle has grown to be restrictive and is applied arbitrarily, denying whole classes of individuals and groups access to the courts while ignoring basic requirements for others. In doing so, issues of massive public import are made impossible to challenge and, in many cases, are simply removed from legal debate.

This paper will examine the ways in which the conservative majority on the Supreme Court has, over the past half-century, shaped the doctrine of standing so that it is both punishingly restrictive and suspiciously partisan. Two areas of jurisprudence are particularly helpful in understanding this process: first, the Court's use of standing to dismiss suits brought by conservation groups invites devastation of endangered species and the environment; second, restrictions on the ability of taxpayers to challenge government funding of religion take a constitutional issue out of the purview of the people it affects most. In order to explain these decisions, this paper will additionally investigate the constitutional theories—or lack thereof—that motivate individual justices to restrict standing, including the extent to which such a narrow reading of standing is constitutionally mandated. Finally, this paper will consider whether

standing doctrine has simply been a shield for partisanship by looking at the Court's willingness to hear suits in a third area of jurisprudence: challenges to affirmative action programs by plaintiffs with dubious claims to standing. Ultimately, this piece hopes to prove that even if the Court has valid reasons for restricting citizens' access to legal remedies, the modern doctrine of standing fails to achieve this purpose. It is not a mandate from the time of the Framers, but rather a relatively recent invention shaped by judges and politicians, and as such it should be construed to serve the practical purpose of increasing access to the courts. The conservative majority's use of standing has been the reverse: to legitimize abuses of the environment and to expand the Executive Branch's power and government subsidies of religious organizations. Ultimately, creating a fair and open judicial system will necessitate removing many of standing's current requirements.

I. A SLASH-AND-BURN EXPEDITION

While enforcing standing rules with regard to environmental groups has some logical appeal, its practical application has placed a large category of destructive policies and actions beyond the reach of the courts. A first example of this destruction became evident in Lujan v. Defenders of Wildlife (1992)[1], in which the Court dismissed a challenge, brought by wildlife conservation groups, to a 1986 decision by the Reagan Administration restricting the scope of its enforcement of the Endangered Species Act.[2] As written, Justice Antonin Scalia's majority opinion posed a major threat to environmental protection laws, arguing that "a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy."[3] The wildlife conservation group was not itself at risk of harm from the Reagan Administration's policy change; even if it had been, Scalia insisted that in lieu of past injury, plaintiffs must prove the threat of future injury to be imminent. The groups' pur-

ported harm—the inability to see endangered animals in the event of extinction—did not ultimately meet this burden.

Scalia's argument is well taken that the plaintiffs in Lujan did not seem to be those who would most suffer from the ESA amendment. Yet the question of who the appropriate plaintiff would be remains worryingly unanswered. Who, precisely, is able to sue the government for relinquishing protection of endangered species? Scalia is explicit that a zookeeper of endangered animals would not have standing; indeed, he calls the very notion "beyond all reason."[4] Scalia does not address this broader question directly, but the answer seems to be that no one would have standing, and that the policy change is best relegated to the legislative and executive branches. If wildlife conservation groups are dissatisfied with the policy, then they should elect leaders who will change it. This is an unsatisfying response, not least because there is an obvious threat of irreparable harm. If no one has standing, and the endangered species becomes extinct as a result, what possible legal remedy could exist? No change in elected leadership, nor any successful court battle for damages, could bring back the lost species.

The consequences of the Court's reasoning in Lujan are serious: Scalia and the other six justices who joined the majority in Lujan effectively placed a major procedural obstacle in front of suits over environmental policy, leaving plaintiffs with little chance of success. Imagine, for example, a group of citizens who challenge a government agency decision that loosened restrictions on pollution or deforestation. Can the members of this organization prove that they, personally, have been or will be harmed by this decision? The answer is likely no, and as a result the members will be denied an attempt to seek legal recourse in the courts. This much was clear to the dissenters in Lujan, Justices Blackmun and O'Connor, who wrote that they "cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing."[5]

One potential solution would be to grant standing rights to

the endangered species themselves. In 1972, legal scholar Christopher Stone argued in favor of a radical conception of rights that would include nature.[6] Acknowledging that the concept appears absurd at first glance, he notes that many rights were only recognized by the legal system in recent memory; for example, the rights of prisoners and children. Indeed, Stone's analysis is prescient in light of conservative politicians who suggest expanding the 14th amendment to the unborn, or, more pertinently, of the Court's recent decisions regarding the legal rights of corporations.[7] For Stone, when a natural object appears endangered, lawyers might apply for guardianship of that object, much as a corporation can be assigned a trustee, or someone elderly and senile can be assigned a caregiver. In situations akin to Lujan, for example, a guardian would have standing to sue on the endangered species' behalf. While we may be skeptical of any justice accepting this reasoning today, at the time of its conception, Stone's perspective seemed to be gaining some traction. In fact, his work was cited in dissenting opinions by Justices Hugo Black and William Douglas.[8] Stone's approach also has the advantage of not requiring any expansion of standing to include the marginally injured or concerned third parties.

Despite these advantages, there are serious concerns that make it unlikely, and quite possibly undesirable, for the Court to adopt Stone's reasoning. One concern is obvious: for each political "side," his theory, if applied consistently, would pose both advantages and disadvantages. Political liberals, for example, might relish having more avenues to pursue environmental protection in the courts but balk at the possibility of this language being appropriated to restrict abortion rights; one could argue that, if endangered species are granted standing rights, so too should the unborn. It is also important to note that while academic theories can influence case law, court precedent can likewise restrict the possible theories that can be implemented in the future. In an epilogue written 25 years after his original book, Stone admits that Lujan was a significant

setback to the expanding conception of rights. Though he remains optimistic, he laments the concrete injuries animals have suffered and will continue to suffer as a result of the Court's decision.[9]

While several more recent decisions paint a more optimistic picture for plaintiffs challenging environmental policy, these are largely narrow victories around the margins of Lujan that do not challenge its most devastating implications. First, in Friends of the Earth v. Laidlaw Environmental Services (2000)[10], the Court ruled 7-2 that plaintiffs do not lose standing simply because a defendant accused of violating environmental regulations voluntarily begins to comply with those regulations after the suit has been filed. Although this was a very limited ruling, Scalia, along with Justice Thomas, dissented, arguing that no immediate injury had been established.[11] Moreover, in the only major environmental standing case since Chief Justice John Roberts and Justice Samuel Alito joined the court, they showed the same hostility to plaintiffs that Scalia demonstrated in Lujan. In Massachusetts v. EPA (2007),[12] the Court ruled 5-4 that Massachusetts and other states had standing to sue the EPA for failing to combat global warming. Roberts and Alito, along with Scalia and Thomas, dissented.

On the facts of the case alone, this was a major victory for environmental groups, leading many to optimistically question whether Lujan's reasoning had become obsolete. Bradford Mank in particular sees Mass. v. EPA as a potential new development, suggesting that the Court may abandon its requirement of actual and imminent injury in favor of an innovative test that protects the interests of future generations.[13] If the Court acknowledges that a strong likelihood of future harm is sufficient to grant standing, even if we cannot determine precisely who will suffer harm and to what extent, then we may see more successful environmental policy suits in future. That said, the majority did not rely exclusively on the prospect of future harm, and discussed extensively the current effects of climate change on Massachusetts's coastlines and citizens.[14]

Indeed, it is difficult to see this case as a clear repudiation of the Court's restrictive interpretation of standing when it was decided by a single vote—that of Justice Anthony Kennedy, the frequent swing justice. By failing to challenge the core reasoning of Lujan, Friends of the Earth v. Laidlaw and Mass v. EPA did little to expand access to the courts in cases of environmental damage. A single replacement justice by a future president could undo Mass v. EPA and thus restrict standing even further; moreover, environmental plaintiffs have no guarantee of winning Kennedy's vote in future cases. In other realms of jurisprudence, Kennedy has been just as willing as his fellow conservatives to place procedural bars in front of citizens seeking access to the courts.

II. THE TAXPAYER AS LITIGANT

When government action potentially violates the Constitution, the judiciary provides crucial recourse for those who seek to prove a violation has occurred. As with environmental destruction, however, the Court has failed to establish clear and fair rules with respect to who is able to bring suit against government policies on spending and taxation. While the executive and legislative branches check one another, there are many cases in which the two branches may cooperate to pass and sign an unconstitutional law. Despite this, taxpayers generally do not have standing to challenge government expenditures. Since 1923, as established in Frothingham v. Mellon, the Court has considered such actions to be "of public, and not of individual, concern" and thus best resolved by political action.[15] Otherwise, it was argued, overly partisan or frivolous suits might be brought claiming that every new tax is an "injury" to those who would pay it. In 1968, however, the Court carved out an important exception to this rule. In Flast v. Cohen, the Court ruled that a taxpayer had standing to challenge government subsidies to religious schools, as he had met the majority opinion's two-pronged test that required a) an established link between taxpayer status and the

government legislation being challenged, and b) a showing that the government expenditure exceeded its constitutional spending and taxation power.[16] In other words, since the taxpayer alleges that paying taxes inherently causes injury when government expenditures violate the constitution, a taxpayer must be capable of challenging these expenditures. Crucially, the Court found this test to be consistent with Frothingham. Only Justice Douglas, in his concurring opinion, suggested overturning Frothingham entirely.[17] Flast was thus seen as cementing the right for taxpayers to challenge government funding that allegedly violates the Establishment Clause of the First Amendment.

Flast created a powerful tool for citizens to assert their right to challenge government action, but over the past few decades, the conservative majority on the Court has slowly but steadily eroded this right. The first such decision was relatively minor; it refused to expand the exception in Flast to government conveyance of property to religious organizations. In Valley Forge Christian College v. Americans United for Separation of Church and State (1982), the Court ruled 5-4 that taxpayers seeking to challenge the Department of Health and Human Services' decision to donate surplus property to a religious college did not meet the Flast test, as the challenge addressed an in-kind transfer of property. In other words, constitutionally, it involved the Property Clause rather than Spending.[18] More recently, the Court has continued this trend of drawing new distinctions without formally overturning Flast. In Hein v. Freedom from Religion Foundation (2007),[19] the Court rejected a challenge to the Bush Administration's creation of an Office of Faith-Based and Community Initiatives, with Justice Alito's plurality opinion arguing that Flast applied only to legislative, not executive, action.

While the reasoning has differed from case to case depending on which justice penned the majority opinion, when taken together, these cases have left only a tiny subset of situations in which a citizen can challenge government support of religion. Moreover,

it seems likely that this number will continue to shrink in the future. In Hein, for example, Justice Kennedy concurred separately, writing that Flast's narrowness was required by the separation of powers, such that "the Executive Branch should be free, as a general matter, to discover new ideas…The exchange of ideas between and among the State and Federal Governments and their manifold, diverse constituencies sustains a free society."[20] That Kennedy would see government policies as essential "ideas" in American society is a novel concept, and a worrying one in the context of policies that potentially violate the Establishment Clause. If its beliefs about the relationship between Church and State are given constitutional protection as "ideas," then the executive branch has far-reaching capabilities to effectively re-write the Establishment Clause as it pleases. In 2009, Carol Nackenoff discussed this concept with alarm, writing "the day may not be far off when Justice Kennedy's approach…comes to prevail in cases of government expenditures for faith-based initiatives and school vouchers."[21] Just two years later, this prediction came true: in Arizona Christian School Tuition Organization v. Winn,[22] Kennedy, writing for a 5-4 majority, declared that taxpayers had no standing to challenge an Arizona tuition tax credit that went to private religious schools.

When taken together, Valley Forge, Hein, and Winn restrict the scope of Flast immensely. It now applies only when government action involves a) use of the Spending Clause, b) is pursued through the legislative branch, and c) is a direct expenditure rather than a tax subsidy.[23] Many of these distinctions appear entirely arbitrary. For example, Justice Alito writes that Flast specifically referred to the authorization of Congressional funds, as contrasted with the office created and funded by the executive branch in Hein.[24] As Justice David Souter writes in his Hein dissent, however, the "plurality opinion declares that Flast does not apply, but a search of that opinion for a suggestion that these taxpayers have any less stake in the outcome than the taxpayers in Flast will come up empty: the plurality makes

no such finding, nor could it."[25] There is a strong case to be made that access to the courts is more important with respect to executive action, as taxpayers have greater contact with their legislative representatives than with the President of the United States. Nevertheless, the Court has drawn an artificial line between these two situations, severely limiting access to the judiciary.

While the damage caused by this line of cases is significant enough, several justices advocate for even more radical limits on taxpayer suits. In both Hein and Winn, Scalia wrote concurring opinions, joined by Justice Clarence Thomas, insisting that the Court overturn Flast directly. Indeed, he is even more skeptical of the majority's limiting of Flast than the dissenters, calling the legislative/executive distinction in Hein "meaningless." For Scalia, Flast legitimizes what he calls "psychic injury" as distinct from "wallet injury"—the latter would be excessive taxation of an individual, while the former is where the taxation creates "mental displeasure that money extracted from him is being spent in an unlawful manner." Wallet injury is concrete, writes Scalia, while psychic injury is a mere political grievance.[26] This is ultimately unsatisfying, however: the entire point of Flast was that the government expenditure potentially violated the Constitution. Scalia's narrow interpretation of standing creates the same problem as in Lujan: if the plaintiffs can't challenge government illegality, who can?

It is worth considering, however, whether slowly chipping away at taxpayer standing is less intellectually honest than Scalia's view. Is the "death by a thousand cuts" approach better or worse for taxpayers who wish to challenge Establishment Clause violations? Some scholars, most prominently Cass Sunstein, favor minimalist decisions such as these that create doctrine piece by piece. In doing so, the argument goes, all three branches of government and the public can best debate the issues and react to Court decisions in order to, eventually, form a coherent doctrine; it is, in other words, a form of judicial restraint that still allows for constitutional inter-

pretation to adapt over time.[27] On the other hand, minimalism can just as often serve as a way of cloaking radical change, rendering it unnoticeable. For example, we might not see Winn as having a huge political effect on its own, but when taken as part of a line of cases, it becomes clear that there are now very few instances in which Flast applies. It might be better if Flast were killed outright, rather than reduced to meaninglessness. In truth, however, these strategic distinctions have much to do with the preferences and strategies of individual justices. While the conservative majority has been largely united on restricting standing, with regards to both the taxpayer as a litigant and environmental lawsuits, they have used very different tools in order to get there.

III. THE JUSTICES AND THE FRAMING

The originalist case for a narrow reading of standing, which emphasizes separation of powers, is logically persuasive but ultimately fails to present a strong historical case for restrictive procedural rules. Justice Scalia has arguably done more to shape the modern Court's standing doctrine than any other justice currently sitting on the Court. In a 1983 article, written while he was still a judge for the U.S. Court of Appeals for the District of Columbia Circuit, Scalia outlines the concept of standing as a check on judicial power. At its most basic level, he writes, standing acts to prevent the courts from taking on the responsibilities constitutionally left to the executive or legislative branches, by limiting the "Cases or Controversies" that it can examine under Article III to those where there are "adverse parties with personal interest in the matter."[28] This is required to keep the courts from interfering in the political and ideological debates of the other branches. What we must avoid, Scalia argues, is for the judiciary to serve as a policymaker of last resort, where those who lose in the executive or legislative arena turn to the courts to enact or block certain policies. For example, by preventing the NAACP from challenging certain laws unless their plaintiff can

demonstrate "concrete injury in fact" resulting from that law, the courts "can do their work well"; otherwise, they would be simply deciding as a matter of law which policies the nation should follow.[29] Ultimately, this perspective cements the Supreme Court in its "countermajoritarian" role of protecting individuals who are injured by the will of the majority, which Scalia insists was the Framers' intent.

This is not, at its core, an unreasonable interpretation. The protection of the minority from persecution at the hands of the majority is a noble goal, and reinforced by much of the debate surrounding the framing of the Constitution. Yet this theory has several flaws: it was not until 1975, in Warth v. Seldin, that the Court explicitly argued that Article III limited standing to "concrete injury" rather than "generalized grievances."[30] Writing for a 5-4 majority, Justice Lewis Powell argued that low-and moderate-income plaintiffs who were unable to find housing in Penfield, New York, could not prove that this "can be said to have resulted, in any concretely demonstrable way, from respondents' alleged constitutional and statutory infractions," and that as a result the plaintiffs were third parties and unable to sue.[31] Warth is one of the cases Scalia cites in favor of his argument that narrow standing rules are constitutionally mandated, but there is no reason to take a Court decision from 1975 as proof of the Framers' intent. As Sunstein notes, "[Scalia's] article does not address the question of whether the Framers actually had this conception of Article III . . . Scalia reads Article III broadly, invests it with general, controversial values, and ultimately recommends judicial invalidation of the outcomes of democratic process."[32] For Sunstein, a restrictive theory of standing accomplishes the opposite of what Scalia says it does: by allowing the judiciary to reject attempts by Congress to make it easier for certain groups to bring suit, Scalia in fact calls upon the unelected judicial branch to limit the impact of laws passed by democratically elected branches of government.

In fact, the historical evidence points in the opposite direc-

tion, away from Scalia's conclusion. Firstly, writes Sunstein, the traditions of English common law that the Framers drew upon did not create any strict limits on case-or-controversy; more importantly, the conception of standing Scalia is so fond of has its roots not in the Constitution, but in the history of the Progressive Era and New Deal. In the early 20th century, the Court struck down a number of economic regulations based on dubious judicial doctrines, leading some to claim that this constituted reading "Mr. Herbert Spencer's Social Statics" into the Constitution.[33] While some modern scholars have sought to challenge this disapproving description, it is nonetheless true that these doctrines posed a threat to legislation proposed in the 1930s to combat the Great Depression.[34] Supporters of the New Deal, including economically progressive justices such as Louis Brandeis and Felix Frankfurter, developed the modern concept of standing, requiring individuals bringing suit to demonstrate a personal stake in the policy at hand, to "insulate progressive and New Deal legislation from frequent judicial attack."[35] Crucially, while this doctrine was consistent with preexisting law, it did not foreclose future statutory changes. As a result, if Congress chooses to cement this interpretation or create exceptions to this interpretation, it is questionable to argue that Article III prohibits such action by Congress.[36]

The Administrative Procedures Act of 1946 accomplished precisely this purpose, inviting future Congresses to open the courts to individuals and groups who did not meet the more restrictive conception of standing. This Act codified the Brandeis-Frankfurter conception of standing, but it also allowed Congress to create future statutes that, under certain circumstances, would allow anyone "adversely affected or aggrieved" to bring suit, in effect acting as private attorney general.[37] In these "citizen suits," whether a suit could be brought before the courts did not depend exclusively upon proving an injury in fact. The APA also emphasized the ability of Congress to create a "zone of interests" with regards to certain policies.

Those within this "zone" had standing to sue, even if they were not directly or concretely harmed. Over the next few decades, Congress most explicitly placed these citizen suit provisions in environmental legislation, where it was most feared that bureaucratic agencies would fail to enforce Congressional legislation.[38] Scalia's opinion in Lujan was a major victory over citizen suits and the APA in general. Whether Scalia is correct with regard to the origins of standing is beside the point, in other words; his position on the nation's highest court allows him to enact his vision.

While other justices, particularly Roberts and Alito, have been less concerned with what the Framers thought about standing, their experiences have likewise led them to support restrictions on standing in their rulings. In a 1993 article in the Duke Law Journal, Roberts was largely dismissive of citizen suit provisions: he describes the Court's decision in Lujan as "sound" but one that "can hardly be regarded as remarkable."[39] He later speculates, however, that the Court's position on standing is a very small burden for plaintiffs to overcome. Alito, too, had shown hostility to citizen suit provisions in some of his decisions on the Third Circuit Court of Appeals. Michael Solimine notes that, interestingly, Alito's plurality opinion in Hein, which Roberts joined, contained no originalist analysis. This is in stark contrast to Scalia's opinions, as we have seen, but also in contrast to the majority in Flast, Justice William Brennan's dissent in Valley Forge, and Justice Souter's dissent in Hein, all of which attempted to explore the history of the Establishment Clause.[40] This is characteristic of the incremental approach on the Roberts Court, writes Solimine, particularly as employed by Alito and Roberts himself.[41] Yet given that Roberts, Scalia, Alito, and Thomas have all voted to restrict standing in the cases described above, it seems unlikely that these different approaches reflect genuine minimalism. Rather, it seems as though they are simply pursuing the same goal of restricting access to the courts using different theories.

IV. JUDICIAL HYPOCRISY AND AFFIRMATIVE ACTION

This question of what ends justices wish to achieve raises the uncomfortable possibility that standing is rooted not in constitutional interpretation but in partisan allegiance. Roberts finds the concept that judges and justices make decisions based on ideology absurd—not only from his "judge as umpire" analogy during his confirmation, but also from his 1993 article, in which he calls standing "an apolitical limitation on judicial power" that restricts liberal and conservative challenges alike.[42] Is this true? The Court was unanimous in its finding that ranchers in districts receiving water from certain reservoirs had standing to sue the Fish and Wildlife Service for lowering the water levels to protect endangered species of fish, in Bennett v. Spear (1997), but Scalia's opinion for the Court is telling, with evident joy at being able to apply the "zone of interests" test to those challenging environmental protection.[43] Solely as anecdotal evidence, this may suggest a partisan enthusiasm at using expanded standing, usually cherished by liberals, against progressive regulation.

Shortly after Massachusetts v. EPA was decided, Jack Balkin wrote that standing is "among the most unprincipled and arbitrary parts of American constitutional law," suggesting that, among other things, it would be nigh-impossible to create a unified, non-ideological theory of when to expand and when to restrict standing.[44] Yet it is still instructive to examine particular cases where judges and justices act hypocritically. Richard Pierce examines the question of standing as political interpretation in much greater depth. Examining five cases that dealt with standing, of which Lujan was one, he writes that "with only two mild surprises, moderate to liberal justices voted to grant access to the courts to prisoners, employees, and environmentalists, and voted to deny access to banks," and vice versa, with the ideological approach predicting 94% of votes and 100% of outcomes.[45] Moving on to the federal circuit courts, he finds that Republican judges were roughly 3.9 times more likely to

deny standing to environmental plaintiffs than Democratic judges. On the D.C. Circuit this disparity grew to over 4.3 times more likely.[46] In other words, whatever the theoretical appeal of emphasizing concrete injuries for discrete minorities—as the modern Court has done—in practice, the conservative justices seem to find that business owners and ranchers suffer these types of injuries much more frequently than do prisoners, taxpayers, or environmental organizations.

One area Balkin describes as particularly unprincipled, if we move beyond the realm of environmental and establishment clause cases, is that of challenges to affirmative action programs. In Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville (1993), which dealt with businesses challenging an affirmative action contracting program, Justice Scalia joined Justice Thomas' majority opinion both granting standing and finding for the businesses.[47] Among other things, this opinion explicitly disagreed with the two justices' position in Laidlaw, criticized narrow standing in Warth, and defined "injury in fact" much more broadly than either justice had previously done. For example, Thomas writes that "Unlike petitioner, which alleged that its members regularly bid on contracts in Jacksonville and would bid on those that the city's ordinance makes unavailable to them, the construction association in Warth did not allege that 'any member ha[d] applied ... for a building permit.'"[48]

This distinction is superficially plausible but, upon deeper inspection, largely meaningless. Thomas's point is chiefly that while no petitioner in Northeastern Florida Chapter could prove concrete injury in fact, the presence of the affirmative action contracting program would invariably harm one or more business, given that the businesses regularly applied for contracts. This means nothing in the context of Thomas's (and Scalia's) previous votes and opinions restricting standing in environmental cases.[49] The conservation groups in Lujan argued that the agency regulatory activity as determined by

the Reagan Administration would invariably cause harm. Scalia's rebuttal argued that injury had to have already occurred, or that any possible future injury must be imminent, in order to grant standing. Plaintiffs in Massachusetts v. EPA argued that the State and citizens of Massachusetts would invariably suffer harm from the EPA's failure to combat climate change and rising sea levels. Roberts's dissent highlighted the failure of the petitioners to prove a "concrete and particularized…distinct and palpable" injury to a particular individual.[50] Similar examples abound in Valley Forge, Hein, and Winn. A vague, general inevitability of harm to some unspecified white business owners is a fundamentally different requirement than the conservative justices have relied upon in other cases. By this standard, anyone who could prove that some individuals living somewhere in the State of Massachusetts would be harmed by global warming would have standing. Likewise, the general prohibition on lawsuits over use of taxes would have to be reversed, as every taxed citizen is harmed, however slightly, when a government collects money from them.

Moreover, there are some ways in which the plaintiff's claim of injury in Warth was in fact stronger than those of the businesses in Northeastern Florida Chapter. In Warth, the town's exclusionary zoning practices effectively forced the plaintiffs to live elsewhere; while the town did not explicitly exclude low-and-moderate-income residents, these regulations made it impossible for them to find housing. Elise Boddie, writing about the co-development of standing and equal protection jurisprudence, notes that the plaintiffs in Warth were able to point to this near-total inability to live in the town, while the plaintiffs in Northeastern Florida Chapter were unwilling or unable to allege any concrete harm beyond the city's consideration of race.[51] Elsewhere in Northeastern Florida Chapter, Thomas writes that, in denial of equal protection cases, the "injury in fact" requirement "is the denial of equal treatment resulting from the imposition of the barrier…not the ultimate inability to obtain the

benefit."[52] In Boddie's words, "A complaint about the inability to compete for a benefit—even on a regular basis—was plainly a less substantial harm than an inability to secure the benefit. But the Court treated this framing of plaintiff's claim as if it was a virtue."[53] The plaintiffs in Northeastern Florida Chapter could best be described as suffering from Scalia's "psychic injury," because they had a belief that affirmative action programs discriminated against them, but lacked proof of direct injury to any specific individual. This logic, if applied consistently, would allow a wide range of taxpayer suits on issues far beyond affirmative action or government subsidy of religion.

This more expansive interpretation of standing may have merit, but the larger issue is its contrast with the way Thomas, Scalia, and even Roberts and Alito write about standing in suits challenging environmental degradation or government funding of religious organizations. It is not as though the majority in Northwestern Florida Chapter explicitly overturns or repudiates the reasoning of these other cases. Rather, it is the tone that is radically different: the majority in Northeastern Florida Chapter sees a far greater role for the judiciary in correcting the abuses of other branches of government. In Lujan or Hein the majorities speak of reluctance to interfere with the right of the executive and legislature to act, and they emphasize the ways in which citizens should turn to those other branches and rely on the democratic process in order to achieve their ends. There is no such advice in affirmative action cases. Indeed, Thomas's opinion makes no mention of the democratic process, participation therein, or even of the legislative branch aside from describing the specific actions of the Florida legislature.[54] This serves as an uncomfortable suggestion that it is ideological ends, not constitutional requirements, which motivate the justices in granting or denying standing.

Serious standing issues have also gone unnoticed by the justices in one of the most contemporary affirmative action cases.

2013's Fisher v. University of Texas at Austin,[55] which will return to the Court in the current October Term 2015, involved a student who challenged her rejection from the university in 2008. Abigail Fisher claimed that the university's use of race in admissions discriminated against Caucasian students, like herself, and thus violated the Equal Protection Clause of the 14th Amendment.[56] In 2013, the Supreme Court reached a compromise verdict, sending the case back to the lower courts to determine whether the university's admissions policy met the standard of strict scrutiny that had been set ten years earlier in Grutter v. Bollinger. There, the Court, by a 5-4 margin, upheld the use of "race-conscious" admissions policies that were narrowly tailored, did not include quotas, and used race merely as one of a number of factors in considering admissions.[57] When the Fifth Circuit once again upheld the university's admissions policy as consistent with Grutter, Fisher appealed again. It is this case the Court will be hearing during the current term.

What harm, exactly, did Abigail Fisher suffer that would grant her standing to sue? At a very basic level, we might note that Fisher was allegedly discriminated against in 2008, and has since graduated from an entirely different institution. But this is only a small part of the issue with Fisher. For Fisher to have suffered an "injury in fact" as a result of the University of Texas at Austin's consideration of race as a factor in admissions, there should have been at least some effort to ascertain whether she would have been admitted to the university absent such an admissions policy. UT Austin fills much of its incoming class with what is known as a Top Ten Program, whereby any student who graduates in the top ten percent of their high school class is guaranteed admission. In 2008, "92% of all Texas residents admitted as freshmen were Top Ten Percent applicants, leaving only 841 slots to be filled by Non-Top Ten Percent applicants."[58] Fisher was not among these students. Her combined SAT score of 1180 (out of 1600) and grade point average of 3.59 did not place her in the top 10% of her graduating class. As a result, her

application was evaluated in full.

According to the merits brief submitted by UT Austin before the Supreme Court, this process evaluates students by assigning them two separate scores: an Academic Index (AI) and a Personal Achievement Index (PAI).[59] The AI score examines the grades and test scores of each applicant. The PAI score evaluates students' required application essays, "leadership potential, extracurricular activities, honors and awards, work experience, community service, and special circumstances."[60] This latter category, "special circumstances," includes seven different attributes, one of which is race. Fisher does not dispute the precise workings of UT Austin's admissions process. The university makes a compelling case that Fisher would not have been admitted regardless of their consideration of "special circumstances" such as race. Fisher received an AI score of 3.1 for her good, but not outstanding, grades and test scores. Her PAI score has been kept confidential, but was less than the maximum of 6. It could be argued that Fisher's being white lowered her PAI score, but, according to the university, it was uncontested that "due to the stiff competition in 2008 and petitioner's relatively low AI score . . . petitioner would not have been admitted to the Fall 2008 freshman class even if she had received 'a 'perfect' PAI score of 6."[61] Fisher does argue, and UT Austin does admit, that some students were offered provisional admission subject to completing a summer program at the university. This program also rejected Fisher, but it admitted "one African-American and four Hispanic applicants with lower combined AI/PAI scores" than Fisher. It also, however, admitted 42 white applicants with scores equal to or lower than Fisher's, and rejected 168 nonwhite applicants with scores equal to or higher than Fisher's.[62]

It is difficult to conclude either that Fisher's race or the race of other applicants was dispositive, or that, if not for the university's consideration of race, she would have been admitted. This has little impact on the merits of affirmative action. It may be that Fish-

er and her attorneys are correct, and affirmative action violates the 14th amendment, but the entire point of standing, as interpreted by the conservative majority on the Court over the past four decades, is to prevent these disputes from reaching the courts without the right plaintiffs. According to Scalia's criticism of Flast, for example, Fisher is more akin to a taxpayer upset that affirmative action exists, rather than someone who has suffered a concrete injury. Boddie concludes her article on equal protection and standing by arguing that, according to the standing rules outlined in other areas of jurisprudence, "the relevant constitutional harm in affirmative action cases is the rejection itself, not an implied racial injury that stems from the very consideration of race. For damages claims, a defendant could defeat plaintiff's standing if it could show that racial considerations did not in fact cause the plaintiff's rejection. The plaintiff's simple resentment or personal offense would not be enough to overcome the defendant's same-decision showing."[63] Applied to Fisher, any accusation of an unfair admissions process, absent proof of injury, would be insufficient.

Fisher's case is also groundbreaking for its ability to retroactively challenge considerations of race. Even if we accept the more expansive theory of standing employed in Northeastern Florida Chapter, that case involved "prospective injunctive relief, not retrospective claims for damages."[64] Yet none of the Court's four opinions, not even Justice Ruth Bader Ginsburg's dissent, made note of these inconsistencies. Nor is it at all likely to consider them when Abigail Fisher returns to the Court during the upcoming term. Abigail Fisher's lawsuit threatens to destroy a system loathed by conservatives and beloved by liberals. The Court's previous rulings on standing, from Lujan to Winn, should require Fisher to prove that she actually has a stake in the game. This paper has thus far been very critical of the Court's narrow interpretation of standing; to be clear, in the interests of open access to the courts, Fisher should be granted standing. If the current Court is silent on this question, how-

ever, it will send a very strong signal that the rules of standing exist to serve an ideological purpose.

V. CONCLUSION

Let us suppose, then, that ideologies have shaped conservative justices' votes to grant standing to white petitioners challenging affirmative action programs and deny standing to environmental organizations and to taxpayers challenging government subsidies of religion. Does that imply that we cannot glean from the Court's decisions any firm principles of standing? Not quite. While specific cases may hinge upon ideological leanings, taken together they strongly suggest that, as a general rule, we should promote increased access to the courts. The reasons for doing so are threefold. First, when it is difficult to get the courts to hear cases at all, it is usually the least powerful in society—such as low-wage employees or prisoners—who are without legal remedy. Second, if the purpose of restrictive standing law is to prevent the Court from becoming "ombudsmen of the administrative bureaucracy," in Roberts's words,[65] then it does an abysmal job of achieving that purpose. Heather Elliott similarly rejects this argument, noting that it is far more likely that standing will create "false positives"—pushing valid judicial questions into the legislative sphere—than adequately reflect separation of powers.[66] Moreover, far from ensuring that the branches of government do not interfere with one another, it often gives the executive branch power over the legislative,[67] as with the Bush administration interpreting the Clean Air Act through the EPA, or creating the Office of Faith-Based and Community Initiatives as an executive order.

Lastly, the modern Court has a great deal of control over its docket. In 1988, Congress largely abolished mandatory appellate jurisdiction, whereby the Court was often required to review appeals of state court decisions under federal law. To get the present-day Court to grant certiorari is no easy task. There are many

adequate avenues for the Court to decline to review "bothersome" or excessively political cases without resorting to the murky doctrine of standing. Indeed, there is a valid case to be made that the Court should abandon standing altogether, relying instead on the voting process to grant certiorari in order to avoid frivolous or overly partisan cases. Some inappropriate suits might slip through the cracks, but they do the same in the current system.[68] There may indeed be some issues that simply cannot be litigated, but the Court's decisions—on the environment, taxpayers, the separation of Church and State, and affirmative action—over the past forty years have not determined what these issues are. In fact, these decisions have done the reverse: the doctrine is murkier than ever, and, in the meantime, the Court has done far more harm than good.

1 Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

2 The 7-2 decision to dismiss is slightly misleading; only six justices found that the plaintiffs lacked standing, and Justice Kennedy wrote separately with Justice Souter to suggest that Congress should have been more specific in creating a citizen suit provision in the ESA. Specifically, Kennedy writes that while he rejects the proposed theory of "ecosystem nexus" which claimed that any person who used any part of a "contiguous ecosystem" adversely affected by government action has standing to sue, he is "not willing to foreclose the possibility, however, that in difference circumstances a nexus theory…might support a claim to standing," id at 579.

3 Id at 556.

4 Id.

5 505 U.S. 555, 606 (1992).

6 Christopher D. Stone, Should Trees Have Standing? (Oxford University Press 3rd edition 1996).

7 Id at 2-3.

8 See San Antonio Conservation Society v. Texas Highway, 400 U.S. 968 (1970) for Justice Black's dissent, and Sierra Club v. Morton, 405 U.S. 727 (1972) for Justice Douglas's.

9 Stone, Should Trees Have Standing? at 172-174.

10 Friends of the Earth v. Laidlaw Environmental Services, 528 U.S. 167 (2000).

11 Id at 204.

12 Massachusetts v. EPA, 549 U.S. 497 (2007).

13 Bradford C. Mank, "Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?" 34 Columbia Journal of Environmental Law 1, 7 (2009).

14 549 U.S. 497, 521-522 (2007).

15 Frothingham v. Mellon, 262 U.S. 447, 487 (1923).

16 Flast v. Cohen, 392 U.S. 83, 102-103 (1968).

17 Id at 107.

18 Valley Forge Christian College v. Americans United for Separation of Church and State, 454 U.S. 464, 480 (1982). Interestingly, Justice White is the only justice who joined the majority in both Flast and Valley Forge.

19 Hein v. Freedom from Religion Foundation, 551 U.S. 587 (2007).

20 Id at 616.

21 Carol Nackenoff, "The Dueling First Amendments: Government as Funder, as Speaker, and the Establishment Clause" 69 Maryland Law Review 132, 137 (2009).

22 Arizona Christian School Tuition Organization v. Winn, 131 U.S. 1436 (2011).

23 See Justice Kagan's dissenting opinion in Winn, at 1450: "Precisely because appropriations and tax breaks can achieve identical objectives, the government can easily substitute one for the other… From now on, the government need follow just one simple rule—subsidize through the tax system—to preclude taxpayer challenges to state funding of religion."

24 551 U.S. 587, 593 (2007).

25 Id at 637.

26 Id at 619-620.

27 For more on minimalism, see Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harvard University Press 1999).

28 Antonin Scalia, "The Doctrine of Standing as an Element of the Separation of Powers," in Mark Cannon and David O'Brien (ed.), Views from the Bench, 200 (Chatham House 2nd edition 1997).

29 Id at 206.

30 Warth v. Seldin, 422 U.S. 490, 490 (1975).

31 Id at 504.

32 Cass R. Sunstein, "What's Standing After Lujan? Of Citizen Suits, 'Injuries,' and Article III" 91 Michigan Law Review 163, 217 (1992).

33 Quote is from Justice Holmes' dissent, Lochner v. New York, 198 U.S. 45, 75 (1905). It refers to the work of Herbert Spencer, a British philosopher and political theorist who advocated for a minimalist state and supported Social Darwinism ("survival of the fittest").

34 See, for example, Howard Gillman, The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence (Duke University Press 1995), which argues that the Lochner majority was adhering to a longstanding constitutional tradition prohibiting the state from enacting legislation to benefit one class over another.

35 Sunstein, "Standing After Lujan," at 179-180.

36 For more on standing as largely a New Deal invention, see Steven L. Winter, "The Metaphor of Standing and the Problem of Self-Governance" 40 Stanford Law Review 1371 (1988), which argues that the Framers were almost entirely unconcerned with creating a doctrine of standing.

37 An Act To Improve the Administration of Justice by Prescribing Fair Administrative Procedure, Public Law 404, U.S. Statutes at Large 60, 243 (1946).

38 Sunstein, "Standing After Lujan," at 182, 193.

39 John G. Roberts, Jr., "Article III Limits on Statutory Standing" 42 Duke Law Journal 1219, 1226 (1993).

40 Michael Solimine, "Congress, Separation of Powers, and Standing" 59 Case Western Reserve Law Review 1023, 1045-1046 (2009).

41 Id at 1059.

42 Roberts, "Article III Limits on Statutory Standing," at 1230.

43 Bennett v. Spear, 520 U.S. 154, 162 (1997).

44 Jack Balkin, Standing and Executive in Massachusetts v. EPA, Balkinization (2007), online at http://balkin.blogspot.com/2007/04/standing-and-executive-power-in.html (visited October 1, 2015)

45 Richard J. Pierce, "Is Standing Law or Politics?" 77 North Car-

olina Law Review 1741, 1754-1755 (1999).
46 Id at 1760.
47 Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville, 508 U.S. 656 (1993).
48 Id at 668.
49 See also Shaw v. Reno, 509 U.S. 630 (1993), where the Court found that white voters in North Carolina had standing to challenge the creation of a majority-minority voting district as a violation of equal protection.
50 549 U.S. 497, 540 (2007).
51 Elise C. Boddie, "The Sins of Innocence in Standing Doctrine" 68 Vanderbilt Law Review 297, 354-355 (2015).
52 508 U.S. 656, 657 (1993).
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60 Id at 7.
61 Id at 15.
62 Id at 16.
63 Boddie, "The Sins of Innocence," at 377.
64 Id at 378.
65 Roberts, "Statutory Standing," at 1232.
66 Heather Elliott, "The Functions of Standing," 61 Stanford Law Review 459, 485-487 (2008).
67 Id at 496. See also Justice Blackmun's dissent in Lujan, writing

"in the plurality's view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch's way."

68 King v. Burwell, 576 U.S. ___ (2015) is an excellent example of this phenomenon. Though there is some doubt as to whether any plaintiffs had sufficient standing to bring suit, the majority did not rely upon this fact in finding for the defendant.

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In the Language of "Because of": The Inherence of Title VII Protections for Transgender Individuals

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Abstract

Under guidance of Title VII of the 1964 Civil Rights Act, the Department of Justice (DOJ) affirmed workplace protections for transgender people in 2014; there was no shortage of criticism. Critics argued against such protections, especially as Title VII lacks explicit reference to "gender" or "sexual orientation." Legal scholarship, however, affirms the decision. Drawing from the same body of legislation, but with a clearer understanding of gender theory, scholars have long argued that transgender workers are federally protected against discrimination. This paper affirms the DOJ decision through examining legislative language, gender theory, and jurisprudence. Though "gender identity" is not explicitly mentioned in Title VII, the act provides language supportive of protecting transgender individuals "because of…sex." In extending workplace protections to transgender individuals, a fundamental link between sex-based discrimination and gender-based discrimination is realized. Courts have recognized this in cases such as Price Waterhouse v. Hopkins (1989) and Schroer v. Billington (2008). These provide sufficient precedent for acceptance of transgender workplace protections, but I consider further cases for the argument, including Macy v. Holder (2012), the very case which prompted the DOJ's declaration. In light of the efficacy of Title VII, I examine additional remedies for transgender discrimination.

I. Introduction

In December 2014, U.S. Attorney General Eric Holder announced that the Department of Justice would uphold interpretations of the Civil Rights Act of 1964 that were in favor of protecting individuals, not only on the basis of "race, color, sex, and national origin," but also "gender identity and expression."[1] Spurred in part by the ruling in Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012), the Attorney General made his purpose abundantly clear in explicitly noting that Title VII protections are inclusive of "transgender individuals."[2] Unsurprisingly, there was no shortage of criticism. Drawing upon overly narrow definitions of sex and gender, critics asserted that transgender protections lie outside of Title VII's intended purpose.[3] However, I respectfully disagree with Holder's dissenters.

Title VII protections for transgender individuals flow naturally from sound legal scholarship and established jurisprudence. Under Section 2000e-2, Title VII of the Civil Rights Act of 1964 states that employers may not discriminate against individuals "because of such individual's race, color, religion, sex, or national origin."[4] The "because of…sex" clause, in particular, is crucial for this argument, as transgender protections can be construed from the meanings of sex and gender within themselves. In extending protection to transgender individuals, Holder invokes a fundamental link between sex-based discrimination on one hand and gender-based discrimination on the other. While deeply interconnected in concept, sex and gender are quite different ontologically. An individual's "reproductive organs and glandular composition" are markers of "biological sex" but not of one's "gender identity."

Unlike gender, "biological sex" rests on a binary scale with individuals endowed with certain physical characteristics at birth, such as genitalia and hormone ratios. Sex and gender are often entangled, in part, because of social propensities to assign gender to objects and actions that are not actually biologically sexed. Through

language, we can convey the commonly obfuscated interplay between personal identity and external perception. Courts have used this same differentiation to understand how discrimination "because of sex" is, in fact, largely premised upon mere assumptions of gender.[5]

To illustrate this point most completely, it is best to examine judicial precedent in relation to transgender identity along all ends of the spectrum: from non-operative to operative. Once the current dynamics between jurisprudence from all levels, federal anti-discrimination legislation, and non-normative gender identities are understood, a clearer portrait emerges for how the United States can better protect its citizens against workplace discrimination.

In laying out this argument, Part II will further examine gender theory. This section particularly relies upon understanding terminology, establishing the philosophical underpinnings for this critical aspect of human identity.[6] In Part III, a diverse body of jurisprudence will further support this argument. Varied in scope, these cases span from district and federal courts to the Supreme Court of the United States. Finally, Part IV will examine potential – albeit, less desirable – alternatives to Title VII for protecting individuals on the basis of gender. The Employment Non Discrimination Act (ENDA) and Americans with Disabilities Act (ADA) stand as such example, mired in a problematic language and implications. Title VII protections, through the established logic of the circuits, remain the best remedy for the transgender individuals who face discrimination in the workplace.

II. Gender Theory: Trans Philosophy

Transgender identity is fundamental in understanding how Title VII's "because of sex" clause protects individuals because of "gender" as well. "Transgender" is an umbrella term for anyone whose gender identity varies from the "dimorphic norm."[7] Essentially, dimorphic non-normatism is delineated by mismatches between

sex-based and gender-based attributes. "Post-operative transsexual" is the most societally visible and widely recognized of transgender identities; however, transsexual is only one of many transgender identities. Most non-traditional gender identities are transgender as well.

The etymological root of the word "sex" is the Latin word "sexus," "a division or grouping," a derivative of "seco," "to cut or divide." Linguistically, then, "sex" stems from the idea of a division in human nature, a classification of individuals based on specific traits.[8] In Western society, biological sex once heavily determined "spheres of living" or, as Justice Bradley's concurrence in Bradwell v. State of Illinois, 83 U.S. 130 (1873), states, "paramount destiny and mission… under the law of the Creator."[9] This variety of essentialist, sex-based discourse relies upon three assumptions: 1) sexual dimorphism, 2) intrinsic differences in physical ability between the two sexes, and 3) intrinsic differences in psychological and behavioral characteristics between the two sexes.[10] Thus, "gender identity" in early works of theory relied upon a classical definition: "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."[11] There is a distinct twinge of "cultural preference" in these foundations, the products of which are greatly varied for individuals who are "exceptions to the rule," an obfuscated understanding of human identity. Many courts have thus come to understand sex as the gender posited to an individual at birth. However, such interpretations rely heavily on legislative intent.[12]

Transgender identity is complex and fairly new to the socio-legal scene. Lack of congressional intent should not be misconstrued as lack of present-day coverage. Societal understandings of sex and gender have evolved greatly, even since the inception of the Civil Rights Act.[13] More recent works define "gender identity or expression" as meaning "one's own deeply held conviction and deeply felt inner awareness of belonging to one gender or an-

other."[14] Self-identification and self-expression do not correspond directly with the physicality of an individual. As mentioned previously, "sex" and "gender" cannot be used fully interchangeably. "Sex" more properly refers to biological difference between male and female, while "gender" more accurately assesses society's construction of a system that identifies masculinity and femininity.[15] Unlike biological sex's binary scale, gender identity characterizes individuals in more complex ways. For example, a person may have both "masculine" and "feminine" traits – and most people do. Hyper masculinity and femininity would go so far as to undermine normative expectations of an individual.

Gender theorist and legal scholar Mary Anne Case points to the fact that the work of Justice Ruth Bader Ginsburg in the litigation of sex discrimination cases in the 1970s may have led to this misunderstanding.[16] Ginsburg argued that laws based upon "stereotypical assumptions about the sexes hurt both women and men who violate these assumptions."[17] Ginsburg supported the use of "sex" and "gender" interchangeably, adding to the colloquial confusion of the present day.[18] She reasoned that "[f]or impressionable minds, the word 'sex' may conjure improper images," outside the scope of legislation, and more akin to "what occurs in porno theatres." She thus posited that the use of the word 'gender' in all situations where sex is applicable would "ward off distracting association," while retaining its grammatical understanding. While there are benefits to precluding "embarrassment or salacious thoughts in the minds of judgment," this interchangeability reflects society's problematic views on the matter.[19] Ginsburg's suggestions, while nearly 40 years old, have created some confusion between the concepts of gender and sex in legal studies.[20]

In the past, courts attempted to establish precedent by examining chromosomal and gonadal combinations in search of "legal classifications" for gender.[21] Based on Webster dictionary's definition of "sex," one court ruled that gender should "not be distin-

guished by their mind or mental state but instead by internal organs, chromosomes, and ability to bear children."[22] In the case of transsexualism, this court's problematic opinion posited that, although genitalia was cosmetically altered, "internal organs were not altered, nor were [transsexual individuals] able to bear children."[23] As explained earlier, the genitalia of a transgender individual does not need to correspond with their gender identity – a crucial distinction, as genitalia are rarely portrayed as an explicit issue in employee discrimination cases.[24] Employers should know little, if anything, about the actual anatomical sex of their employees.

Courts' analysis of Title VII must look beyond essentialist understandings of sex. Courts have never ruled that a given individual is "legally" male or female.[25] Weiss points out that citizens may truthfully identify sex and gender on "birth certificates, driver's licenses, and passports" by simply marking "M" or "F," but this is distinct from an individual explicitly becoming "male or female, for the legal purposes of X" in a binding manner.[26] Identification on documentation should be understood as "statements of opinion," as opposed to "statements of law." Thus, discrimination is fueled by "sex-derived presumptions" of gender, and not sex itself.[27] In the end, perception is what drives these hostile actions, and such actions are no less unjust and hateful. Many lower courts simply have not displayed an understanding of these fundamentals of gender theory to provide uniform rulings on the matter.[28]

III. The Transgender Protections of Title VII Jurisprudence

A. The Supreme Court: Price Waterhouse and Oncale

Until 1989, courts commonly rejected arguments favoring the Title VII protection of transgender individuals from employment discrimination. Transgender was not considered a protected class under Title VII's understanding of "sex," nor even a category in its own right.[29] The legal landscape was limited to narrow interpreta-

tions of sex and gender until Price Waterhouse v. Hopkins, 490 U.S. 228 (1989). The Supreme Court deliberated on the topic of "employer liability for sex-based discrimination," explicitly establishing "gender stereotyping" as a type of sex stereotyping prohibited under Title VII.[30]

The court's ruling became the foundation for the protection of all individuals regardless of sex, gender identity, and sexual orientation.[31] In Price Waterhouse, the plaintiff, Ann Hopkins, claimed that her employer, Price Waterhouse, engaged in discriminatory partnership promotion akin to "sex-stereotyping based on her gender nonconformity."[32] The statements made by her coworkers and supervisors provided ample evidence for the claim. Most strikingly, Hopkins was told to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[33] The plethora of evidence made clear the significance that Hopkin's biological sex had in said promotion decision.

As the case proceeded through trial, the district and appellate courts ruled in favor of Ann Hopkins. However, there was disagreement as to what constituted a sufficient level of evidence. When could the decision to promote an individual be considered as truly resting on gender by "clear and convincing evidence," as opposed to "preponderance of the evidence?"[34] The lower courts ruled that the employer must demonstrate that its employment decisions would have remained the same in the absence of discrimination. This question was the primary source of the split in the Court's 6-3 ruling in favor of Ann Hopkins.[35]

Notable among the dissenters of Price Waterhouse was Justice Scalia, who presented the majority in Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998) – a case which further supports the intended applications of Title VII as proposed by this paper.[36] Plaintiff Joseph Oncale filed for sex discrimination based upon the hostile workplace environment produced by sexual harassment from his male co-workers.[37] Oncale was grossly physically and ver-

bally molested, leading to his voluntary resignation from the corporation.[38] The district and appellate courts both ruled against Oncale, in favor of Sundowner.[39] These courts ruled narrowly based on the supposed societal appropriateness of "same-sex" harassment at the workplace.[40] Because he was a man, he could be harassed by men. The Supreme Court, however, thought otherwise.

In an 8-1 ruling, the Court ruled that prohibitions against workplace harassment applied regardless of the actors' sexes.[41] More importantly, in writing the majority, Justice Scalia stated that the language of the Civil Rights Act "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment," effectively drawing broader protections for workers based on sex and gender.[42] Sex-based discrimination becomes actionable when it places victims in an "objectively disadvantageous, hostile working condition," regardless of sex or gender.[43] Furthermore, sexual harassment is not necessitated by motivation stemming from explicit "sexual desire," meaning the interplay between individuals' sex or gender identities.

Price Waterhouse provides guidance for cases in which an individual's gender identity and expression do not conform with expectations of one's sex or gender, while Oncale allows for the application of Title VII widely, beyond what Congress may or may not have intended. Thus, with gender non-conformity a defining trait of transgender individuals, the Court established the necessary logic for their protection under Title VII. Change within the circuits, on the other hand, has been slow.[44]

However, several lower courts have continued reasoning that transgender status still occupies a separate category from "sex," as defined and interpreted in Title VII.[45] These courts have suggested that non-normatively gendered individuals are deprived of "sex-based protections" altogether.[46] Despite this, the turn of the century saw cases such as Smith v. City of Salem, Ohio, 378 F. 3d 566 (2004) applying the reasoning of Price Waterhouse to rule in favor

of Title VII protections for transgender individuals, with the rationale that such discrimination is indeed a form of "gender policing," the same which Anne Hopkins was subjected to decades prior.[47]

B. The D.C. District: Schroer v. Billington

With Schroer v. Billington (2008), the District Court for the District of Columbia established another pivotal victory for transgender individuals, building upon Price Waterhouse through crucial lines of reasoning in favor of applying Title VII protections to transgender individuals.[48] Petitioner Diane Schroer filed a claim for employment discrimination under Title VII's "because of sex" clause against the Library of Congress, after applying for a position as a terrorism specialist, which required her to undergo security clearance.[49] Schroer was well-qualified for the position, boasting relevant academic experience along with 25 years in the military as a member of the Special Forces. Conflict arose when Schroer disclosed that she would be undergoing gender reassignment surgery to complete her transition to a fully female identity.[50]

When Schroer first interviewed, she had done so under her legal name at the time, "David Schroer," while still maintaining a masculine appearance. Following the interview process, she was offered a position, scoring higher than any of the other prospective applicants. Upon receiving the offer, Schroer disclosed her transsexual status, explaining that she would be assuming a permanent, outward female appearance following her upcoming surgery.[52] Charlotte Preece, a staff member of the Library of Congress, responded, "Why in the world would you want to do that?" She goes on to inform Schroer that this information was "a lot to think about."[53] After the exchange, Schroer's offer was rescinded, as Preece explained that, "based on [their] conversation," Schroer was "not a good fit."[54] The position was soon assumed by the next highest-scoring candidate interviewed. Since 2005, Diane Schroer has lived as woman, legally changing her identification documents to reflect her name and

gender transition.[55] In reviewing the facts, the D.C. District Court approached two questions.[56] First, did the Library of Congress discriminate on the basis of transsexual status in choosing to not hire Diane Schroer? Second, does such discrimination on the basis of transsexual identity violate Title VII?

The Library of Congress argued several "non-discriminatory" reasons in defense of its refusal to hire Schroer unrelated to her newly discovered transsexual status. These included concerns over her ability to receive "a timely security clearance," her overall trustworthiness, her ability to focus while undergoing such a significant transition, and her inability to benefit from previously established military contacts due to her new physical identity.[57] The Library of Congress' concerns of security clearance, trustworthiness, and lack of focus were all deemed "pretextual" by Judge Robertson in that they were actually concerned primarily with Schroer's status as a transsexual.[58] Concerns about Schroer's ability to retain her military contacts were discerned to be "facially discriminatory," as "deference to the real or presumed biases of others is discrimination, no less than if an employer acts on behalf of his own prejudices."[59]

Regarding Title VII's coverage of transsexual individuals, the court ruled based on two independent theories affirming such protections.[60] The first of said theories involved the notion of illegal sex-stereotyping, a doctrine established in Price Waterhouse.[61] Preece admitted her concern that Schroer did not look "feminine enough" upon seeing pictures of her post-operative appearance, claiming that Schroer appeared as "a man dressed as a woman."[62] While the argument could be made that Schroer's sex change was accepted by Preece, as a woman, Schroer did not live up to the physical expectations of the female sex. The sort of punishment for gender non-conformity in the workplace seen in this case is in clear violation of Title VII.[63] Gender non-conformity is a defining aspect of transsexualism, thus potential discrimination may be prohibited outright by this established jurisprudence.[64] However, the court

looked past gender stereotyping, stating that there were grounds that Schroer was a victim of explicit sex discrimination.[65] Due to the nature of Schroer's operation, which involved the conversion from one sex to the other, the Library of Congress was deemed to have made an employment decision explicitly "because of … sex." The subsequent portion of Judge Robertson's ruling broke new ground, as no other federal court had ruled in such a manner on the same issue.[66]

Robertson drew an effective analogy explaining how transgender is not a "new category" as many would argue. If an employer discriminated against an employee who had converted from Christianity to Islam, bias against only "converts" would be a "clear case of discrimination 'because of religion'" under Title VII. This same notion can be applied in parallel to sex and gender as well, meaning protections for "converts from male to female" from Title VII.[67]

The D.C. District Court applied precedent in ways other courts failed to.[68] Judge Robertson's reasoning is thus especially noteworthy in its analysis of entrenched sex and gender stereotypes, deeming them detrimental to women as well as gender non-conforming individuals. More recently, a decision was made providing further signs of progress as is demonstrated by its influence on the Attorney General's assent.

C. The EEOC: Macy v. Holder

In Macy v. Holder, the subject of transgender discrimination coverage was once again questioned.[69] In 2010, Mia Macy, at the time still presenting as a man, began pursuing a position in a crime laboratory with the Federal Bureau of Alcohol, Tobacco, Firearms and Explosives.[70] Through the beginning of 2011, Macy retained contact with the director of the office, having been told she would receive the position without issue once they completed a background check. Shortly after Macy informed the office that she was in the process of transitioning from male to female, she received an e-mail from the firm that the position was no longer available due to federal budget

restrictions.[71]

Macy contacted an EEO counselor with her suspicions that the position was withheld from her due to her sex transition. In fact, the lab had not cut the position, but instead hired someone else.[72] In June 2011, Macy proceeded to file a formal discrimination complaint against her prospective employer. On the form, Macy described the claim as being on the basis of "sex, gender identity (transgender woman) and… sex stereotyping."[73] It is vital to understand what Macy wrote on her claim, because the information leads to two separate means of recourse for discrimination on federal government applicants.[74]

As the EEOC described it, the DOJ has "one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees."[75] Macy was notified that her transgender discrimination claim would thus not be processed under Title VII and the relevant EEOC procedures. Unfortunately for Macy, the "separate system" for complaints based on gender identity provided fewer rights and did not grant the complainant power to have the case heard before an EEOC administrative judge. This system relies on the distinct segregation of "sex" and "gender," and the primary question of the case was whether or not Macy was subject to "sex discrimination" or "gender identity discrimination."[76] Macy relied on the question of whether a transgender discrimination qualifies as sex discrimination under Title VII. This distinction alone would guide the strength by which her claim was processed.[77]

According to the EEOC, the sex discrimination protocols do apply to claims of gender identity discrimination.[78] Thus, the separation of Macy's situation into two separate claims was faulty, as both sex and gender are aspects of sex discrimination. The precedent of Price Waterhouse supports the conclusion that Title VII's "because of … sex" clause should be interpreted as discrimination on the basis of sex and gender, biological differences, and the differences in so-

cial expectation attached to those biological differences.[79] Upon the same precepts, employers are not allowed to "make gender-based evaluations." Accordingly, the same evaluation would be made on the basis of transgender status: "Whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person."[80]

Elaborating on this point, the EEOC concluded that transgender-based discrimination is always unlawful, whether it involves gender-stereotyping or sex-stereotyping.[81] The idea of sex-stereotyping ruled unlawful by Price Waterhouse is only "one means of proving sex discrimination," not a separate action under Title VII "because of … sex."[82] Both gender and sex stereotyping are means of proof to demonstrate that an employer considered sex and gender identity to be of importance in making an employment decision, a certain violation of Title VII. The EEOC clinched the ruling by stating: "Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort."[83] As Judge Robertson noted in Schroer, transgender status is not some category distinct from sex and gender – it is simply a manifestation of it. There are no grounds for separating such claims into different systems.[84]

This is the ruling that motivated Holder in his December 2014 memo, and as the order stems from the EEOC, the agency tasked with enforcing and implementing Title VII, it was a decisive moment towards equal protection for transgender individuals based on sex and gender.[85] Although federal courts are not as bound to implementing the EEOC's ruling, the precedent outlined in this sec-

tion demonstrates a growingly inescapable reality – discrimination against transgender individuals is well within the scope of Title VII "because of … sex."[86]

IV. Stand-alone Legislation: A Separation of Equals

A. Dead-ends of ENDA

To date, efforts to enact specific federal legislation for the protection of transgender individuals from discrimination have been unsuccessful. Congress has long considered the Employment Non-Discrimination Act (ENDA), which would extend explicit protections similar to Title VII to individuals within the LGBT community.[87] Earlier bills covered both transgender and gay individuals, but the all-important "gender identity" clause was dropped in a last-minute compromise.[88] However, based on the promise of precedent that transgender is not a separate category from sex, perhaps Congress should rethink the notion of "stand-alone" legislation.[89]

The Equality Act of 1974 proposed the addition of sex, marital status, and sexual orientation as protected classes under the Civil Rights Act of 1964.[90] This bill was the first "gay rights" bill proposed at the federal level, and it never made it out of committee in the house. For the next two decades, civil rights amendments in the same vein were proposed continuously.[91] Although these amendments never made it far, they kept the subject on the table, slowly garnering support amongst legislators. In 1974 only 3 members of Congress (0, House; 3, Senate) voted in favor of the bill, while in 1991 the number increased to 126 (110, House; 16, Senate).[92]

The passage of the Americans with Disabilities Act in 1990 (ADA) demonstrated the potential success of a strategy focused on stand-alone legislation.[93] This shifted activists away from attempts to pass all-encompassing "omnibus civil rights bills" towards bite-sized pieces of legislation that would leave many individuals unprotected when taken alone.[94] ENDA entered the scene in the early 1990s, and since then, only two versions have made it out of con-

gress: ENDA 1995 and ENDA 2007.[95] Unfortunately, ENDA has since been weakened for the sake of political expediency. For most of its history, ENDA has been a trans-exclusive bill with no mention of "gender identity" under its protections.[96] In 2007, gender identity was added alongside "actual or perceived sexual orientation;" however, this amendment was short-lived, as it was once again dropped in favor of expediency.[97] As legal scholar William Sung eloquently describes the situation: the T in LGBT was once again left silent. The community was left split and more than happy to stay that way. Many of those who identified under the LGB prong were happy to make this incremental leap for protection.[98]

Perhaps, America was ready for "this" – sexual orientation protections – but not "that" – transgender protections. Oddly, by choosing to mention only sexual orientation and not identity as well, proponents of a trans-exclusive ENDA ignore the core of the "sex, gender, orientation" discrimination issue. Sexual orientation can be viewed as a deviation of expectations about gender identity and expression. By pinpointing only sexual orientation, proponents are simply tackling, in many ways, an overly specific subcategory.[99] This is the main fault of the act; however, it is not the only one, as outlined by Sung.[100]

All iterations of ENDA since 2009 have expansive religious exemptions, and unlike Title VII, in an especially problematic manner. Title VII states that religious organizations may discriminate on the basis of "religion, sex, or national origin" if such traits are Bona Fide Occupational Qualifications (BFOQ). ENDA, however, exempts "corporation, association, educational institution, or society that is exempt from the religious discrimination provision of Title VII." Without touching upon the justification of BFOQ, ENDA allows religious organizations to discriminate without restraint. Such organizations are thusly allowed to discriminate based on perceptions alone.[101]

Another flaw in ENDA is its prohibition of disparate impact

claims.[102] Under ENDA, claims cannot be based merely on "statistical disparities" between the number of transgender individuals in a particular workplace as opposed to the number of transgender individuals generally. This greatly restricts the avenues by which discriminated individuals may assert their claims. Disparate impact affects sex very clearly, and as the jurisprudence holds, transgender individuals are not excluded from the category of "sex."[103] This exclusion is dangerous because it allows employers to argue that "disparate impact" claims because sex are in fact "transgender" as expressly outlined in ENDA, rendering the claim invalid.

Furthermore, stand-alone legislations as a whole are bound by two considerations that make them ineffective if there is already established law and precedent on a matter, as with gender discrimination and Title VII.[104] First is a "lack of doctrinal development." ENDA would not have the rich body of jurisprudence for effective implementation of its provisions. The courts could very easily manipulate this new statute to conform to a political agenda, and that is if the legislature has not done so already.

A second fault of standalone legislation is its inherent vulnerability to legislative tinkering.[105] It segregates individuals with non-normative gender identities and expressions from the protections of Title VII. In such a vulnerable form of protection, lawmakers can push for further amendments and changes to the law with little to no consequence for other protected classes under Title VII.[106] This places transgender individuals in a more disadvantaged position and at the mercy of politics, not the logic established by the judiciary.

B. Disability: Discrimination, and its Many Prongs

The Americans with Disabilities Act certainly had a hand in inspiring support for ENDA, but disability anti-discrimination laws also have the potential for protecting transgender individuals. Although "gender dysphoria"[107] is no longer classified as a psychological disorder as of the last revision of the Diagnostic and Statistical Manual

of Mental Disorders (DSM), transgender individuals may still be impaired in ways which still constitute disability, by their own attitudes towards gender identification.[108]

Transgender encompasses a wide range of experiences, and anti-discrimination law should not ignore that. Some individuals describe "pain" and "discomfort" due to their gender identity – however, this is not to say that these individuals are the only "truly transgender" ones, while other are not (as was common when "gender dysphoria" was considered a psychological disorder). This acknowledges that there is indeed a wide spectrum of lived experience and reason to identify with a gender apart from one's biological sex.[109]

In fact, these differences in experience provide grounds for eligibility for disability protection, and state courts have already been granting protection for transgender individuals by means of state disability legislation.[110] The definition for disability under some state legislation often mirrors that of the ADA, except without explicit mention of transgender status, relying on three prongs: (1) "a person who has a physical or mental impairment that substantially limits one or more major life activities," (2) "a person who has a history or record of such an impairment," or (3) "a person who is perceived by others as having such an impairment."[111] This particular definition was expressly crafted without mention of specific disabilities to allow for the broadest protections as possible. Unfortunately, The ADA explicitly excludes transgender individuals.[112] At a federal scale, transgender individuals cannot gain access to protection on the basis of disability.[113] Primarily, this skews the general public's perceptions of disability towards the overly narrow, focused solely on traditional interpretations.[114]

Individuals who are in a post-operative state, necessitating medication or further treatment, should be able to access disability protections under both the first and second prongs, requiring accommodation due to the fact that they have just undergone sur-

gery, regardless of surgery having been for gender reassignment.[115] This poses the danger of employers falsely justifying discrimination based on disability – for example, an employer could discharge an employee because of the burdens caused by surgery, yet legitimately claim that, "in actuality," that individual was discharged because of transgender identity, explicitly excluded. Additionally, scholars have also provided strong evidence for the application of the third prong to situations where transgender individuals may face discrimination.[116]

The "regarded as" prong was implemented in order to combat stereotypical attitudes and ignorance surrounding impairment.[117] Certain cosmetic features, such as burn marks or scars, fall under the third prong of the ADA's definition of disability so as to prevent attitudes and perceptions that may in themselves be disabling to an individual. In itself, discrimination is disabling to an individual as "substantially [limiting] major life activities only as a result of the attitudes of others towards such impairment," an idea central to disability and its protections.[118] Transgender individuals can similarly draw upon these lens of discrimination from reaction of others, not that transgender status directly inhibits major life activities. Thus, the clause of exclusion in the ADA is particularly injurious for the movement for protection of transgender individuals. It should be removed from the law, if for any reason that it further perpetuates narrow interpretations for the category of disability as a whole.

V. Conclusion

The Civil Rights Act of 1964 is based upon the premise of equal protections for all individuals. No proposed piece of standalone legislation claims the same. Regardless of identity or expression, individuals can be victims of workplace discrimination and harassment. As the DOJ and EEOC align with one another in the interpretation of Title VII for the protection of transgender individuals, and courts at all levels begin reasoning the same, it is only a matter

of time before this interpretation is maintained as a de facto application of the "because of … sex" clause. Stand-alone legislation with the sole purpose of ensuring such protections, such as ENDA, would impede such momentum. The jurisprudence surrounding Title VII and proclamations of its application by federal agencies should remain unhindered by all means.

A Supreme Court ruling on the matter would put much of the opposition at ease, but in the meantime, change can also be affected through amendments in Title VII and the ADA. Crucially, the language of the ADA should be amended to remove the explicit exclusion of transgender status. There is no harm in allowing multiple avenues for protection of transgender individuals especially in regards to topics as personal as sex and gender. In fact, having multiple, established bodies of valid legislation can help illuminate the realities each situation entails. If an individual is experiencing discrimination based on supposed disability, he or she should be able to access protection as such. The ADA's explicit prohibitions of transgendered protections should be reexamined since, although state-level remedies may be effective, the scope of such protections are lacking. It is important that these protections be approached from a federal lens. The United States must enact federal legislation so all workers may be ensured protection, even those working in small business and state government. Critics who point to corporate-based protections fail to recognize those left without protection in a broader sense.

I recommend, however, that the fullest path to protection lies in amending Title VII to include "gender identity" and "gender expression" to further clarify the rulings of the courts. Legal scholars, such as William Sung, have argued for this expanded language under Title VII. This move would not conflict with the dealings of the courts – in fact, the amendment would work with the established framework exceedingly well. The established jurisprudence holds that gender is a key aspect of "sex discrimination," and that there is

precedent in the Pregnancy Discrimination Act of 1978 for amending the language of Title VII, itself, to reflect such realities.[119]

This Act's purpose was to "amend Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy," ultimately adding the language of pregnancy directly into "because of … sex."[120] Thus, Congress can more easily envision and model an Act which similarly "prohibits sex discrimination on the basis of" gender identity and gender expression. When pregnancy discrimination is not a disparate category from sex discrimination, it is only stranger that gender discrimination has not already accepted as such. In such a legislative climate, these amendments can only help to bolster such rulings, and it is imperative that the government do so.

Under what circumstances would it truly be justified to discriminate against an individual based on prejudiced assumptions? When it comes down to it, this is not a fight for "transgender rights" or "gay rights." Politics do not need to have a say in the prevention of discrimination in any form. It is in the spirit of "human rights" that Title VII infallibly codifies protections – protection from hateful discrimination, a bare minimum that must be ensured.

1 Eric Holder. "Attorney General Holder Directs Department to Include Gender Identity and Sex Discrimination Claims." Department of Justice. December 18, 2014. Accessed April 8, 2015. http://www.justice.gov/opa/pr/attorney-general-holder-directs-department-include-gender-identity-under-sex-discrimination

2 Ibid.

3 Ed Whelan, "Eric Holder's Transgendered Mutilation of Title VII." National Review Online. December 19, 2014. Accessed April 12, 2015. http://www.nationalreview.com/bench-memos/395084/eric-holders-transgendered-mutilation-title-vii-ed-whelan

4 Civil Rights Act of 1964 § 7, 42 U.S.C. § 2000e et seq (1964).

5 William Sung, "Taking The Fight Back To Title VII: A Case For Redefining 'Because of Sex' To Include Gender Stereotypes, Sexual Orientation, and Gender Identity," Southern California Law Review 84, no. 487 (2010-2011): 537.

Jillian Weiss. "Transgender Identity, Textualism, and the Supreme Court: What is the 'Plain Meaning' of 'Sex' in Title VII of the Civil Rights Act of 1964?."Temple Political & Civil Rights Law Review 18, no. 573 (2009): 574-578.

6 Transgender has come to delineate an umbrella of gender identities. Non-operative transgender individuals are those living a sex role different from that assigned at birth, but without medical or surgical intervention, retaining their original anatomy. Non-operative transgender individuals express themselves as the opposite sex through dress, grooming, and voice. Operative transgender (or transsexual) individuals, on the other hand, utilize medical and surgical intervention to achieve sex reassignment, altering their physical anatomy to match that of a sex different from that assigned at birth.

6 Weiss, Transgendered Identity, 597.

7 Ibid., 599.

8 Ibid., 599-600.

9 Ibid., 596.

10 Ibid., 595.
11 Anthony Varona and Jeffrey Monks, "Engendering Equality: Seeking Relief Under Title VII Against
Employment Discrimination Based on Sexual Orientation." William & Mary Journal of Women & Law 7, no. 67 (2000): 70-72.
12 Weiss, Transgendered Identity, 589.
13 Ibid., 598.
14 Mary Anne Case, "Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence," Yale Law Journal 105, no. 1 (1995): 9-12.
15 Ibid., 10.
16 Ibid.
17 Ibid.
18 Ibid., 11.
19 Weiss, Transgendered Identity, 594-596.
20 Ibid., 594.
21 Ibid.
22 Ibid., 597.
23 Ibid., 591.
24 Ibid.
25 Sung, Taking the Fight Back To Title VII, 527-533.
26 "Sexual orientation" completes the interdependent aspects of human sex-based identification. Biological sex and gender identity can be examined separately from sexual orientation; however, once again this notion is deeply rooted with the interactions between sex and gender. Sexual orientation is bound to human anatomy and genitalia. Sexual orientation is largely distinguished by an individual's attraction to male or female, an attraction which can be emotional and/or erotic. Legislation which protects individuals from discrimination on these grounds refer to "sexual orientation" explicitly for these reasons. Sexual orientation cannot be construed from "because of… sex" as easily as gender identity.
27 Paisley Currah, Richard M. Juang, and Shannon Price Minter.

Transgender Rights. (Minneapolis: The University of Minnesota Press, 2006), 3-4.
28 Currah, Juang, and Minter, Transgender Rights, 96-97.
29 Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)
30 Ibid.
31 Ibid.
32 Ibid.
33 Ibid.
34 Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998)
35 Ibid.
36 Ibid.
37 Ibid.
38 Ibid.
39 Ibid.
40 Ibid.
41 Ibid.
42 Case, Disaggregating Gender, 37-38.
43 Sung, Taking the Fight Back To Title VII, 529-531.
44 Ibid., 530.
45 Ibid., 529.
46 Schroer v. Billington, 577 F. Supp. 2d 293 - Dist. Court, Dist. of Columbia (2008)
47 Ibid.
48 Ibid.
49 Ibid.
50 Ibid.
51 Ibid.
52 Ibid.
53 Ibid.
54 Ibid.
55 Ibid.
56 Ibid.
57 Ibid.

58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid.
62 Ibid.
63 Ibid.
64 Ibid.
65 Ibid.
66 Ibid.
67 Mia Macy v. Eric Holder, Attorney General, Department of Justice, EEOC Appeal No. 0120120821 (December 9, 2011).
68 Ibid.
69 Ibid.
70 Ibid.
71 Ibid.
72 Ibid.
73 Ibid.
74 Ibid.
75 Ibid.
76 Ibid.
77 Ibid.
78 Ibid.
79 Ibid.
80 Ibid.
81 Ibid.
82 Schroer v. Billington, 577 F. Supp. 2d 293 - Dist. Court, Dist. of Columbia (2008)
83 Holder, "Attorney General Holder."
84 Sung, Taking the Fight Back To Title VII, 537-538.
85 Ibid, 495.
86 Ibid., 501.
87 Ibid., 503-504.
88 Ibid., 495-496.

89 Ibid., 497-501.
90 Ibid. 497.
91 Ibid.
92 Ibid.
93 Ibid., 497-498.
94 Ibid., 501.
95 Ibid., 502.
96 Ibid., 502.
97 Ibid., 507.
98 Ibid., 508.
99 Ibid., 508-509.
100 Ibid., 510-511.
101 Ibid.
102 Ibid., 511-512.
103 Ibid., 513.
104 Ibid.
105 "For a person to be diagnosed with gender dysphoria, there must be a marked difference between the individual's expressed/experienced gender and the gender others would assign him or her, and it must continue for at least six months. In children, the desire to be of the other gender must be present and verbalized. This condition causes clinically significant distress or impairment in social, occupational, or other important areas of functioning. Gender dysphoria is manifested in a variety of ways, including strong desires to be treated as the other gender or to be rid of one's sex characteristics, or a strong conviction that one has feelings and reactions typical of the other gender. The DSM-5 diagnosis adds a post-transition specifier for people who are living full-time as the desired gender (with or without legal sanction of the gender change). This ensures treatment access for individuals who continue to undergo hormone therapy, related surgery, or psychotherapy or counseling to support their gender transition." (Diagnostic and Statistical Manual for Mental Disorders 5. American Psychiatric

Association. 2013. P. 454.)
106 Currah, Juang, and Minter, Transgender Rights, 75.
107 Ibid., 80.
108 Ibid., 89-90.
109 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 328 (1990).
110 Ibid.
111 Currah, Juang, and Minter, Transgender Rights, 77.
112 Ibid.
113 Ibid., 83.
114 Ibid., 87-88.
115 Ibid., 89.
116 Ibid.
117 Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000(e) et seq.

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