UNLACING THE GOLDEN BOOTSTRAPS: LEGISLATING AWAY LEGACY AND DONOR PREFERENCES IN COLLEGE ADMISSIONS

Abstract: Many colleges and universities in America give admissions preferences to the children of alumni and relatives of donors. This practice helps colleges raise funds and cultivate a strong alumni network but results in drastic inequality in the admissions process for applicants without such connections. The pending Merit-based Educational Reforms and Institutional Transparency Act (MERIT Act) seeks to end legacy and donor preferences at all private universities receiving federal funding. Because the vast majority of private colleges accept federal funding, this legislation has the potential to be incredibly impactful in the college admissions process. To combat such legislation, the affected private colleges and universities may be able to raise First Amendment and Spending Clause challenges. A private college could argue that it is an expressive association entitled to First Amendment protection, and that setting funding conditions that alter its admissions practices unduly burdens its First Amendment rights. A college could also argue that a ban on legacy and donor preferences places an unconstitutional condition on it, which entirely limits its ability to pursue its mission as an institution. Finally, a college can argue that conditioning all existing federal student loan money on ending legacy and donor preferences is outside Congress's Spending Clause power because too much money is at stake and the conditions further a policy goal not originally contemplated by the colleges. This Note discusses and assesses each of these First Amendment and Spending Clause challenges a college could raise. Further, this Note argues that there are strong political reasons for Congress to pass the MERIT Act, and that, with careful drafting, Congress can pass such legislation in a way that survives First Amendment and Spending Clause challenges.

INTRODUCTION

"We hold these truths to be self-evident, that all men are created equal . . . ."[1] That is the promise of the American dream.[2] For the millions of American teenagers that apply to college every year, this dream is not entirely attainable.[3]

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[1] THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[2] *See* Sarah Churchwell, *A Brief History of the American Dream*, GEORGE W. BUSH PRESIDENTIAL CTR. (2021), https://www.bushcenter.org/catalyst/state-of-the-american-dream/churchwell-history-of-the-american-dream [https://perma.cc/93B6-JYXG] (quoting the Declaration of Independence and introducing the core principles of the modern American dream).

[3] *See* Peter Arcidiacono, Josh Kinsler & Tyler Ransom, *Legacy and Athlete Preferences at Harvard* 1, 11–12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 26316, 2019) (detailing the prefer-

Higher education is a powerful equalizer and differentiator.[4] Education provides students with the opportunity to succeed in their personal and professional lives.[5] Admissions processes should be fair, but the admissions processes at most colleges and universities today are anything but that.[6]

Take Harvard as an example: Children of alumni and donors are about ten times more likely to be offered admission at Harvard than applicants without such a connection.[7] This disparity cannot be explained away with an argument that legacy and donor applicants are generally more academically qualified.[8] When comparing only applicants with similar academic credentials near the upper echelon, legacy and donor applicants are still five times more likely to be admitted than non-legacy or non-donor applicants.[9]

The debate over admissions practices extends to the policy of affirmative action in college admissions.[10] Some saw affirmative action as making the ad-

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ences that legacy applicants receive at Harvard University); ELYSE ARMSTRONG ET AL., COMMON APPLICATION, DEADLINE UPDATES, 2024–2025: FIRST-YEAR APPLICATION TRENDS THROUGH MARCH 1, at 3–4 (2025), https://www.commonapp.org/files/DAR/deadline-updates/Common-App-Deadline-Updates-2025-03-13.pdf [https://perma.cc/R9EF-R63J] (detailing trends in applications to college for past four years and noting that almost 1.4 million high school students applied to college for admission in Fall 2025, marking a four percent increase from the prior year).

[4] *See* Roslin Growe & Paula S. Montgomery, *Educational Equity in America: Is Education the Great Equalizer?*, 25 PRO. EDUCATOR 23, 23 (2003) (discussing the importance of education to create equal opportunity).

[5] *See id.* at 23, 25 (explaining that education can lift people out of poverty by offering an opportunity for a better career).

[6] *See, e.g.*, Arcidiacono et al., *supra* note 3, at 7–12 (detailing the process of admissions at Harvard University, including many stages of review, scoring based on a variety of categories, and alternative review criteria for legacy and donor applicants).

[7] *See* Shaun Harper, *Legacy Admissions at Harvard and Other Elite Institutions Advantage White Applicants, New Evidence Shows*, FORBES (July 5, 2023), https://www.forbes.com/sites/shaunharper/2023/07/05/legacy-admissions-at-harvard-and-other-elite-institutions-privilege-white-applicants-new-evidence-reveals/?sh=25374979593b [https://perma.cc/3ENM-DL48] (explaining the drastic advantage legacy and donor applicants have in the college admissions process).

[8] *See* Arcidiacono et al., *supra* note 3, at 41 (detailing admissions data for students with legacy and donor backgrounds versus students without those connections). For example, when controlling for academic performance among applicants, legacy and donor applicants are five times more likely to be admitted than non-legacy and non-donor applicants. *Id.*

[9] *See id.* (showing that legacy and donor applicants had a 49% acceptance rate compared to the normal 10% acceptance rate when academic performance was neutralized to the second (out of five total) tier of grades and test scores out of five total tiers). This trend holds true among thirty of the nation's most elite colleges and universities as well. *See* Michael Hurwitz, *The Impact of Legacy Status on Undergraduate Admissions at Elite Colleges and Universities*, 30 ECON. EDUC. REV. 480, 480, 490 (2011) (showing that legacy applicants are 15.5 times more likely to be admitted in early decision and 5.5 times more likely to be admitted in regular decision that non-legacy applicants). When academic performance is neutralized at these thirty schools, legacy applicants are still 10.9 times more likely to be admitted than non-legacy applicants. Arcidiacono et al., *supra* note 3, at 42.

[10] *See* PEW RSCH. CTR., MORE AMERICANS DISAPPROVE THAN APPROVE OF COLLEGES CONSIDERING RACE, ETHNICITY IN ADMISSIONS DECISIONS 4 (2023), https://www.pewresearch.org/wp-content/uploads/sites/20/2023/06/PP_2023.06.08_college-admissions_REPORT.pdf [https://perma.cc/

missions process fairer, while others viewed it as yet another source of inequality that excluded the most qualified applicants from opportunities.[11] In 2023, in *Students for Fair Admission v. Harvard*, the U.S. Supreme Court declared affirmative action to be unconstitutional.[12] Shortly after, momentum gathered to tackle the inequalities that arise from legacy and donor preferences in admissions.[13]

Members of Congress have debated legacy and donor preferences for decades.[14] In 2023, Senators Tim Kaine (D-VA) and Todd Young (R-IN) introduced the Merit-based Educational Reforms and Institutional Transparency Act (MERIT Act).[15] The MERIT Act would ban legacy and donor preferences at private universities that accept federal funding.[16] If passed, the bill could make college admissions fairer.[17]

In recent years, states have begun passing legislation to ban legacy and donor preferences in college admissions.[18] By the end of 2024, five states had passed different bans on legacy and donor preferences—California, Colorado, Virginia, Maryland, and Illinois.[19] Additionally, similar legislation is pending in other states.[20] Enacted state legislation prevents public universities in that state from giving preferential treatment to legacy and donor college appli-

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GM98-7HT5] (providing data on public opinion surrounding affirmative action prior to the U.S. Supreme Court ruling in 2023).

[11] *See id*. (detailing a divided American public's views on affirmative action).

[12] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (declaring affirmative action practices in college admissions unconstitutional).

[13] *See* Niha Masih, *The Tradition of 'Legacy' College Admissions Is Under Fire. Here's Why.*, WASH. POST (July 28, 2023), https://www.washingtonpost.com/education/2023/07/28/legacy-admissions-explained-harvard-lawsuit/ [https://perma.cc/DT5B-98EZ] (covering the sharp increase in debate over legacy admissions following the Supreme Court's 2023 decision on affirmative action).

[14] *See* Nina H. Pasquini, *Bob Dole, the Department of Education, and the Nebulous Fight Against Legacy Admissions*, HARV. CRIMSON, https://www.thecrimson.com/article/2018/10/18/legacy-admissions/ [https://perma.cc/3HMX-RLD2] (Oct. 18, 2018) (telling the story of debate over legacy admissions within the federal government in the 1990s and early 2000s).

[15] Merit-based Educational Reforms and Institutional Transparency Act (MERIT Act), S. 3232, 118th Cong. (2023).

[16] *See* Press Release, Tim Kaine, U.S. Senate, Young, Kaine Introduce Bill to End Legacy Admissions (Nov. 7, 2023), https://www.kaine.senate.gov/press-releases/young-kaine-introduce-bill-to-end-legacy-admissions [https://perma.cc/KUZ9-6E73] (explaining the framework of the proposed MERIT Act).

[17] *See id.* (explaining how the MERIT Act would eliminate preferential treatment and create upward mobility for more applicants).

[18] *See* NAT'L CONF. OF STATE LEGISLATURES, NCSL RESEARCH REQUEST: LEGACY COLLEGE ADMISSIONS 1–2 (2024), *available at* https://calmatters.org/wp-content/uploads/2024/08/NCSL_LegacyAdmissions_August2024-1.pdf [https://perma.cc/C73L-T7VD] (Aug. 20, 2024) (providing a timeline of bills enacted in state legislatures to end legacy and donor preferences in college admissions in recent years).

[19] *Id.*

[20] *See id.* (detailing pending legislation in Minnesota, Massachusetts, New York, Connecticut, and Washington).

cants.[21] Some states also condition their grant funding to private colleges.[22] State legislation begins to address the issue of legacy and donor preferences, but federal legislation would be more effective because of the considerable federal money most colleges receive.[23]

Scholarship has focused on potential legal challenges to legacy and donor preferences under existing law, rather than through new legislation.[24] This Note argues that Congress may be able to pass legislation banning legacy and donor preferences in admissions without violating the First Amendment or the Spending Clause.[25]

Part I of this Note examines Harvard's current admission procedures as well as the admissions statistics surrounding legacy and donor preferences.[26] It also explains the current legal challenges to legacy and donor preferences and the legal framework necessary to analyze the constitutionality of banning legacy and donor preferences in college admissions.[27] Part II discusses different interpretations of the First Amendment and the Spending Clause, and how a court might apply these doctrines to a ban on legacy and donor preferences.[28] Part III argues that there are strong political reasons for passing the MERIT Act, and that carefully drafted legislation could successfully ban legacy and

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[21] *See id.* (explaining that Colorado, Maryland, Virginia, and Illinois have enacted laws conditioning their public universities on eliminating legacy and donor preferences in college admissions).

[22] *See id.* (providing that Maryland and Colorado also condition private colleges that receive state funding). Other states take a different approach as well. *Id.* California, for example, forces all public and private colleges in the state to disclose whether they give preferential treatment to legacy or donor applicants. *Id.* If a school is noncompliant, its name is placed on the California Department of Justice website for a year as a noncompliant college. *Id.* California recently passed another bill directing the legislature to enact further legislation to stop legacy and donor preferences in California colleges. *Id.*; Act of Sept. 30, 2024, ch. 1006, 2024 Cal. Legis. Serv. (West) (codified at CAL. EDUC. CODE § 66018.4 (West 2025)).

[23] *See About Us*, FED. STUDENT AID, https://studentaid.gov/about [https://perma.cc/DA2L-743D?type=image] (providing that the federal government allocates over $120 billion every year to federal student loans to public and private colleges and universities).

[24] *See* Carlton F.W. Larson, *Titles of Nobility, Hereditary Privilege, and the Unconstitutionality of Legacy Preferences in Public School Admissions*, 84 WASH. U.L. REV. 1375, 1375 (2006) (arguing that legacy preferences violate the Nobility Clause of the Constitution); Kathryn Ladewski, Note, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577, 577 (2010) (arguing that legacy preferences violate the Civil Rights Act of 1964 because they result in a disparate racial impact on admissions); Recent Complaint, *Title VI—College Admissions—Community Groups Argue Harvard's Legacy and Donor Admissions Policy Is Illegal Race Discrimination*, 137 HARV. L. REV. 1272, 1272 (2024) (examining the current Title VI disparate impact complaint submitted by the Chica Project to the Department of Education).

[25] *See infra* notes 30–307 and accompanying text.

[26] *See infra* notes 64–93 and accompanying text.

[27] *See infra* notes 30–63, 94–104 and accompanying text.

[28] *See infra* notes 105–253 and accompanying text.

donor preferences at colleges and universities that accept federal funding despite potential legal challenges.[29]

I. BACKGROUND ON THE FACTUAL AND LEGAL ISSUES

The practice of legacy and donor preferences in colleges admissions has raised political and legal questions in America for decades.[30] A minority of colleges and universities have voluntarily ended legacy preferences.[31]

Section A of this Part explains how public and private colleges are regulated differently by the Constitution and Congress.[32] Section B discusses the U.S. Supreme Court case that ended the practice of affirmative action in institutions of higher education in 2023.[33] Section C outlines the MERIT Act—legislation introduced in Congress during the 118th Congress targeted at ending legacy and donor preferences in college admissions.[34] Section D details the college admissions process at Harvard University through data.[35] Section E explains the existing lawsuit that targets legacy and donor admissions preferences at colleges in the United States.[36]

A. Public and Private Colleges Receive Federal Funding Differently

Both public and private universities give preferential treatment to legacy and donor applicants.[37] Although public and private universities both receive federal funding, they do so in different ways.[38]

The government directly funds public universities, which makes them public actors.[39] Public colleges and universities must adhere to the same con-

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[29] *See infra* notes 254–307 and accompanying text.

[30] *See* Pasquini, *supra* note 14 (suggesting that legacy and donor preferences have sparked political debate for decades).

[31] *See* Jeannie Suk Gersen, *The End of Legacy Admissions Could Transform College Access*, NEW YORKER (Aug. 8, 2023), https://www.newyorker.com/news/daily-comment/the-end-of-legacy-admissions-could-transform-college-access [https://perma.cc/HBX5-E547] (explaining that over one hundred colleges have ended the practice of legacy preferences in admissions).

[32] *See infra* notes 37–52 and accompanying text.

[33] *See infra* notes 53–56 and accompanying text.

[34] *See infra* notes 57–63 and accompanying text.

[35] *See infra* notes 64–93 and accompanying text.

[36] *See infra* notes 94–104 and accompanying text.

[37] *See* Suk Gersen, *supra* note 31 (explaining the history of legacy and donor preferences, and how the practice is under public scrutiny following the U.S. Supreme Court's ruling on affirmative action).

[38] *Compare* Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2018), https://www.forbes.com/sites/richardvedder/2018/04/08/there-are-really-almost-no-truly-private-universities/?sh=1857178557bc [https://perma.cc/LFW6-M86H] (explaining that private universities and public universities receive federal funding), *with* AM. ACAD. ARTS & SCIS., PUBLIC RESEARCH UNIVERSITIES: UNDERSTANDING THE FINANCIAL MODEL 4–9 (2016), https://www.amacad.org/sites/default/files/publication/downloads/PublicResearchUniv_FinancialModel.pdf [https://perma.cc/R66X-WNV9] (explaining how public universities are funded).

stitutional standards that other government actors are held to.[40] Therefore, federal and state governments have latitude to ensure that public colleges and universities comply with the demands of the Constitution.[41]

The government has a tougher time regulating the conduct of private universities.[42] Private universities are not government actors and are not held to the same constitutional standards as public universities.[43] For example, the Constitution does not require private universities to provide their students with free speech.[44] So, in order for the federal government to regulate the conduct of private colleges and universities, Congress must do so through legislation.[45]

Two of Congress's main sources of power are the Commerce Clause and the Spending Clause.[46] The Commerce Clause allows Congress to directly regulate commodities, instrumentalities, and channels of interstate commerce as well as activities that are commercial or economic in nature.[47] The Spending Clause allows Congress to impose conditions on the receipt of federal funding if done in pursuit of "the general welfare," if the conditions have a close nexus to the purpose of the funding, and if the conditions are clear and not in violation of the recipient's constitutional rights.[48]

The requirement that conditions do not violate the constitutional rights of the recipient prevents federal funding conditions that are legally coercive.[49]

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[39] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2156–57, 2175–76 (2023) (implying that public colleges are public actors by holding University of North Carolina at Chapel Hill (UNC Chapel Hill) to the demands of the Equal Protection Clause); *id.* at 2218 (Gorsuch, J., concurring) ("Title VI and the Equal Protection Clause mean the same thing . . . . As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment."); Vedder, *supra* note 38 (explaining that public universities are public actors and must follow the requirements of the Constitution because they are created by either the federal or state governments).

[40] *See Students for Fair Admissions*, 143 S. Ct. at 2149 (explaining that the Equal Protection Clause applies to public colleges).

[41] *See id*. (explaining that racial discrimination in public education is unconstitutional).

[42] *See* Vedder, *supra* note 38 (suggesting implicitly that the federal government can condition the funding it gives to private universities, but not to the same extent as it can with public universities).

[43] *See Campus Free Speech Guide: The Basics*, PEN AM., https://campusfreespeechguide.pen.org/the-law/the-basics/ [https://perma.cc/R5DZ-8X2P] (explaining that private schools are not subject to the First Amendment).

[44] *Id.*

[45] *See* U.S. CONST. art. I, § 1 (introducing the legislative powers of Congress and suggesting that, by stating all legislative powers "herein provided," Congress's power to legislate is limited).

[46] *See id.* art. I, § 8, cl. 3 (the Commerce Clause); *id.* art. I, § 8, cl. 1 (the Spending Clause).

[47] *See id.* art. I, § 8, cl. 3 (the Commerce Clause); Gonzalez v. Raich, 545 U.S. 1, 29 (2005) (providing that, under the Commerce Clause, the government can only regulate commercial or economic activity).

[48] *See* U.S. CONST. art. I, § 8, cl. 1 (the Spending Clause); South Dakota v. Dole, 483 U.S. 203, 206–08 (1987) (explaining that conditions on federal funding must have a nexus with the spending, the conditions cannot be an entirely new policy, and the amount of funding cannot be coercive).

[49] *See Dole*, 483 U.S. at 211 (holding that Spending Clause conditions may not be so coercive as to compel the recipient to accept the funds); Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49

Factors that determine whether conditions are legally coercive include the amount of money at stake, whether the money is already expected to be received, and whether a new condition forces the recipient to make a policy choice that is different from the policy originally accepted as a condition of funding.[50]

The Spending Clause and the Commerce Clause are two primary ways Congress can influence the behavior of private colleges and universities.[51] The remainder of this Note focuses on private colleges and universities, and how Congress may regulate their conduct.[52]

B. SCOTUS' Affirmative Action Ruling

In June 2023, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the Supreme Court held that it was a violation of the Equal Protection Clause and Title VI of the Civil Rights Act of 1964 (Title VI) for both public and private colleges and universities to use race as a factor in the admissions process.[53] As a result, affirmative action is no longer permitted at public colleges or private colleges subject to Title VI.[54] This ruling sparked heated social and political discourse.[55] Although the Court did not address the right to association, the *Students for Fair Admissions* ruling may indicate limits on the First Amendment right to association for colleges and universities.[56]

(2001) (holding that Spending Clause conditions may not coerce a recipient to give up their constitutional rights).

[50] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580–82 (2012) (outlining situations that may make Spending Clause conditions unconstitutionally coercive).

[51] *See* U.S. CONST. art. I, § 8, cl. 3 (the Commerce Clause); *id.* art. I, § 8, cl. 1 (the Spending Clause).

[52] *See infra* notes 53–307 and accompanying text.

[53] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2149, 2175–76 (2023) (holding that giving preferential treatment on the basis of race in college admissions to further a goal of diversity violates the Equal Protection Clause and Title VI).

[54] *See id.* (ending the use of race as a consideration in college admissions).

[55] *See, e.g.*, Mike Lillis & Mychael Schnell, *Affirmative Action Ruling Sharply Divides Dems, GOP*, THE HILL (June 29, 2023), https://thehill.com/homenews/house/4073932-affirmative-action-ruling-sharply-divides-dems-gop/ [https://perma.cc/2SKE-KTB3] (detailing the sharp political divide created in the wake of the Supreme Court's decision to end affirmative action).

[56] *See Students for Fair Admissions*, 143 S. Ct. at 2149, 2175–76 (implying that Congress's ability to limit admissions practices through legislation may not violate the schools' First Amendment rights). Although, in 2023, in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, the Supreme Court did not weigh in on this issue, it is worth noting that colleges and universities may not hold the same rights to association as other types of expressive associations. *See id.* (omitting any consideration of expressive association when evaluating admissions practices).

C. The MERIT Act

On November 7, 2023, Senators Tim Kaine (D-VA) and Todd Young (R-IN) introduced the MERIT Act in the Senate Health, Education, Labor and Pensions Committee.[57] The MERIT Act seeks to end the practice of preferential admissions for legacy and donor applicants at private colleges and universities receiving federal funding.[58] The MERIT Act would prohibit private universities from accepting federal student loans if they gave preferences to legacy and donor applicants in the admissions process.[59] Specifically, the MERIT Act would modify the Higher Education Act by adding an additional requirement to the accreditation process.[60]

Accreditation, a process spelled out in the Higher Education Act, recognizes institutions that maintain a certain level of educational quality.[61] This quality-assurance system measures curricula, facilities, student support services, and admissions practices, among other metrics.[62] Importantly, only accredited colleges and universities are eligible for funding from the federal government.[63]

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[57] *See* Press Release, Tim Kaine, *supra* note 16.

[58] *See id.* (seeking "to end the practice of colleges and universities giving 'preferential treatment' in the admissions process based on an applicant's relationship to alumni or donors of the deciding institution"); MERIT Act, S. 3232, 118th Cong. (2023).

[59] *See* Press Release, Tim Kaine, *supra* note 16 (noting that accreditation would require that no legacy or donor preferences are given in admissions).

[60] *Id.*; MERIT Act, S. 3232, 118th Cong. (2023).

[61] *See Overview of Accreditation in the United States*, U.S. DEP'T OF EDUC. (Jan. 14, 2025), https://www2.ed.gov/admins/finaid/accred/accreditation.html [https://perma.cc/77TQ-FL7H] (explaining the broad purpose of accreditation, some of the factors that go into the decision to grant accreditation to an institution, and what it means when a college is accredited); 20 U.S.C. § 1099b (creating the statutory authority for college accreditation and laying out the factors that must be considered by the Department of Education for college accreditation).

[62] *See* 20 U.S.C. § 1099b(a)(5) (listing the broad categories of requirements for accreditation).

[63] *See Overview of Accreditation in the United States*, *supra* note 61 (explaining that only accredited colleges are eligible to receive federal funding through student loans research grants and other sources). A large source of federal funding for private universities is the availability of federal student loans. *See When It Comes to Paying for College, Career School, or Graduate School, Federal Student Loans Can Offer Several Advantages Over Private Student Loans*, FED. STUDENT AID, https://studentaid.gov/understand-aid/types/loans/federal-vs-private [https://perma.cc/9BHF-NUKW] (explaining how federal student loans are administered). With federal student loans, the government functions much like a bank. *See id.* (explaining how the federal government lends money to student loan borrowers much like banks do for private loans). Students incur debt by borrowing from the government to pay for their educational expenses. *See id.* (explaining the debt structure of federal student loans). The proceeds from the loans are then paid by students to colleges and universities. *See id.* (providing that federal student loan money may be used to pay for college tuition). Although this appears to be federal funding to students and not colleges and universities, it is considered federal funding to universities because the universities receive the benefit of tuition and other expenses paid by students who would otherwise be unable to pay. *See Institutional Eligibility*, FED. STUDENT AID, https://fsapartners.ed.gov/knowledge-center/fsa-handbook/2020-2021/vol2/ch1-institutional-eligibility [https://perma.cc/3HL9-SHEJ] (June 5, 2022) (explaining that colleges must be accredited to be eligible to receive federal student loan money).

D. The College Admissions Process and Harvard's Admissions Data

College admissions processes are complex.[64] Each successful application must pass through many stages of consideration before a final decision is made.[65] This Note specifically examines Harvard University's admissions process because Harvard's admissions process was made public in the *Students for Fair Admissions* case.[66]

At Harvard University, applications are first split into different dockets, which are based on geography.[67] Each application is read by an admissions officer and scored in a number of categories.[68] These categories include academic success, extracurricular involvement, athletic involvement, and personal

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On March 21, 2025, President Donald Trump announced that all student loan portfolios would be immediately moved out of the Department of Education, and into other agencies including the Small Business Administration. *See* Erica L. Green, Karoun Demirjian & Alan Blinder, *Trump Cleaves Student Loan and Special Education Services from Education Dept.*, N.Y. TIMES (Mar. 21, 2025), https://www.nytimes.com/2025/03/21/us/politics/trump-education-department-student-loans.html [https://perma.cc/4T35-PJ7W] (reporting on President Trump's decision to move the $1.6 trillion student loan portfolio out of the Department of Education as a part of his broader effort to dismantle the Department of Education). The statutory language itself brings into question the decision's legality. *See* 20 U.S.C. § 1078 (operating as the statutory authority for all federal student loans and providing explicitly that the loans are "insured by the Secretary," meaning the Secretary of Education). *See generally* Dole v. United Steelworkers, 494 U.S. 26 (1990) (holding that courts should only defer to agency interpretations of law if, after the court exhausts all methods of statutory interpretation, a statute is deemed to be unambiguous). Additionally, the Higher Education Act, says clearly that "the Secretary shall" over eight hundred times, referring to the Secretary of Education. *See* Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219. "Secretary" is clearly defined in the Higher Education Act as the Secretary of Education. 20 U.S.C. § 1003(17). The Higher Education Act, at least at first glance, does not appear to allow the president to unilaterally move federal student loans—provided for under the Higher Education Act—out of the Secretary of Education's purview. *See generally Dole*, 494 U.S. 26 (holding that courts do not defer to agency interpretations of unambiguous statutes). This Note assumes student loans will continue to be administered by the Department of Education.

[64] *See* Arcidiacono et al., *supra* note 3, at 7–12 (explaining the complicated process that Harvard uses to assess applications).

[65] *Id.* Many schools have a multi-stage applicant review process. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2155–56 (2023) (providing an overview of the admissions process at UNC Chapel Hill).

[66] *See Students for Fair Admissions*, 143 S. Ct. at 2154–57 (outlining the, normally opaque, admission process at Harvard College).

[67] Arcidiacono et al., *supra* note 3, at 8. At UNC Chapel Hill, the applicant pool is divided into "in-state" and "out-of-state" for review. *See* Blake Weaver, *How Does Legacy Status Factor into UNC Admissions?*, DAILY TAR HEEL, https://www.dailytarheel.com/article/2019/02/legacies-in-admissions-0218 [https://perma.cc/PKQ5-YNVT] (Feb. 21, 2019) ("[T]here is no legacy preference for North Carolina applicants . . . . For out-of-state applicants, . . . legacy status is only one of many factors considered.").

[68] Arcidiacono et al., *supra* note 3, at 8–9. At UNC Chapel Hill, the admissions team considers factors such as academic success and difficulty, extracurriculars, standardized test scores, essay quality, and the student's background. *Students for Fair Admissions*, 143 S. Ct. at 2155–56.

qualities.[69] Additionally, letters of recommendation are added to an applicant's score.[70]

An applicant's status as a relative of an alumnus or someone who has donated to the university is not a factor in the scoring.[71] Nevertheless, the process by which an applicant is scored changes if the applicant is an athlete the university wants to recruit, the child of an alumnus (legacies), the relative of a donor (dean's interest list), or the children of faculty or staff.[72] These four categories—athlete, legacy, donor or dean's interest list, and children of faculty (ALDC)—and the admissions advantages they receive, illuminate university preferences to admit those with ALDC status.[73]

For legacies, the dean of admissions personally reads the application in addition to the scoring reading given by the initial admissions officer.[74] The dean can then request that the application be given special attention or another reading.[75]

For non-legacy relatives of donors on the dean's interest list, the dean of admissions does not play a role.[76] Instead, these applicants are given another score after the initial scoring process.[77] This second score reflects the applicant's (or their family's) "donation history and future donation prospects."[78] When these applications are discussed in committee, the dean of admissions can join the meeting or meet with the subcommittee chair to discuss a particular applicant.[79]

Under the MERIT Act, preferential treatment exists when the status of an applicant as a relative of an alumnus of the college plays a determinative role in the admissions process.[80] Preferential treatment also exists when a donation

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[69] Arcidiacono et al., *supra* note 3, at 9–10. The personal qualities score is partially derived from an interview an applicant has with an alumnus or a member of the admissions staff. *See id.* at 7, 10 (explaining how the personal rating score is calculated). Only three percent of applicants are interviewed by a member of the admissions staff. *Id* at 8. The vast majority are interviewed by an alumnus. *Id.*

[70] *Id.* at 10.

[71] *Id.* at 11–12. Legacy status is supposedly not considered at UNC Chapel Hill for in-state applicants, though it is considered for out-of-state applicants. Weaver, *supra* note 67.

[72] Arcidiacono et al., *supra* note 3, at 11–12.

[73] *Id.*

[74] *Id.* at 12. At UNC Chapel Hill, the Vice Provost for Enrollment and Undergraduate Admissions sends a letter to each alumni whose child applies to UNC Chapel Hill to thank them for their efforts to stay connected to the university and explain the factors that go into the admissions process. Weaver, *supra* note 67.

[75] Arcidiacono et al., *supra* note 3, at 12.

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *See* MERIT Act, S. 3232, 118th Cong. § 2(a)(2) (2023) (defining legacy preferences in admissions). This Note also refers to this concept as a "legacy preference."

by an applicant or their relative(s) plays a determinative role.[81] Colleges and universities defend the practices of donor and legacy preferences by citing their necessity for the financial health of the university and the establishment of a thriving "intergenerational community on campus[]."[82]

Data exists to help readers understand the impact of legacy and donor preferences at Harvard.[83] In 2018, the overall acceptance rate at Harvard University was 6.6%.[84] Nevertheless, the acceptance rate for legacies was 33.6%, and the acceptance rate for applicants on the Dean's interest list was 42.2%.[85]

Legacy and donor preferences also have a disparate impact on applicants of different races.[86] In 2018, 32% of white students admitted to Harvard were

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[81] *See id*. (defining donor preferences in admissions). This Note also refers to this concept as a "donor preference."

[82] *See* Vimal Patel, *Why Legacy Admissions Are at the Center of a Dispute in Higher Education*, N.Y. TIMES (July 26, 2023), https://www.nytimes.com/2023/07/26/us/legacy-admissions-colleges-universities.html [https://perma.cc/F8Y9-NANB] (explaining that colleges use legacy and donor preferences to increase alumni donations and build community with alumni). Legacy preferences were first implemented in the 1920s by colleges and universities seeking to restrict Jewish and immigrant applicants gaining admission. Michael T. Nietzel, *Legacy College Admissions Come Under Fire in New Report*, FORBES (Oct. 30, 2022), https://www.forbes.com/sites/michaeltnietzel/2022/10/30/legacy-college-admissions-come-under-fire-in-new-report/?sh=1cff7795f077 [https://perma.cc/7EYY-4BWE].

[83] *See* Arcidiacono et al., *supra* note 3, at 40–49 (displaying data produced by Harvard University as a part of affirmative action litigation). Though less comprehensive, data from UNC Chapel Hill and a collection of thirty of the top colleges and universities also helps one understand legacy preferences. *See* Hurwitz, *supra* note 9, at 490 (providing a statistical analysis on the preferences given to legacy applicants at thirty of the nation's top colleges and universities); Douglas S. Dibbert, *Carolina Admissions—And Creating a Legacy*, CAROLINA ALUMNI REV. (Mar. 10, 2011), https://alumni.unc.edu/news/carolina-admissions-and-creating-a-legacy/ [https://perma.cc/A4J5-CPKN] (providing statistics on legacy preferences at UNC Chapel Hill, broken down by in-state and out-of-state applicants).

[84] *See* Arcidiacono et al., *supra* note 3, at 40. In 2022, UNC Chapel Hill's acceptance rate was 16.8%. *Admissions Case*, UNIV. N.C. CHAPEL HILL, https://admissionslawsuit.unc.edu/about/admissions/ [https://perma.cc/PCT5-VHGA] (disclosing that the acceptance rate was 43.1% for in-state applicants and 8.2% for applicants from outside of the state).

[85] *See* Arcidiacono et al., *supra* note 3, at 40. In 2010, UNC Chapel Hill accepted in-state legacy applicants at a 64% rate, and out-of-state legacy applicants at a 42.7% rate. *See* Dibbert, *supra* note 83 (providing that the non-legacy in-state admissions rate was 47.8%, and the non-legacy out-of-state admissions rate was 19.6% in 2010). The Varsity Blues college admissions scandal provides an extreme example of the impact on college admissions when the children of donors are given preferential treatment. *E.g.*, Kate Taylor, *Lori Loughlin and Mossimo Giannulli Get Prison in College Admissions Case*, N.Y. TIMES, https://www.nytimes.com/2020/08/21/us/lori-loughlin-mossimo-giannulli-sentencing.html [https://perma.cc/U3PB-SANE] (Oct. 30, 2020) (explaining that actress Lori Loughlin was sentenced to prison time for paying University of Southern California (USC) $500,000 and posing her daughters as rowers to guarantee their admission to USC); *see* Blair Rotert, Note, *Was "Varsity Blues" Actually a Crime? The Supreme Court's Crusade Against the Federal Mail and Wire Fraud Statutes*, 64 B.C. L. REV. 415, 415–21 (2023) (providing the factual background of the Varsity Blues college admissions cheating scheme); *see also* Saturday Night Live, *Cut for Time: College Admissions—SNL*, YOUTUBE (Mar. 31, 2019), https://www.youtube.com/watch?v=DFia7FhVmuM [https://perma.cc/5MXV-KPCR] (providing a satirical and speculative example of how wealth and legacy status can impact a college admission board's decision on college applications).

[86] *See* Arcidiacono et al., *supra* note 3, at 11–12, 43 (detailing admissions rates according to race and whether the applicant has legacy parents, donor relatives, or is a child of a university employee

legacy or donor applicants.[87] In contrast, Asian American, African American, and Hispanic admitted students were less likely to be legacy or donor applicants.[88] Only 12% of Asian American students, 10% of Hispanic students, and 6% of African American students admitted to Harvard were legacy or donor applicants.[89]

Data on the racial makeup of Harvard's legacy and donor students does not tell the whole story.[90] White, Asian American, and Hispanic legacy applicants are all admitted at about the same rate, 35%.[91] Further, 42% of donor applicants in these racial groups are admitted.[92] In contrast, African American legacy and donor applicants are admitted at slightly lower rates, 29% and 33% respectively.[93]

E. The Existing Lawsuit Challenging Legacy Preferences

In July 2023, the Office for Civil Rights in the U.S. Department of Education initiated an investigation into Harvard's admissions practices.[94] The complaint alleges that Harvard's admissions preferences for athletes, legacies, and relatives of donors violates Title VI.[95]

(LDC)). Although potential student-athletes undergo the same admissions process—or preferential treatment—as applicants with LDC status, the available admissions data on such preferential treatment may not always include these potential student-athletes as they make up only a small portion of the admission pool, whether preferred or not. *Id.*

[87] *See id.* at 43. (providing data on overall admissions numbers by race and LDC status). In fact, white legacy and donor applicants make up seventy percent of all legacy and donor applicants at Harvard. *Id.* at 42–43 (giving two views of the same data where the vast majority of LDC admits are white, though the admissions rates for each racial group are relatively similar).

[88] *See id.* at 43 (detailing the admitted student makeup of all legacy and donor applicants based on race).

[89] *Id.*

[90] *See id.* at 42 (providing a different view of the data by looking at admissions rates based on race rather than total admit numbers).

[91] *Id.*

[92] *See id.* (providing that about forty two percent of donor applicants that are White, Asian, and Hispanic are admitted to Harvard, despite the overall numbers of admits based on race being different).

[93] *Id.*

[94] Michael D. Shear & Anemona Hartocollis, *Education Dept. Opens Civil Rights Inquiry into Harvard's Legacy Admissions*, N.Y. TIMES (July 25, 2023), https://www.nytimes.com/2023/07/25/us/politics/harvard-admissions-civil-rights-inquiry.html [https://perma.cc/BG9V-Y773]. The U.S. Department of Education opened an investigation in response to a complaint filed by civil rights groups. *Id.* The Office for Civil Rights in the Department of Education has been largely dismantled since the beginning of President Donald Trump's second term in office, beginning in January 2025. *See* Collin Binkley, *Education Department Layoffs Gut Its Civil Rights Office, Leaving Discrimination Cases in Limbo*, ASSOCIATED PRESS, https://apnews.com/article/trump-education-department-layoffs-civil-rights-8cbf463cce765f497c10d688ab4d51e1 [https://perma.cc/RTZ8-6EJC] (Mar. 12, 2025) (explaining that President Trump has laid off approximately 1,300 employees from the Department of Education as of March 2025, including 240 employees in the Office for Civil Rights). The status of the discrimination investigations and cases filed with this office, including the investigation into Harvard's admissions practices, is unknown at the time of publication. *Id.*

[95] *See* Complaint Under Title VI of the Civil Rights Act of 1964, at 3, Chica Project v. President & Fellows of Harvard Coll. (Off. for C.R., U.S. Dep't of Educ., filed July 3, 2023), https://lawyersfor

Title VI prohibits colleges and universities that receive federal funding from discriminating on the basis of race.[96] Courts interpreting Title VI have found both intentional racial discrimination and actions having a disparate impact among racial groups to be unlawful.[97] Title VI requires private colleges and universities receiving federal funding to adhere to the same standards that the Equal Protection Clause of the Fourteenth Amendment imposes on public actors.[98]

The Department of Education is currently investigating whether Harvard's admissions practices create a disparate impact on the basis of race.[99] If the Department of Education finds that athlete, legacy, and donor admissions

civilrights.org/wp-content/uploads/2023/07/Federal-Civil-Rights-Complaint-Against-Harvard.pdf [https://perma.cc/QPT5-9RH5] [hereinafter *Chica Project* Complaint] (arguing that legacy preferences violate Title VI of the Civil Rights Act of 1964 because legacy and donor applicants admitted to Harvard are overwhelmingly white).

[96] *Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/fcs/TitleVI [https://perma.cc/YF6E-3BZH] (Feb. 7, 2025); *see* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting racial discrimination in activities that receive federal funding).

[97] *See* Butts v. Nat'l Collegiate Athletic Ass'n, 751 F.2d 609, 614 (3d Cir. 1984) (acknowledging that practices resulting in a disparate impact may constitute a violation of Title VI); Washington v. Davis, 426 U.S. 229, 239, 243, 247 (1976) (holding that discriminatory impact is not a violation of the Equal Protection Clause if there is a legitimate, nondiscriminatory purpose for the governmental action, and that intentional, invidious racial discrimination by a government actor does violate the Equal Protection Clause).

[98] 42 U.S.C. § 2000d; *see Title VI of the Civil Rights Act of 1964*, *supra* note 96 (explaining that if a recipient of federal funds is found to discriminate on the basis of race, the government should terminate the funding to that recipient). When a college or university intentionally discriminates on the basis of race (disparate treatment), the college or university must have a compelling interest and the action must be narrowly tailored. Grutter v. Bollinger, 539 U.S. 306, 326 (2003). Otherwise, courts will find such action to violate the Equal Protection Clause or Title VI. *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2166 (2023) (striking down affirmative action as a violation of Title VI and the Equal Protection Clause). When a college or university does not intentionally discriminate, but instead conducts itself in a way that has a disproportionate impact among racial groups (in other words, disparate impact), the college need only have a legitimate, nondiscriminatory purpose. *See Butts*, 751 F.2d at 611 (suggesting that disparate impact does not violate Title VI if the actor has a legitimate, nondiscriminatory purpose). When a private university accepts federal funding by adopting Title VI of the Civil Rights Act, that private university is subject to the same standards as public universities under the Equal Protection Clause. *See Students for Fair Admissions*, 143 S. Ct. at 2156–57, 2175–76 (explaining that Student for Fair Admissions' challenge against Harvard is under Title VI and the challenge against UNC Chapel Hill is under the Equal Protection Clause, and implying that Title VI commands the same analysis and standard as the Equal Protection Clause by analyzing Harvard and UNC Chapel Hill together for the remainder of the opinion); *id.* at 2218 (Gorsuch, J., concurring) ("Title VI and the Equal Protection Clause mean the same thing . . . . As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment.").

[99] Chica Project Complaint, *supra* note 95, at 3 (arguing that legacy preferences violate Title VI of the Civil Rights Act of 1964 because of disparate racial impact); Shear & Hartocollis, *supra* note 94.

practices do amount to disparate impact, Harvard must provide a legitimate nondiscriminatory purpose for its actions.[100]

Harvard's stated purpose for its admissions practices is to maintain funding from alumni in order to increase the quality of education and diversity of the student body.[101] If the Department of Education finds Harvard's purpose for its admissions practices to be illegitimate or discriminatory, Harvard must then choose between accepting federal funding or maintaining these preferences in its admissions process.[102] If the Department of Education finds Harvard's purpose to be legitimate and nondiscriminatory, then Harvard will not have violated Title VI.[103] The outcome of this legal challenge may have implications for the MERIT Act, as they are both targeted at the same issue: ending legacy and donor preferences in college admissions.[104]

II. THREE POTENT LEGAL CHALLENGES TO THE MERIT ACT

Universities could challenge the MERIT Act on the basis that it is beyond Congress's Spending Clause power, a violation of their First Amendment right of association, or setting unconstitutional conditions on speech.[105] Section A of

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[100] *See Butts*, 751 F.2d at 611 (providing that a nondiscriminatory purpose is required to overcome a Title VI disparate impact claim).

[101] *See* Patel, *supra* note 82 (explaining why Harvard uses legacy and donor preferences).

[102] *See Students for Fair Admissions*, 143 S. Ct. at 2156–57, 2175–76 (implying that the Equal Protection Clause applies to private universities that accept federal funding conditioned on compliance with Title VI, holding private colleges to the same standards that government actors are held to); *id.* at 2218 (Gorsuch, J., concurring) ("Title VI and the Equal Protection Clause mean the same thing . . . . As a result, for over four decades, every case about racial preferences in school admissions under Title VI has turned into a case about the meaning of the Fourteenth Amendment."). *See generally Butts*, 751 F.2d at 611 (holding that the defendant must provide a legitimate, nondiscriminatory purpose to justify actions that cause a disparate impact on the basis of race). Other private colleges receiving federal funding and having the same admissions practices would then follow suit or risk of violating Title VI. *See* Mark Sherman, *Divided Supreme Court Outlaws Affirmative Action in College Admissions, Says Race Can't Be Used*, ASSOCIATED PRESS (June 29, 2023), https://apnews.com/article/supreme-court-affirmative-action-college-race-f83d6318017ec9b9029b12ee2256e744 [https://perma.cc/4PCC-AWPL] (suggesting that the affirmative action ruling extends beyond Harvard and University of North Carolina). Notably, any decision by the Department of Education could be appealed to a federal court for further consideration. *See Appeals*, U.S. CTS., https://www.uscourts.gov/about-federal-courts/types-cases/appeals [https://perma.cc/SF3P-2GFT] ("A litigant who is not satisfied with a decision made by a federal administrative agency usually may file a petition for review of the agency decision by a court of appeals.").

[103] *See* Recent Complaint, *supra* note 24, at 1275–76 (discussing the requirements of a disparate impact claim and claiming that the Chica Project's complaint to the Department of Education likely fails to state a prima facie disparate impact claim). *See generally* Washington v. Davis, 426 U.S. 229 (1976) (holding that disparate impact when justified by a legitimate, nondiscriminatory purpose does not violate the Equal Protection Clause).

[104] *See* Press Release, Tim Kaine, *supra* note 16 (explaining that the MERIT Act seeks to prevent private and public universities receiving federal funding from giving preferences to the children of alumni and donors).

[105] *See infra* notes 127–253 and accompanying text.

this Part addresses the First Amendment right to association argument.[106] Section B examines the unconstitutional conditions argument.[107] Finally, Section C probes the Spending Clause argument.[108]

In general, the First Amendment provides that content-based restrictions on speech by the government must satisfy strict scrutiny.[109] This requires a government-imposed restriction on speech to be narrowly tailored to achieve a compelling governmental interest.[110] When the restriction merely regulates the "time, place, or manner" of speech, however, the restriction need only pass intermediate scrutiny.[111] Corporations generally have the same free speech rights as individuals.[112] Therefore, private colleges and universities have a right to free speech that is protected by the First Amendment.[113]

A. A University's Right to Associate

The U.S. Supreme Court has recognized that expressive association is protected by the First Amendment.[114] When excluding someone or a class of persons from an association is core to a group's expression, the First Amend-

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[106] *See infra* notes 114–155 and accompanying text.

[107] *See infra* notes 156–210 and accompanying text.

[108] *See infra* notes 211–253 and accompanying text.

[109] *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (holding that restrictions on the size and location of signs based on their content must satisfy strict scrutiny).

[110] *See id.* (explaining that an ordinance restricting different types of signs based on their content did not satisfy strict scrutiny because it was not narrowly tailored to serve a compelling government interest).

[111] *See* Ward v. Rock Against Racism, 491 U.S. 781, 789, 791 (1989) (holding that content-neutral restrictions on the "time, place, or manner" of speech only need to serve a substantial governmental interest). Generally, the government gets more latitude when it is not restricting the content of speech. *See id.* at 791–92 (explaining that a regulation on the sound coming from concerts in Central Park is a permissible "time, place, or manner" restriction because it is applicable regardless of the content of the speech).

[112] *See generally* First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765 (1978) (holding that the First Amendment protects a corporation's right to engage in political expenditures on ballot initiatives); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (bringing First Amendment protections for corporations engaging in political expenditures in line with the rights of individuals). Although the organizational structure of colleges can be complex, they are generally organized at some stage as corporations. *See, e.g.*, *Harvard Corporation*, HARV. UNIV., https://www.harvard.edu/about/leadership-and-governance/harvard-corporation/ [https://perma.cc/3TBC-KHUF] (explaining the structure of Harvard University and the Harvard Corporation, and providing that the Harvard Corporation is the oldest corporation in America).

[113] *See generally Citizens United*, 558 U.S. 310 (acknowledging the First Amendment rights of a corporation when making political expenditures); 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023) (acknowledging a corporation's First Amendment right to exclude customers).

[114] *See, e.g.*, Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 656 (2000) (acknowledging the right to expressive association by overturning a government action requiring the Boy Scouts to allow a homosexual Scout Leader when it was core to the Boy Scouts' expression that it does not promote homosexuality).

ment provides protection.[115] Government action is a key prerequisite for an expressive association challenge, which typically involves forced inclusion of a non-member.[116] If the government action would burden the association, courts will employ strict scrutiny to determine whether the government may force inclusion.[117]

For example, in 1984, in *Roberts v. U.S. Jaycees*, the government required the Jaycees, a group for young males promoting civic engagement, to admit women as voting members.[118] The Court held that the Jaycees' core expression was civic duty, and that male-only voting was not core to the group's expression.[119] Thus, the Jaycees were required to let women vote in their association.[120]

Alternatively, in 2000, in *Boy Scouts of America v. Dale*, the Boy Scouts challenged a statute that punished them for excluding a homosexual Eagle Scout from serving as a Scout leader.[121] The Boy Scouts successfully argued that traditional marriage values were core to its association, and that including a homosexual man as a Scout leader would burden its expressive association.[122] In defending the statute, the government failed to satisfy strict scrutiny, so the Boy Scouts were permitted to exclude the Eagle Scout from serving as a Scout leader.[123]

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[115] *Id.* at 651–53; *see* Kent Greenfield, *Using the First Amendment to Save Race-Conscious College Admissions*, 2024 AM. J.L. & EQUAL. 201, 235 (outlining the analytical framework the U.S. Supreme Court has established for claims of expressive association rights).

[116] *E.g.*, Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 557, 567, 569 (1995) (applying the doctrine when an anti-discrimination statute required an expressive association to include a group that was contrary to their core beliefs); *see* Greenfield, *supra* note 115, at 215–16 (explaining that a key to an expressive association claim is state action forcing a group to alter decisions about group membership). In the 1995 Supreme Court case, *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, a LGBT group, Glib, sought to participate in Boston's annual St. Patrick's Day Parade but was excluded by the veterans group tasked with organizing the parade. 515 U.S. at 560–62. A Massachusetts Superior Court judge ordered that Glib be allowed to participate in the parade because the exclusion violated a public accommodation statute. *Id.* at 562–64.

[117] *See Boy Scouts of Am.*, 530 U.S. at 658–59 (implying that the government statute forcing inclusion must pass strict scrutiny).

[118] Roberts v. U.S. Jaycees, 468 U.S. 609, 614–15 (1984).

[119] *See id.* at 628 (holding that being male-only was not core to the group's expression, and even it if was, forcing inclusion of women would satisfy strict scrutiny).

[120] *See id.* at 626–27 (holding that allowing women to vote did not impact the purpose of civic engagement that the Jaycees engaged in).

[121] See *Boy Scouts of Am.*, 530 U.S. at 644–46 (describing the facts of Mr. Dale's exclusion from the Boy Scouts).

[122] *See id.* at 651–53 (deferring to the Boy Scouts on the interpretation of "morally straight" in its mission statement).

[123] *See id.* at 658–59 (implying that anti-discrimination on the basis of sexual orientation is not a compelling interest). The Court avoided directly answering whether eliminating discrimination on the basis of sexual orientation was a compelling interest by noting that in all of the cases the Court had found a compelling interest, the expressive association was not actually burdened by the inclusion. *Id.* at 657–58. The First Amendment rules regarding expressive association have not been applied to the college and university context to date. *See generally* Rumsfeld v. Forum for Acad. & Institutional Rts.,

Subsection 1 of this Section explores the qualities that make an association an expressive association.[124] Subsection 2 considers how a forced inclusion can burden an association's core expression.[125] Finally, Subsection 3 weighs the scrutiny the government must overcome to survive an expressive association challenge.[126]

1. Universities as Expressive Associations

Not every association is protected by the First Amendment.[127] For a group to receive First Amendment protection in its right to associate, the group must be an expressive association.[128] Thus, a university must first overcome the burden of convincing a court that they are an expressive association for the court to engage in a First Amendment analysis.[129] Although not presumed to be expressive, associations do not need to provide much proof that a practice is core to their purpose to be deemed an expressive association.[130] It appears that the Supreme Court takes a group claiming that it is an expressive association nearly "at their word," unless there is evidence to the contrary.[131]

A university must first establish that it is an expressive association.[132] In 2006, in *Rumsfeld v. Forum for Academic & Institutional Rights* (*FAIR*), the

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Inc. (*FAIR*), 547 U.S. 47 (2006) (applying the First Amendment association analysis to a law school, but ultimately concluding that the law school's right to expressive association had not been infringed).

[124] *See infra* notes 127–141 and accompanying text.

[125] *See infra* notes 142–148 and accompanying text.

[126] *See infra* notes 149–155 and accompanying text.

[127] *See Roberts*, 468 U.S. at 617–18 (holding that only expressive associations are protected by the First Amendment).

[128] *See id.* (recognizing that only expressive associations are protected by the First Amendment, not intimate associations); *Boy Scouts of Am.*, 530 U.S. at 648 (holding that expressive associations are when one engages in some form of public or private expression). Associations are not automatically expressive just because they say they are. *See Boy Scouts of Am.*, 530 U.S. at 648–49 (implying that a relatively thorough case-by-case analysis of a group is required to show that a group engages in expression).

[129] *See Boy Scouts of Am.*, 530 U.S. at 656 (implying that the first two steps of inquiry in a First Amendment right to expressive association case are to determine whether the group is an expressive association, and then whether the forced inclusion would burden the group's expression).

[130] *See id.* at 652–53 (finding that there is no reason to question the sincerity of the Boy Scouts' expressive beliefs, implying that expressive associations receive deference as to the sincerity of their beliefs).

[131] *See id.* at 651–53 (analyzing the facts of the case to see if there is any reason to question the sincerity of the Boy Scouts' expressive beliefs).

[132] *See id.* (implying that a court's first task is to determine whether an association is expressive). Cases have focused on groups within universities being expressive associations, but universities themselves have not been held to be expressive associations. *See generally, e.g.,* Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435 (3d Cir. 2000) (holding that a university did not violate a fraternity's expressive association rights when stripping the fraternity of its status after members were arrested in a drug raid).

Supreme Court implied that law schools may be expressive associations.[133] Boston College Law School, and other law schools, sought to protest the military policy of "Don't Ask, Don't Tell"—which excluded homosexual individuals from joining the military—by moving military recruitment events from the law school campus to the undergraduate campus.[134] The Solomon Amendment, however, requires the university to give military recruiters the same access to law students as other recruiters, or risk forfeiting certain federal funding.[135] The Supreme Court held, ultimately, that the location of recruitment events was non-expressive conduct and could not be core to the law school's expressive purpose.[136] The Court did not directly answer the question of whether a law school was an expressive association, but continued its analysis beyond the threshold expressive association inquiry.[137]

A university challenging the MERIT Act could therefore infer from *FAIR* that universities are expressive associations.[138] Scholars argue that colleges and universities are expressive associations made up of students, researchers, faculty, and others.[139] In particular, institutions with a religious or ideological mission may very likely be expressive associations.[140]

Although a university would not need to produce overwhelming evidence to show its expressive purpose, it would likely need to produce some evidence beyond citing *FAIR* to be deemed an expressive association.[141]

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[133] *See FAIR*, 547 U.S. 47, 68–69 (2006) (implying that law schools have a right to expressive association by glossing over that step of the analysis).

[134] *Id.* at 52–53.

[135] *Id.*

[136] *Id.*

[137] *See id.* (forgoing an analysis of whether an association is expressive by finding that the condition did not restrict First Amendment rights to speak out against military policy). The Court did address whether the law school's conduct excluding military recruiters was expressive, but not whether the law school itself was an expressive association. *Id.* Whether conduct is expressive is key to the "unconstitutional conditions" doctrine within the First Amendment. *See id.* at 61, 66 (beginning the unconstitutional conditions analysis and finding that the actions of Boston College Law School are not expressive in nature).

[138] *See id.* at 68–69 (implying that Boston College Law School is an expressive association). It is unclear whether a court, directly examining this question, would accept or reject the university's argument because the law schools in *Rumsfeld v. Forum for Academic & Institutional Rights* lost their freedom of association argument on other grounds. *See id.* at 69–70 (holding that the right to expressive association argument failed because allowing military recruiters on campus did not infringe Boston College Law School's expressive association).

[139] Greenfield, *supra* note 115, at 235–36.

[140] *Id.*

[141] *See FAIR*, 547 U.S. at 68–69 (implying that colleges may have a right to expressive association, but not specifically addressing that question). A university would likely need to produce evidence of its expressive purpose because the Court has found it helpful when a group claiming expressive association provides evidence of expressiveness in conjunction with precedent regarding similar associations that were deemed expressive. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648–50 (2000) (detailing the Scout Oath and mission of the Boy Scouts which supports the proposition that

2. Admissions Restrictions as Burdens on Expressive Association

Assuming a university could establish that it is an expressive association, the university must then establish that restrictions on giving preferences to legacy and donor applicants burden its expressive association.[142] This stage of analysis is where a group claiming it is an expressive association faces the toughest climb.[143] It must convince the court that a change to its exclusion practices would burden the core of its expressive purpose.[144]

The key question is whether the forced inclusion of members that the association would not otherwise admit runs contrary to the core expressive purpose of the group.[145] Although universities seek a diverse, well-rounded, and intelligent student body, they also give preferential admissions treatment to legacy and donor applicants.[146] Universities say they engage in this preferential treatment to foster an engaged alumni network and an "intergenerational community on campus[]."[147] Thus, a university would have to argue that the community it develops through its alumni network is core to its expressive purpose as an association to protect legacy and donor preferences under the First Amendment.[148]

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the Boy Scouts are an expressive association in addition to precedent from similar associations deemed to be expressive).

[142] *See Boy Scouts of Am.*, 530 U.S. at 653 (finding that the second step of analysis is to determine whether forced inclusion would burden the association's core expression). When a university decides to admit an applicant, that inclusion not only furthers the student's education, but also allows a student to contribute to the community, the school's reputation, and a wide variety of athletics and clubs within the university. *See Extracurricular Participation and Student Engagement*, NAT'L CTR. FOR EDUC. STAT. (June 1995), https://nces.ed.gov/pubs95/web/95741.asp [https://perma.cc/F9HR-M8M4] ("Recent research suggests that participation in extracurricular activities may increase students' sense of engagement or attachment to their school, and thereby decrease the likelihood of school failure and dropping out.").

[143] *See FAIR*, 547 U.S. at 69–70 (finding that the law school had not met its burden to show that allowing the military recruiter on campus infringed on its core expressive beliefs); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (finding that the Jaycees had not convinced the Court that including women in voting positions would harm its core expression).

[144] *See Boy Scouts of Am.*, 530 U.S. at 656 (finding the Boy Scouts is an expressive association and that forcing it to accept a homosexual Scout leader would significantly affect its expression).

[145] *See id.* at 653 (holding that the key inquiry is whether forced inclusion burdens the core expression of a group and analyzing whether the Boy Scouts is burdened by including a homosexual Eagle Scout as a Scout leader). In *Boy Scouts of America v. Dale*, the Court noted that an expressive association can exist for a purpose other than their core expression, and that not every member must agree with the expressive message for an expression to be core to an association. *Id.* at 655–56.

[146] *See* Arcidiacono et al., *supra* note 3, at 40 (providing data on the stark advantage legacy and donor applicants have in college admissions at Harvard).

[147] *See* Patel, *supra* note 82 (highlighting that universities participate in legacy admissions to build inter-generational community on their campuses).

[148] *See Roberts*, 468 U.S. at 627 (finding that excluding women was not core to the Jaycees' core purpose of furthering civic, charitable, and other community engagement).

3. The Governmental Interest in Ending Legacy and Donor Preferences

If a university passes through the first two stages of analysis, the government's restriction must satisfy strict scrutiny.[149] Strict scrutiny requires the government action to be narrowly tailored to serve a compelling governmental interest.[150] The Supreme Court rarely finds that a law satisfies strict scrutiny.[151]

It is difficult to think of an interest the government could put forward for the MERIT Act that would satisfy strict scrutiny.[152] The government could argue that the MERIT Act seeks to level the playing field in admissions on the basis of race given the fact that, at Harvard, seventy percent of legacy and donor applicants are white.[153] More logically, however, the MERIT Act appears targeted at removing the advantage some applicants have simply because of wealth and status.[154] Further, a university could respond that it admits legacy and donor applicants of all races at roughly the same rates, making this not a case of disparate treatment.[155]

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[149] *See id.* at 623 (beginning a strict scrutiny analysis after finding that inclusion may burden a group's expression).

[150] *See id.* (requiring a compelling interest to overcome a burden on the right to expressive association).

[151] *See* Williams-Yulee v. Fla. Bar, 575 U.S. 433, 444 (2015) ("We have emphasized that 'it is the rare case' in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest . . . . [b]ut those cases do arise." (quoting Burson v. Freeman, 504 U.S. 191, 211 (1992) (plurality opinion))). The Court ultimately decided that inclusion of women as voting members would not burden the Jaycees' core expression because women were already in the group and there was no indication that being male was core to the purpose of promoting civic engagement. *Roberts*, 468 U.S. at 623. It is unclear whether the compelling interest the Court found is binding or dicta. *See id.* at 628 ("In the absence of a showing far more substantial than that attempted by the Jaycees, we decline to indulge in the sexual stereotyping that underlies appellee's contention that, by allowing women to vote, application of the Minnesota Act will change the content or impact of the organization's speech."). In fact, the Court found that strict scrutiny was not satisfied when a law sought to end discrimination on the basis of sexual orientation by forcing the Boy Scouts to allow a homosexual Eagle Scout to become a Scout Leader. *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (implying that the Boy Scouts' right to expressive association was not overcome by a compelling governmental interest).

[152] *See Boy Scouts of Am.*, 530 U.S. at 660 (implying that eliminating discrimination on the basis of sexual orientation was not a compelling interest, even though public opinion has changed dramatically on homosexuality). The Court has, however, recognized eliminating discrimination on the basis of race as a compelling interest. *See* Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that ending discrimination on the basis of race satisfies "the most rigid scrutiny").

[153] *See* Arcidiacono et al., *supra* note 3, at 42–43 (comparing admissions statistics at Harvard based on race and LDC status and showing that about seventy percent of LDC students are white).

[154] *See* Press Release, Tim Kaine, *supra* note 16 (explaining that the purpose of the bill is to make America "a land of opportunity, not a land of aristocracy"). Wealth inequality is not a compelling interest that has been explicitly recognized by the Court. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . .").

[155] *See* Arcidiacono et al., *supra* note 3, at 42 (providing data on admissions rates for LDC applicants based on race at Harvard).

B. An Unconstitutional Condition on University Speech

The government is allowed to express a point of view when it determines where to spend federal tax dollars.[156] If funding is not so large or crucial, leaving recipients able to choose whether to accept the funding, such conditions are not legally coercive.[157] If, however, funding is so crucial that recipients have no choice but to accept the funding, the conditions are considered impermissibly coercive.[158]

In 1991, in *Rust v. Sullivan*, the Supreme Court considered a case in which the federal government was providing funding to hospitals on the condition that no abortion services or counselling would occur within the hospital.[159] The Court found these conditions to be merely the government's point of view and, therefore, constitutional.[160] Even though the conditions forced doctors to "speak" against abortion by not offering those services, they did not completely limit the doctors' ability to speak.[161] For example, a doctor could run an abortion clinic somewhere else on the weekend and continue to offer abortion services there.[162]

On the contrary, in 2001, in *Legal Services Corp. v. Velazquez*, the Supreme Court considered a case in which the federal government provided a public funding mechanism for individuals who could not afford a lawyer in welfare benefits claims.[163] The imposed condition prohibited lawyers working with the public funding from bringing claims challenging the underlying welfare laws.[164] Unlike in *Rust*, in *Velazquez* there was no option for the lawyers to counsel their clients

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[156] *See* Rust v. Sullivan, 500 U.S. 173, 198 (1991) (holding that the government may choose to fund some activities and not others).

[157] *See id.* at 197–98 (holding that Spending Clause conditions that leave a recipient with other avenues for funding or speech are not necessarily coercive); South Dakota v. Dole, 483 U.S. 203, 208–09, 211 (1987) (holding that when the amount of money is relatively small and the policy promoted by the conditions is a previously accepted policy, then the conditions are not coercive).

[158] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (holding that conditions may not coerce a recipient to give up their constitutional rights); *Dole*, 483 U.S. at 211 (holding that conditions may not be so coercive as to compel the recipient to accept the funds).

[159] *See* 500 U.S. at 178–79.

[160] *See id.* at 193 ("[T]he Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.").

[161] *See id.* (holding that limits placed on abortion services at a hospital do not totally infringe the doctors' ability to engage in abortion-related speech). In *Rust*, the Court held that placing a condition on an institution did not place an unconstitutional condition on the doctors that primarily work at that institution. *Id.* Because the doctors were permitted to perform abortion services elsewhere, they were not coerced for purposes of the First Amendment, and there was no consideration of whether the hospital as an institution was coerced to speak. *Id.*

[162] *See id.* (implying that such a hypothetical would be permissible under the conditions set for funding).

[163] 531 U.S. at 536.

[164] *Id.* at 536–37.

outside of work hours about their options for suing the government.[165] The funding conditions made it impossible for the lawyers to "speak" on behalf of their clients by challenging the validity of the welfare law.[166] Thus, the conditions went beyond the government merely deciding to fund one program over another.[167] The Supreme Court struck down the conditions in *Velazquez* as an infringement on the attorneys' First Amendment rights.[168]

The unconstitutional conditions doctrine has also been applied in the context of colleges and universities.[169] In 2006, in *FAIR*, the Supreme Court held that forcing law schools to allow military recruiters on campus for recruiting events was not an unconstitutional condition.[170] The Court reasoned that the law schools could speak out against the military recruiters at any point.[171] Therefore, the government could require law schools to allow military recruiters on campus as a condition of receiving federal funding.[172]

Although the government is allowed to have a point of view, it may not coerce recipients of funding to speak when they have no choice but to accept the funding.[173] For a university to successfully claim that a condition of fund-

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[165] *See id.* at 542–45 (holding that the conditions for funding in this case totally restricted private speech rather than simply a medium in which private speech occurs); *Rust*, 500 U.S. at 193 (finding that conditioning all hospital funds on a hospital not performing abortion counseling or services is within the government's funding purview and not impermissible viewpoint discrimination).

[166] *See Velazquez*, 531 U.S. at 542–45 (finding that funding conditions at issue entirely prevented the lawyers from challenging existing welfare law on behalf of their clients, and that this constituted an impermissible condition on a recipient, not merely a condition on a program the government has decided to fund).

[167] *See id.* (implying that the conditions set by the government extended beyond choosing to fund one program over another).

[168] *Id.* at 549.

[169] *See FAIR*, 547 U.S. 47, 51–52 (2006) (challenging a condition placed on law schools that receive federal funding).

[170] *See id.* at 47, 70 (finding that requiring Boston College Law School to allow military recruiters on campus as a condition of federal funding did not infringe First Amendment rights). The law schools in this case were challenging this condition because of the "Don't Ask, Don't Tell" policy that excluded homosexuals from serving in the military. *Id.* at 52–53; *see also id.* at 52 n.1 ("Under this policy, a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex.").

[171] *See id.* at 60 (holding that military recruiters speaking on campus did not limit the school's speech because the school could continue to express its opinion on military policy without sacrificing eligibility for federal funding).

[172] *See id.* at 60, 70 (acknowledging that law schools could speak out against the military recruiters while they were on campus without violating the conditions of their funding).

[173] *See* Rust v. Sullivan, 500 U.S. 173, 192–93 (1991) ("[T]he Government may 'make a value judgment . . . and . . . implement that judgment by the allocation of public funds." (quoting Maher v. Roe, 432 U.S. 464, 474 (1977))); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581 (2012) (holding that the government may not set conditions on funding when the recipient of the funding has no choice but to accept).

ing places an unconstitutional restriction on its speech, it must show that the condition entirely restricts an area of speech it had previously engaged in.[174]

Subsection 1 of this Section addresses what practices may constitute speech in a university context.[175] Subsection 2 addresses how to distinguish between the government conditioning a recipient versus a program, and why that distinction matters.[176] Finally, Subsection 3 addresses what level of scrutiny the government must satisfy to overcome an unconstitutional conditions challenge.[177]

1. Are Admissions Practices Speech?

As outlined in *FAIR*, the relevant test to determine whether conduct is classified as speech is whether an observer, absent any explanation, would interpret the conduct by the actor to be expressive speech.[178] A university may argue that, like a doctor's decision to perform abortions or a lawyer's legal advice, the act of building a community through the admissions process is speech.[179]

A university could also use *FAIR* to bolster its argument that admissions practices are speech.[180] Although *FAIR* did not involve admissions practices, it did bring universities into the fold of unconstitutional conditions cases.[181] In that case, the Court distinguished between speech and non-speech conduct at a law school.[182] A university could seek to distinguish its admissions practices from non-expressive conduct, such as scheduling the location of recruiting events.[183] Although choosing where to schedule an event on a campus is not inherently expressive in nature, the community that a school builds may be.[184] Universities do not necessarily only admit the most academically qualified ap-

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[174] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543–44 (2001) (finding that a restriction on the traditional work of a lawyer was too restrictive).

[175] *See infra* notes 178–191 and accompanying text.

[176] *See infra* notes 192–203 and accompanying text.

[177] *See infra* notes 204–210 and accompanying text.

[178] *See FAIR*, 547 U.S. 47, 66 (2006) (finding that the location of recruiters on a college campus was not inherently expressive without accompanying speech); Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (finding that burning a flag inherently conveys a message).

[179] *See* Rust v. Sullivan, 500 U.S. 173, 196 (1991) (implying that the decision to perform abortions conveys an inherent message); *Velazquez*, 531 U.S. at 548 ("There can be little doubt that the LSC Act funds constitutionally protected expression . . . .").

[180] *See FAIR*, 547 U.S. at 68–69 (implying that law schools have protected First Amendment rights).

[181] *Id.*

[182] *See id.* at 66 (holding that the location of military recruiters alone was not speech, but that flyers and organized events did constitute speech). The Court noted that an outside observer would not obviously equate the school's directing of recruiters to a policy decision by the university to combat the military's practices of excluding homosexuals. *Id.*

[183] *See id.* (finding that the scheduling of recruiting events on a campus away from the law school did not constitute speech).

[184] *See id.* (implying that conduct that inherently conveys a message is considered speech).

plicants.[185] When universities make admissions decisions, they often weigh factors such as athletic accomplishments, community involvement, geographic backgrounds, and the institutional mission.[186] It is possible that an observer could look at the community and culture at a university and view it as expressive speech from the university.[187]

On the contrary, the government could argue that the community and culture at a university are not expressive speech.[188] In *FAIR*, the Court determined that an observer would not clearly believe that scheduling decisions themselves, without accompanying speech, were speech.[189] Similarly, it may be argued that, without a university's mission statement, the existence of a community at a university might not be inherently expressing any view.[190] In fact, historically, conduct that the Court has deemed inherently expressive has been more directly political, such as burning a flag or a draft card.[191]

2. Is the Government Conditioning the Recipient or the Program?

If it is established that conduct is in fact speech, the next question is whether the government is conditioning a recipient of funding or merely a program.[192] When the government restricts a recipient's conduct entirely, the

[185] *See* Arcidiacono et al., *supra* note 3, at 41 (showing that legacy and donor applicants to Harvard have a much greater likelihood of admission, even when academic credentials are neutralized); *see, e.g.*, *Mission and History*, B.C., https://www.bc.edu/bc-web/about/mission.html [https://perma.cc/JMA2-NF4J] (explaining the mission of Boston College to "lead[] its students on a comprehensive journey of discovery—one that integrates their intellectual, personal, ethical, and religious formation").

[186] *See* Arcidiacono et al., *supra* note 3, at 8–10 (detailing the factors considered and process of admissions at Harvard).

[187] *See* Texas v. Johnson, 491 U.S. 397, 405–06 (1989) (finding that burning a flag inherently conveys an expressive message, even though it is conduct and not pure speech); Boy Scouts of Am. v. Dale, 530 U.S. 640, 651–53, 656 (2000) (crediting the Boy Scouts as an organization whose expressive purpose includes promoting heterosexual identities).

[188] *See FAIR*, 547 U.S. at 66 (finding that, when not accompanied by speech, an administrative decision made by a college was not expressive).

[189] *See id.* (finding that administrative decisions made by a college is not expressive without speech accompanying it).

[190] *See id.* (finding that accompanying speech is sometimes necessary for university actions to become constitutionally protected "speech"). Just as the location of the military recruiters was not protected speech without flyers or events, a school's community might not express a message without a mission statement. *See id.* at 60, 66 (holding that the location of military recruiting events on the undergraduate campus was not inherently speech without further expression such as posters).

[191] *See Johnson*, 491 U.S. at 405–06 (holding that burning a flag is speech because it conveys a message implicitly about what the flag represents); United States v. O'Brien, 391 U.S. 367, 376 (1968) (assuming that burning a draft card on the steps of a courthouse is speech).

[192] *See* Rust v. Sullivan, 500 U.S. 173, 197–98 (1991) (holding that limits placed on abortion services at a hospital limit a program and not a human recipient because the doctors may continue to engage in abortion-related speech while not acting under the government's funding).

Court has generally held the restrictions to be unconstitutional.[193] In contrast, when the government restricts a program or service, but, the recipient has other avenues for speaking, the Court deems the condition constitutional.[194]

A university may argue that, like the blanket restriction on a lawyer's ability to challenge welfare law in *Velazquez*, a restriction on admissions practices impermissibly limits the ways in which a university can build its student body.[195] Admissions is the primary way in which a university filters in the students that will help further its institutional goals and values.[196] Any restriction changing those practices places a total restriction on the university's speech.[197]

To the contrary, the government can argue that restrictions placed on admissions do not totally limit the school's expression, but rather, limit only one of the practices the school engages in.[198] In *Rust*, the Court held that doctors could continue offering abortion counseling while not acting pursuant to the conditioned subsidy at issue.[199] Additionally, in *FAIR*, Boston College Law School was allowed to continue supporting the LGBT community and speaking out against discriminatory military practices so long as it also allowed military recruiters to speak on campus.[200]

Thus, if the university's goal is to foster an intergenerational community and build the alumni network, surely there are other ways for the school to pursue this goal outside of preferential admissions treatment.[201] Hosting alumni events and fostering a culture of successful sports teams are two separate

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[193] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 543–44 (2001) (finding that a restriction on a lawyer's ability to challenge the constitutionality of a welfare statute was too restrictive because it did not just limit a program but the entire scope of a lawyer's representation).

[194] *See Rust*, 500 U.S. at 197–98 (holding that limiting abortion services at a hospital do not totally infringe the doctors' ability to engage in abortion-related speech).

[195] *See Velazquez*, 531 U.S. at 543–44 (finding that a restriction on the scope of a client's rights and a lawyer's duties was too restrictive because it placed a restriction on the recipient-lawyer's ability to fully perform his duties by preventing the lawyer from bringing a constitutional challenge to the welfare law on the client's behalf).

[196] *See* Frederick Hess, *Is It Time to Ditch Selective College Admissions?*, FORBES (June 5. 2023), https://www.forbes.com/sites/frederickhess/2023/06/05/is-it-time-to-ditch-selective-college-admissions/?sh=3bbdc8e507a3 [https://perma.cc/A5AA-NT5L] ("[S]elective colleges identify the students mostly likely to benefit from their offerings.").

[197] *See Velazquez*, 531 U.S. at 543–44 (finding that the First Amendment prevents the government from restricting a lawyer's ability to bring a constitutional challenge on their client's behalf).

[198] *See Rust*, 500 U.S. at 197–98 (holding that doctors are not entirely limited by conditioning funding to a clinic on not providing abortion counseling because doctors may engage in abortion counseling at other clinics).

[199] *See id.* at 198 ("The employees remain free, however, to pursue abortion-related activities when they are not acting under the auspices of the Title X project.").

[200] *See FAIR*, 547 U.S. 47, 69–70 (2006) (finding that even though a law school had to allow a military recruiter on campus, it could continue to freely express its views while the military recruiter was on campus).

[201] *See* Patel, *supra* note 82 (explaining how universities purport to engage in legacy preferences to build community on their campuses and keep alumni engaged).

practices that could keep alumni engaged with their alma matter.[202] Under this view, the MERIT Act may merely limit a practice that universities are engaged in, while still allowing universities to continue their expressive speech through separate means.[203]

3. First Amendment Rights Are Not Absolute

The Supreme Court has allowed limits to be placed on university admissions in the past.[204] Title IX of the Education Amendments of 1972 provides that universities cannot discriminate on the basis of sex in their admissions practices.[205] Title VI of the Civil Rights Act of 1964 provides the same protections on the basis of race in university admissions.[206] In 2023, the Court struck down the consideration of race as a factor in admissions.[207] These limits all concern discrimination on the basis of race and sex—interests that can satisfy strict scrutiny and may justify government incursions on First Amendment rights.[208]

Typically, restrictions must satisfy strict scrutiny when they implicate the recipient's First Amendment expressive speech rights.[209] If the Court proceeds to this stage of analysis, it is unlikely that the government could produce a compelling interest to justify the MERIT Act unless the purpose of the Act was to combat discrimination on the basis of race.[210]

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[202] *See, e.g.*, Boston College Football (@BCFootball), TWITTER (Feb. 9, 2024), https://twitter.com/BCFootball/status/1756072765499875457 [https://perma.cc/X5DE-7LB9] (announcing that Boston College Football hired Bill O'Brien, a championship-winning coach with the University of Alabama and the New England Patriots); *2024 FBS Attendance Trends*, D1.TICKER, https://www.d1ticker.com/2024-fbs-attendance-trends/ [https://perma.cc/Y328-8YYR] (showing that Boston College football game attendance grew nearly ten percent following the hiring of Bill O'Brien as head coach).

[203] *See Rust*, 500 U.S. at 199 ("The employees' freedom of expression is limited during the time that they actually work for the project; but this limitation is a consequence of their decision to accept employment in a project, the scope of which is permissibly restricted by the funding authority.").

[204] *See generally* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141 (2023) (holding that using race as a factor in admissions to promote diversity violated the Equal Protection clause of the Constitution).

[205] 20 U.S.C. § 1681.

[206] 42 U.S.C. § 2000d.

[207] *See generally Students for Fair Admissions*, 143 S. Ct. 2141 (holding that promoting diversity by considering race as a factor in admissions violated the Equal Protection clause of the Constitution).

[208] *See, e.g.*, *id.* at 230 (holding that the government has a compelling interest eliminating discrimination on the basis of race).

[209] *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (implying, without directly addressing, that the conditions set by Congress were not justified by a compelling interest).

[210] *See* Washington v. Davis, 426 U.S. 229, 247 (1976) (holding that disparate impact alone is not enough to invalidate a statute designed to serve a nondiscriminatory purpose, even if the result is disproportionate impact on the basis of race). Legacy and donor preferences likely result in disparate impacts, and it remains to be seen whether legacy and donor preferences in college admissions are justified by a nondiscriminatory purpose. *See supra* notes 94–104 and accompanying text (explaining the current legal challenge to legacy preferences in college admissions, which will evaluate the viability of a college's interest in legacy preferences). Racial inequality remains a stronger purpose to justify the MERIT Act than wealth inequality because the Supreme Court has held that wealth inequality

C. Coercive Funding Under the Spending Clause

The government may choose to fund one policy over another without infringing on the First Amendment or violating the Spending Clause.[211] Nevertheless, the Spending Clause does not allow the government to place conditions on funding that are legally coercive to the recipient.[212]

Spending conditions become unconstitutionally coercive when the amount of money at stake is high, the recipient has already planned to accept the funding in its budget, and a new condition on existing funding causes a recipient to make a different policy choice than the one it made initially when accepting the funding.[213] On balance, these factors help a court determine whether Congress has mildly encouraged a recipient to accept a set of conditions, or whether funding is being used as "a gun to the head."[214]

In 2012, in *National Federation of Independent Businesses v. Sebelius*, the Supreme Court addressed the issue of coercive spending conditions.[215] In *Sebelius*, the Court held that a law was coercive when it caused a state to forfeit all of its existing Medicaid funding as a consequence of refusing to accept new conditions placed on the Medicaid program.[216] Additionally, the Court distinguished between conditioning only new funding and conditioning fund-

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alone does not constitute a compelling interest or justify strict scrutiny. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) ("[T]his Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny . . . .").

[211] *See* Rust v. Sullivan, 500 U.S. 173, 193 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). For example, the government was allowed to cover only medically necessary first trimester abortions under Medicaid without interfering with a recipient's constitutional rights even while the right to a first trimester abortion was a constitutional right. *See* Maher v. Roe, 432 U.S. 464, 475 (1977) ("There is a basic difference between direct state interference with a protected activity and state encouragement of an alternative activity consonant with legislative policy."); Roe v. Wade, 410 U.S. 113, 153–54 (1973) (holding that a person has an unconditional constitutional right to terminate a pregnancy until the fetus is viable), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022). *But see Dobbs*, 142 S. Ct. at 2284 (overturning *Roe* and holding that there is no unconditional constitutional right to abortion granted by the Constitution).

[212] *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (stating that Congress may place conditions on funding that pressure a recipient to comply, but not conditions that compel them to comply).

[213] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 580, 583, 585 (2012) (considering whether the condition furthers a new policy or the existing policy, whether new or old money is being conditioned, and the amount of money at stake for the recipient).

[214] *See id.* at 581 ("In this case, the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head." (quoting *Dole*, 483 U.S. at 211)). The Court has not explicitly stated where "the line" is with these factors. *See id.* at 585 ("[W]herever that line may be, this statute is surely beyond it.").

[215] *See id.* at 575 (beginning the analysis on the claim of coercive funding beyond Congress's Spending Clause power).

[216] *See id.* at 581–82, 589 (holding that expanding the eligible population for Medicaid through conditions that risked the entirety of a state's Medicaid funding was legally coercive).

ing already allocated by the recipient.[217] Where conditions are tied only to new funding, Congress has discretion to fund certain policy initiatives and encourage recipients to comply.[218] When conditions are placed on funding that already exists, a court must determine whether the conditions accomplish a shift in policy, or simply just change the degree in which an existing policy is being promoted.[219]

The changes to the Medicaid program in *Sebelius* were deemed to be a change in kind of policy.[220] The existing program was intended to care for elderly, blind, and disabled individuals as well as families in need with children, yet the new program provided healthcare to the entire population with an income up to 133% of the poverty level.[221] In *Sebelius*, the Supreme Court held that conditioning a state's entire Medicaid funding on accepting an expanded Medicaid program was "a gun to the head."[222] In contrast, in 1987, in *South Dakota v. Dole*, the Court held that conditions on highway funding were not coercive when they encouraged a state to raise its drinking age to 21 years old because only 5% of highway funding was on the line.[223] The amount of money at stake was relatively small and the new conditions furthered the original policy accepted by the recipient.[224]

A university challenging the MERIT Act may argue that Congress is placing a gun to its head and forcing it to end admissions preferences to legacy and donor applicants.[225] As it stands, the MERIT Act does not allow for new sources of funding to be made available to universities.[226] It merely adds an-

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[217] *See id.* at 583 (considering whether new money or old money is being conditioned).

[218] *See id.* at 585 (finding that Congress may create new programs with conditions on new funding, but exhibiting skepticism when new conditions are added to existing funding).

[219] *See id.* at 583 (asserting that "[t]he Medicaid expansion . . . accomplishes a shift in kind, not merely degree").

[220] *See id.* (holding that the expansion of the Medicaid program constituted a shift in policy rather than a further degree of the same policy originally considered).

[221] *See id.* (comparing the purpose of the original Medicaid program with the purpose of the expanded Medicaid program).

[222] *Id.* at 581.

[223] *See* South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that conditioning five percent of highway funding amounted to only "mild encouragement"). The Court reasoned that the amount of money suggested that Congress had engaged in a valid use of Spending Clause power. *Id.*

[224] *Id.* at 207–08, 211–12 (the amount of money conditioned was five percent of the total highway funding and furthered the original goal of "safe interstate travel").

[225] *See Sebelius*, 567 U.S. at 581–83 (finding that conditioning a large amount of money that already existed on policies that were different in kind from the original policies contemplated was coercive). Some universities worry that ending legacy and donor preferences in admissions would cause a dramatic falloff in alumni donations, thus making the consequences of complying with Congress's condition very harsh. *See* Patel, *supra* note 82 (explaining that a decrease in alumni donation is possible if legacy and donor preferences are eliminated and that some colleges are concerned about this possibility).

[226] *See* Press Release, Tim Kaine, *supra* note 16 (stating that the MERIT Act adds a new condition to the existing process of accreditation).

other condition to the existing funding available to accredited universities, originating when students take out federal loans.[227] Using *Sebelius* as a guide, to survive a Spending Clause coercion challenge, the MERIT Act must be considered merely a change in degree for a policy the federal government was already pursuing.[228] If the Act pursues a policy different in kind from the one that universities adopted when they originally began accepting federal student loans, the bill would likely fail a Spending Clause challenge.[229]

A university could argue that the purpose of accreditation is to ensure a quality education at institutions of higher education.[230] When universities initially began accepting federal student loans, they had to comply with conditions that set curriculum, standards for facilities, and prevented certain forms of historical discrimination.[231] The universities accepted those conditions in order to accept federal funding through student loans.[232] The changes to admissions practices proposed by the MERIT Act would change the policy decision universities agreed to.[233] Alumni networks are important to many colleges and universities for their community but also for donations that help fund initiatives.[234] A university could argue that by tying all existing federal funding to this new condition, Congress is essentially putting a gun to the head of every university.[235]

The government may respond that the MERIT Act is not a change in kind to the policy that universities chose to accept when initially receiving federal student loans, but rather an extension of the original policy.[236] The government

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[227] *See id.* (adding a condition to the accreditation process).

[228] *See Sebelius*, 567 U.S. at 581, 583 (implying that a change in degree of an existing policy may not be legally coercive).

[229] *See id.* (finding that a Medicaid expansion that pursued a different policy than the original Medicaid policy was legally coercive to the recipients).

[230] *See Overview of Accreditation in the United States*, *supra* note 61 (explaining that one purpose of accreditation is to make sure that colleges and universities in America meet certain minimum "levels of quality").

[231] *See* 20 U.S.C. § 1099b(a)(5) (listing the broad categories of requirements for accreditation).

[232] *See Overview of Accreditation in the United States*, *supra* note 61 (explaining that only accredited universities are eligible to receive federal funding).

[233] *See Sebelius*, 567 U.S. at 583 (finding that expanding Medicaid to a broader scope of individuals is "a shift in kind" of policy rather than degree); Press Release, Tim Kaine, *supra* note 16 (stating that the purpose of the MERIT Act is to increase equality for college applicants, indirectly impacting the quality of education at colleges).

[234] *See* Patel, *supra* note 82 (implying that it is possible alumni will withhold donations from schools their children plan to apply to if they are not afforded preferences in admissions).

[235] *See Sebelius*, 567 U.S. at 581 (finding that Congress's Medicaid expansion conditions tied to existing funding were coercive). Adding to this potential "gun to the head" is that universities may lose out on significant alumni donations if they comply with the MERIT Act, causing universities to lack funding regardless of their decision to comply. *See* Patel, *supra* note 82 (explaining that colleges may lose out on donations if they eliminate legacy and donor preferences in admissions).

[236] *See* South Dakota v. Dole, 483 U.S. 203, 208 (1987) (holding that conditions setting the minimum drinking age in a state are related to safe interstate travel because they prevent teenagers from

could argue that a purpose of both the Civil Rights Act of 1964 and the Higher Education Act is to eliminate inequalities in college admissions.[237] The government could further argue that accreditation seeks to ensure that colleges provide a quality education to students as a result of their merits as individuals, not based on some characteristic that is completely out of their control.[238] In this sense, the government can argue that ending legacy and donor preferences in admissions is not a completely new policy, but rather a next step in a policy already contemplated by the recipients.[239]

The government could further argue, even with the entirety of federal funding to universities on the line, that the MERIT Act is still not legally coercive.[240] For example, in 2005, Congress passed a law conditioning all existing federal funding to universities on them celebrating Constitution Day.[241] No additional funding was provided, yet colleges have chosen to celebrate Constitution Day since 2005.[242] Although an annual celebration may impose a big

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driving to a state with a lower drinking age to purchase and drink alcohol, and then driving back to their home state while intoxicated).

[237] *See Title VI of the Civil Rights Act of 1964*, *supra* note 96 (stating that the purpose of Title VI is to prohibit discrimination on the basis of race and other protected characteristics at educational institutions that receive federal funding); 42 U.S.C. § 2000d (prohibiting discrimination on the basis of race, color, and national origin in programs and activities that receive federal funding); 20 U.S.C. § 1099b (granting statutory authority to the Department of Education to set the requirements of accreditation through the Higher Education Act, providing categories and statements of purpose that must be incorporated in any agency regulation pertaining to accreditation).

[238] *See Overview of Accreditation in the United States*, *supra* note 61 (providing that quality education is a goal of the accreditation process).

[239] *See id.* (providing that educational quality is the purpose of accreditation); *Title VI of the Civil Rights Act of 1964*, *supra* note 96 (providing that the purpose of Title VI—a requirement of accreditation—is to prevent discrimination and inequality on the basis of race). If the Civil Rights Act of 1964—a condition prohibiting discrimination on the basis of race—is seen as furthering the original policy goal of accreditation, then a court could reasonably find that adding a provision that prohibits unequal treatment on the basis of wealth and status is also merely a change in degree of existing policy rather than a change in kind of policy entirely. *See Overview of Accreditation in the United States*, *supra* note 61 (explaining that quality of education at colleges and universities is a goal of the Higher Education Act and accreditation more broadly).

[240] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 581, 583, 585 (2012) (implying that the case before the Court was clear because the policy of the new conditions was different than the policy originally contemplated and the amount of money at stake was large, but that a case in which these two factors pointed in opposite directions would not be clear-cut).

[241] *See Constitution Day and Citizenship*, U.S. DEP'T OF EDUC., https://www2.ed.gov/policy/fund/guid/constitutionday07.html#:~:text=The%20U.S.%20Department%20of%20Education,September%2017%20of%20each%20year. [https://perma.cc/ZVW7-VWW2] (Aug. 28, 2008) (explaining that all private colleges accepting federal funding must celebrate the U.S. Constitution on September 17).

[242] *See Constitution Day*, U.S. SENATE, https://www.senate.gov/about/origins-foundations/senate-and-constitution/constitution-day.htm [https://perma.cc/AC9D-RB94] (explaining that Constitution Day was added to an appropriations bill in 2005); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 111, 118 Stat. 2809, 3344–45 (2004) (creating Constitution Day as a requirement of all colleges and universities that receive federal funding).

change on a university, Constitution Day appears to have only a tenuous connection to the original policy of accreditation.[243]

A university could respond that, even though Constitution Day may be a larger policy shift, the change to practices at universities will be much larger as a result of the MERIT Act.[244] In response, the government could use *Dole* to bolster its argument.[245] Federal funding for highway initiatives was initially passed with conditions aimed at increasing safety on America's roads.[246] Raising the drinking age to twenty-one, although a big shift for some states, was still tied to the original goal of highway safety.[247] Just as drinking age conditions were tied to the original policy underlying highway funding, the MERIT Act's ban on legacy and donor preferences in admissions is tied to the original goals of quality and equality at colleges in America.[248]

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[243] *See Constitution Day*, *supra* note 242 (explaining the origins and practices of Constitution Day as an added condition of accreditation in 2005). *Compare Sebelius*, 567 U.S. at 583–84 (providing an example of a change in kind of policy rather than degree by significantly expanding the pool of eligible Medicaid recipients and conditioning a large portion of a state's budget), *with* South Dakota v. Dole, 483 U.S. 203, 208–09 (1987) (providing an example of a permissible additional condition on existing funding that, despite not obviously pursuing the original policy goal, was found to be pursuing the original policy goal and only conditioned 5% of the state's highway funding). Constitution Day was an unexpected addition to the Consolidated Appropriations Act of 2005, coming as a late amendment by Senator Robert Byrd, thus furthering the argument that Constitution Day was not anticipated by universities when they began accepting federal funding. *Constitution Day*, *supra* note 242 (telling the story of Senator Byrd adding Constitution Day as a requirement of accreditation the Higher Education Act in an amendment to the Consolidated Appropriations Act of 2005).

[244] *See Sebelius*, 567 U.S. at 583 (finding that a Medicaid expansion changes the underlying policy originally enacted under Medicaid because the expansion includes a broader demographic of individuals than just the extremely poor).

[245] *See Dole*, 483 U.S. at 208–09 (providing that adding a condition about drinking ages helps pursue the underlying policy goal of keeping the roads safe because it keeps teenagers from driving across state lines to drink alcohol where the drinking ages differ and then drunk driving back home).

[246] *See id.* (explaining that the original program was implemented to keep roads safe).

[247] *See id.* (recognizing the rationale that uniform drinking ages and safer streets are connected). Young people drove to border states to drink when those states had a lower drinking age, and then drove home after drinking. *Id.* Uniformity among the states regarding drinking age could eliminate any incentives that would cause individuals under the age of twenty-one to drink and drive across state lines to purchase alcohol legally in another state. *Id.*

[248] *See id.* (connecting a uniform drinking age across the states to the policy goal of highway safety); Press Release, Tim Kaine, *supra* note 16 (providing the logical connection between the new and old conditions on accreditation and explaining the purpose of the MERIT Act according to the Senators attempting to pass the bill). The original purpose of the Higher Education Act was to eliminate financial barriers to college admissions and make colleges more merit based. *See* President Lyndon B. Johnson, Remarks at the Southwest Texas State College upon Signing the Higher Education Act of 1965 (Nov. 8, 1965) (available at https://www.presidency.ucsb.edu/documents/remarks-southwest-texas-state-college-upon-signing-the-higher-education-act-1965 [https://perma.cc/C5Y5-9JSZ]) ("It means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor.").

Ultimately, the MERIT Act falls somewhere between the acts in *Dole* and *Sebelius*.[249] Like *Dole*, the policy underlying the MERIT Act is probably in line with the policy choices that universities made when they began accepting federal student loans.[250] Like *Sebelius*, the MERIT Act conditions all federal funding to universities, which is an enormous portion of a university's budget.[251] Nevertheless, conditions like Constitution Day have been added in the past, apparently without challenge.[252] It is not clear how a court would deal with a challenge to the MERIT Act claiming that the conditions it sets are legally coercive and beyond Congress's Spending Clause power.[253]

III. Congress Can and Should Pass the MERIT Act

The three challenges addressed in this Note are the right to expressive association, unconstitutional restrictions on speech as a condition of funding, and a Spending Clause coercion challenge.[254] Section A of this Part focuses on potential issues and solutions to the First Amendment challenges to the MERIT Act.[255] Section B focuses on potential issues and solutions to a Spending Clause challenge to the MERIT Act.[256] Section C makes the political case for passing the MERIT Act.[257]

A. Addressing the Two First Amendment Challenges

Subsection 1 of this Section addresses the viability of an expressive association challenge to the MERIT Act.[258] Subsection 2 addresses an unconstitutional

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[249] *Compare Sebelius*, 567 U.S. at 581 (finding that conditioning all existing Medicaid funding on acceptance of an expanded Medicaid program covering different demographics of people was coercive), *with Dole*, 483 U.S. at 211–12 (finding it not coercive when the federal government conditioned five percent of highway funding on states setting a certain drinking age).

[250] *See Dole*, 483 U.S. at 209, 211 (providing that a tenuous connection between a minimum drinking age and safer streets is sufficient because a logical link between the policy and the condition could be established).

[251] *See Sebelius*, 567 U.S. at 581 (providing that a new condition on Medicaid putting all existing funding on the line was like a "gun to the head").

[252] *See Constitution Day and Citizenship*, *supra* note 241 (explaining that all private colleges that accept federal funding must hold an event on September 17 each year celebrating the U.S. Constitution).

[253] *Compare Sebelius*, 567 U.S. at 581 (finding that an expanded Medicaid program which included more than only the poorest Americans was coercive when it all existing Medicaid funding was on the line), *with Dole*, 483 U.S. at 211–12 (finding that a condition creating uniform drinking ages for states where the amount of highway funding at stake was about 5% was not coercive).

[254] *See supra* notes 105–253 and accompanying text.

[255] *See infra* notes 258–276 and accompanying text.

[256] *See infra* notes 277–291 and accompanying text.

[257] *See infra* notes 292–307 and accompanying text.

[258] *See infra* notes 261–267 and accompanying text.

conditions challenge to the MERIT Act.[259] Subsection 3 suggests drafting changes that may mitigate First Amendment challenges to the MERIT Act.[260]

1. Expressive Association Challenge

It is unclear whether universities are considered expressive associations for the purposes of the First Amendment.[261] Assuming that *Rumsfeld v. Forum for Academic & Institutional Rights* establishes universities as expressive associations, it would still be very difficult for a university to establish that the MERIT Act harms its mission.[262]

The government could argue that preferences for alumni and donor applicants serve no expressive purpose.[263] Further, the government could insist that a university's main purpose for its admissions practices are to keep alumni happy so that they will donate more money.[264] After all, universities promote their communities to be places for students with diverse backgrounds, beliefs, and experiences to become more well-rounded individuals through community and education.[265] If developing a well-rounded community is the core expressive association at universities, then a restriction on preferences to donor and legacy applicants should have no effect.[266]

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[259] *See infra* notes 268–270 and accompanying text.

[260] *See infra* notes 271–276 and accompanying text.

[261] *See FAIR*, 547 U.S. 47, 68–69 (2006)(implying that law schools may be expressive association by skipping the analysis of whether a law school has core expressive purposes); Greenfield, *supra* note 115, at 235–36 (explaining that colleges often are not neatly classified as expressive associations, but that many colleges with a religious or moral mission fit into existing precedent and can claim the First Amendment protections of associations with an inherent expressive purpose).

[262] *See Mission, Vision, & History*, HARV. COLL., https://college.harvard.edu/about/mission-vision-history [https://perma.cc/HV2N-GPJW] (providing that Harvard's mission is to educate future leaders from different walks of life to strive for a more just and fairer world).

[263] *See FAIR*, 547 U.S. at 66 (finding that military recruiters being placed on Boston College's undergraduate campus does not inherently convey a message without additional coinciding speech).

[264] *See* Patel, *supra* note 82 (explaining that some schools, including Harvard, have conveyed worries about diminished alumni donations if they ended legacy and donor preferences in admissions).

[265] *See, e.g.*, *Mission and History*, *supra* note 185 (providing that part of Boston College's mission is to "lead[] its students on a comprehensive journey of discovery—one that integrates their intellectual, personal, ethical, and religious formation").

[266] *See FAIR*, 547 U.S. at 69–70 (finding that letting military recruiters on campus did not infringe the association's core expression because Boston College Law School could continue voicing its support for the LGBT community while the recruiter was on campus); Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984) (finding that including women in voting positions did not infringe the Jaycees' core expression of promoting civic duty); *see also* Lyng v. Int'l Union, United Auto., Aerospace, & Agric. Implement Workers of Am., UAW, 485 U.S. 366, 367 (1988) (explaining that a statute that does not require an association to abandon their core activities does not abridge association rights).

It is highly unlikely that a university could successfully argue that a ban on legacy and donor preferences burdens its core expressive purpose as a university.[267]

2. Unconstitutional Conditions Challenge

The conditions in the MERIT Act also appear to fall somewhere between *Rust v. Sullivan* and *Legal Services Corp. v. Velazquez*.[268] The result of an unconstitutional conditions challenge would rest on whether a university could convince a court that the MERIT Act conditions universities as recipients rather than merely conditioning a program that universities can pursue through other methods.[269] The stronger argument is probably that the MERIT Act conditions only one program—admissions practices—as opposed to a recipient—a college's entire operation—but it would be prudent for Congress to prepare for a First Amendment unconstitutional conditions challenge as it drafts the MERIT Act.[270]

3. Careful Drafting to Avoid First Amendment Violations

Congress can mitigate these challenges in two ways.[271] First, Congress should include a statement of purpose to be included in the legislative history asserting that the congressional purpose is not to interfere with the mission of a university, but rather to help foster a well-rounded and merit-based student body.[272] Second, Congress can also include that the MERIT Act seeks to root out the rem-

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[267] *See Roberts*, 468 U.S. at 628 (finding that the Jaycees had not convinced the U.S. Supreme Court that including women in voting positions would its their core expression); *FAIR*, 547 U.S. at 66 (finding that the law school had not met its burden to show that allowing the military recruiter on campus infringed its core expressive beliefs).

[268] *Compare* Rust v. Sullivan, 500 U.S. 173, 193 (1991) (holding that a program conditioning funding to clinics on not performing abortion services did not infringe the First Amendment rights of doctors who were free to continue performing abortion services at other clinics), *with* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (holding that funding conditions limiting a lawyer's ability to bring a challenge against welfare laws infringed a lawyer's First Amendment right).

[269] *See Velazquez*, 531 U.S. at 543–44 (finding excessive a restriction on a lawyer because it did not limit a program but the traditional duties of a lawyer).

[270] *See Rust*, 500 U.S. at 197–98 (holding that limits placed on abortion services at a hospital did not infringe the doctors' ability to engage in abortion-related speech because doctors could perform abortion counseling at other locations).

[271] *See infra* notes 272–276 and accompanying text.

[272] *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (providing that a minimum drinking age and safer streets are sufficiently connected because they can be connected through a logical link). Even though the Court does not often refer to legislative intent while assessing a First Amendment challenge to a statute or regulation, its decisions suggest that the government's motive is a primary object of the Court's inquiry. *See* Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 414 (1996) ("I argue, notwithstanding the Court's protestations in *O'Brien*, that First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives.").

nants of discriminatory racial impact that continue in college admissions practices.[273] The U.S. Supreme Court has established that eliminating racial discrimination is a compelling interest, and data shows that legacy and donor preferences in college admissions disproportionately disadvantage African American applicants.[274] By focusing the purpose of the MERIT Act on eliminating racial discrimination in college admissions practices, the MERIT Act has a stronger chance at surviving a First Amendment challenge.[275] This argument rests on the success or failure of the current legal challenge to legacy and donor preferences.[276]

B. The Spending Clause Challenge

The Spending Clause challenge is likely the most potent challenge to the MERIT Act.[277] The MERIT Act poses a big change for the admissions practices (and alumni donation norms) at many colleges in America, without accompanying the condition with a new subsidy.[278] Nevertheless, it is not a far stretch to argue that the MERIT Act pursues the policy accepted by universities when they began accepting federal student loans—ensuring quality of education and equality of opportunity for all applicants regardless of economic status.[279] Af-

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[273] *See* Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (holding that eliminating discrimination on the basis of sex when it does not directly relate to the group's core expressive purpose does not violate the First Amendment).

[274] *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 204–05 (2023) (explaining that racial discrimination is unconstitutional); Arcidiacono et al., *supra* note 3, at 42 (providing data on Harvard's legacy and donor preferences, broken down by race).

[275] *See Students for Fair Admissions*, 143 S. Ct. at 2149 (explaining discrimination on the basis of race in college admissions is unconstitutional); Loving v. Virginia, 388 U.S. 1, 11–12 (1967) (holding that ending discrimination on the basis of race is a compelling governmental interest); Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000) (explaining that a compelling governmental interest is required to impose inclusion requirements on an expressive association under the First Amendment).

[276] *See supra* notes 94–104 and accompanying text (explaining the current legal challenge to legacy admissions practices and the potential legitimate, nondiscriminatory purpose a college has in giving preference to legacy applicants). This argument is equally weak given the likely legitimate, nondiscriminatory purpose that colleges may have in legacy and donor preferences. *See supra* notes 94–104 and accompanying text (examining the legal challenge to legacy admissions at Harvard and the possibility of a legitimate, nondiscriminatory purpose in giving preference to legacy applicants).

[277] *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (finding that conditioning all existing Medicaid funds on an expansion that included more than the originally contemplated population in Medicaid was beyond the Spending Clause power of Congress).

[278] *See* MERIT Act, S. 3232, 118th Cong. (2023) (seeking to add conditions to accreditation under the Higher Education Act without adding a new subsidy available to universities).

[279] See *Overview of Accreditation in the United States*, *supra* note 61 (explaining that quality of education is a broad purpose of accreditation and its many conditions); President Lyndon B. Johnson, Remarks, *supra* note 248 ("We can provide loans, free of interest and free of any payment schedule until after you graduate, to worthy, deserving, capable students. And in my judgment, this Nation can never make a wiser or a more profitable investment anywhere.").

ter all, federal student loans are supposed to make college funding easily accessible to students who would not otherwise be able to get a loan.[280]

The obvious way to protect against a Spending Clause challenge is to tie the MERIT Act conditions to a new subsidy that colleges can choose to accept or reject.[281] Given the amount of money some colleges receive from alumni donations, the new subsidy would have to be very large or only very few colleges would be likely to accept the MERIT Act's funding.[282] Only colleges that do not have large alumni donations would be likely to accept the condition for a relatively small subsidy and thus legacy and donor preferences would continue at the colleges that give the largest preferences to legacy and donor applicants.[283]

Without changing the funding structure of the MERIT Act, there are three main ways Congress can protect against a Spending Clause challenge.[284] First, Congress should include a statement of purpose in the MERIT Act or its legislative history to emphasize that the MERIT Act is not intended to eliminate a university's ability to build an alumni community.[285] The true purpose of the bill is to reduce admissions preferences granted to some applicants on the basis of status and wealth.[286] Second, Congress should highlight that similar conditions, such as the requirement that colleges celebrate Constitution Day, have been added to the existing receipt of federal student loans without dispute.[287] Finally, Congress should contrast this case with the Court's 2012 opinion in *National Federation of Independent Businesses v. Sebelius*.[288] Though, like the Medicaid

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[280] *See Why Did the Federal Government Get Involved in Student Loans?*, PETER G. PETERSON FOUND., https://www.pgpf.org/blog/2022/06/why-did-the-federal-government-get-involved-in-student-loans [https://perma.cc/9LWP-VHVW] (June 1, 2022) (explaining that federal student loans have expanded over time to make funding available to all students regardless of the state of the country's economy); President Lyndon B. Johnson, Remarks, *supra* note 248 ("It means that a high school senior anywhere in this great land of ours can apply to any college or any university in any of the 50 States and not be turned away because his family is poor.").

[281] *See Sebelius*, 567 U.S. at 579, 583 (suggesting that new policy conditions are constitutional when they are tied only to new funding).

[282] *See, e.g.*, *Financial Overview*, HARV. UNIV. 10 (Oct. 2024), https://finance.harvard.edu/sites/hwpi.harvard.edu/files/fad/files/fy24_financial_overview.pdf [https://perma.cc/28D3-6C9N] (explaining that Harvard received $528 million in alumni donations for use in 2024, constituting 8% of the University's revenue).

[283] *See id*. (providing an example of an elite college with wealthy alumni).

[284] *See infra* notes 285–291 and accompanying text.

[285] *See* Patel, *supra* note 82 (providing that one stated reason colleges engage in legacy and donor preferences in admissions is to build a community with alumni).

[286] *See* Press Release, Tim Kaine, *supra* note 16 (providing that the MERIT Act is targeted at making college admissions merit-based rather than status-based).

[287] *See Constitution Day*, *supra* note 242 (explaining that Constitution Day has been a condition for all universities that accept federal funding since 2005).

[288] *See generally* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012) (holding that conditions that place existing funding at stake, which represents a large portion of a recipient's total budget, although furthering an entirely different policy goal from the original funding conditions is beyond the scope of Congress's Spending Clause power).

expansion in *Sebelius*, the MERIT Act conditions all existing federal student loan funding on a new condition in admissions practices, the MERIT Act presents a markedly different case.[289] The MERIT Act furthers the goal originally contemplated by universities: to increase the quality of education at universities across the country by pursuing a merit-based admissions system.[290] Ending legacy and donor preferences will open spots for candidates of diverse and qualified backgrounds, which will benefit the quality of education for all students.[291]

C. The Political Case for the MERIT Act

In addition to the legal arguments, there are strong political reasons for Congress to pass the MERIT Act.[292] "If you don't like how the table is set, turn over the table."[293] Public opinion has long been opposed to special treatment for legacy and donor applicants, and public sentiment for ending legacy and donor preferences has become overwhelming since the end of affirmative action.[294] Although public opinion is not a determinative reason for Congress to pass a bill, it is certainly a motivating factor.[295]

Second, the legal challenge to legacy and donor preferences will probably fail.[296] Given that colleges may have a legitimate, nondiscriminatory purpose for their admissions practices, it is very unlikely that legacy and donor preferences

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[289] *See generally id.* (finding that an expanded Medicaid program to cover different demographics of people which conditioned all existing Medicaid funding was coercive).

[290] *See* South Dakota v. Dole, 483 U.S. 203, 211 (1987) (providing that a logical connection between safe streets and a minimum drinking age is sufficient to overcome a Spending Clause challenge); Press Release, Tim Kaine, *supra* note 16 (explaining the purpose and goals of the MERIT Act).

[291] *See* Arcidiacono et al., *supra* note 3, at 40 (providing data on the stark advantage legacy and donor applicants have in college admissions at Harvard). Legacy and donor applicants will still be provided an opportunity to make their case as qualified applicants that benefit the student body, they will just no longer receive preferential treatment solely because of their status or wealth. *See* Press Release, Tim Kaine, *supra* note 16 (providing that the MERIT Act is targeted at eliminating the leg up some applicants have merely because of a status or wealth they were born into).

[292] *See infra* notes 294–307 and accompanying text.

[293] *House of Cards: Chapter 15* (Netflix Feb 14, 2014) ("Cathy, if you don't like how the table is set, turn over the table.").

[294] *See* Nikki Graf, *Most Americans Say Colleges Should Not Consider Race or Ethnicity in Admissions*, PEW RSCH. CTR. (Feb. 25, 2019), https://www.pewresearch.org/short-reads/2019/02/25/most-americans-say-colleges-should-not-consider-race-or-ethnicity-in-admissions/ [https://perma.cc/QZP3-SAHY] (providing that 68% of Americans opposed legacy preferences in 2019); Vianney Gómez, *As Courts Weigh Affirmative Action, Grades and Test Scores Seen as Top Factors in College Admissions*, PEW RSCH. CTR. (Apr. 26, 2022), https://www.pewresearch.org/short-reads/2022/04/26/u-s-public-continues-to-view-grades-test-scores-as-top-factors-in-college-admissions/ [https://perma.cc/9LR5-N6ND] (providing that 75% of Americans oppose legacy preferences in college admissions in 2022—up 7% from three years earlier).

[295] *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5 (2d ed. 2004) (deeming members of Congress "single-minded seekers of reelection"); *see also id.* at 13–77 (observing that members of Congress are motivated to win reelection so they can build power and continue to legislate).

[296] *See supra* notes 94–104 and accompanying text (explaining the weaknesses of the current legal challenge to legacy preferences).

will be deemed a violation of Title VI.[297] Legislation from Congress is perhaps even necessary to end legacy and donor preferences in college admissions.[298]

Third, colleges are unlikely to mount a legal challenge to the MERIT Act.[299] Colleges, especially those with a reputation for being elite, care deeply about how the public perceives them.[300] Given how strongly the public feels about ending legacy and donor preferences, it is unlikely that a college would stake its reputation on this legal battle.[301] This is particularly true given the central role colleges have played in recent political debate.[302]

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[297] *See supra* notes 94–104 and accompanying text (explaining the requirements for a Title VI violation).

[298] *See supra* notes 94–104 and accompanying text (outlining why existing law may be insufficient for banning legacy and donor preferences in college admissions).

[299] *See infra* notes 300–302 and accompanying text.

[300] *See* Jennifer Schuessler, Anemona Hartocollis, Michael Levenson & Alan Blinder, *Harvard President Resigns After Mounting Plagiarism Accusations*, N.Y. TIMES (Jan. 2, 2024), https://www.nytimes.com/2024/01/02/us/harvard-claudine-gay-resigns.html [https://perma.cc/EG2N-MF28] (providing an example of a prominent college responding to public pressure after congressional hearings and plagiarism accusations lodged at the university president); Matthew Haag & Katherine Rosman, *Decades Ago, Columbia Refused to Pay Trump $400 Million*, N.Y. TIMES (Mar. 21, 2025), https://www.nytimes.com/2025/03/21/nyregion/trump-columbia-university-400-million.html [https://perma.cc/J9AD-TY89] (explaining that Columbia University caved to demands made by President Trump without a fight, however legally dubious the demands were, so Columbia did not potentially lose out on $400 million of federal money); Vimal Patel, *More Universities Are Choosing to Stay Neutral on the Biggest Issues*, N.Y. TIMES (Mar. 11, 2025), https://www.nytimes.com/2025/03/11/us/institutional-neutrality-universities-free-speech.html [https://perma.cc/X2DC-BJZH] (overviewing the growing trend of colleges staying silent on major, current political issues because of a growing scrutiny of colleges by the political branches of the federal government). *But see* Mike Damiano, *Trump Administration Freezes More Than $2 Billion in Funding Tied to Harvard*, BOS. GLOBE (Apr. 14, 2025), https://www.bostonglobe.com/2025/04/14/metro/harvard-trump-funding-freeze/ [https://perma.cc/8JQZ-5Y8Y] (reporting on Harvard University's decision to risk $2 billion of federal funding by challenging President Trump's funding conditions that would require Harvard to eliminate all diversity, equity, and inclusion programs and to submit to surveillance of all foreign students). The situation with Harvard in April 2025 is arguably different than the MERIT Act because, unlike the situation with diversity programs and imposing intrusive surveillance mechanisms, there is broad public support for the MERIT Act that would place Harvard's public perception at risk if they raised a legal challenge. Damiano, *supra.*

[301] *See* Gómez, *supra* note 294 (providing data showing that three out of four Americans favor a ban on legacy and donor preferences in college admissions).

[302] *See* Schuessler et al., *supra* note 300 (noting the national attention Harvard received regarding the handling of antisemitic protests on Harvard's campus in the days following the October 7 Hamas-led attacks in Israel); Mitch Smith, *North Carolina Trustees Say Race Can't Be Considered in Hiring or Admissions*, N.Y. TIMES (July 28, 2023), https://www.nytimes.com/2023/07/28/us/unc-affirmative-action-supreme-court.html [https://perma.cc/XX3H-UB6G] (providing two examples of college campuses at the center of political discussion of race in recent years); Justin Wm. Moyer & Peter Hermann, *GW University Suspends Students Involved in Protest Encampments*, WASH. POST, https://www.washingtonpost.com/education/2024/04/26/gwu-protests-encampment-pro-palestinian/ [https://perma.cc/9YLB-UQ7D] (Apr. 26, 2024) (explaining the encampment established at George Washington University protesting the Israel-Gaza war the gained national attention); Elizabeth Brevard, *September 30, 1962: James Meredith & the University of Mississippi*, SMITHSONIAN INST. NAT'L PORTRAIT GALLERY: BLOG, https://npg.si.edu/blog/september-30-1962-james-meredith-university-mississippi [https://perma.cc/P8Y7-6EMA] (explaining the story of James Meredith in his quest to become the first Black

Finally, and most importantly, the MERIT Act is good policy.[303] Competition to get into college should be fierce but based on the academic and non-academic accomplishments of each candidate.[304] Status or wealth assumed by a particular applicant at birth should not give them a leg up on the competition.[305] Applicants from wealthy and powerful families already have greater access to tutoring and extracurricular activities.[306] If we strive to live in a society of equal opportunity for all, the MERIT Act is an important step in accomplishing that goal.[307]

CONCLUSION

In 2023, Senators Tim Kaine (D-VA) and Todd Young (R-IN) introduced the MERIT Act, which would ban colleges and universities that receive federal student loans from giving preferential treatment to legacy and donor applicants. Legislation on the matter is necessary because current legal challenges to legacy and donor preferences under Title VI of the Civil Rights Act of 1964 are unlikely to succeed. Universities may be able to challenge the MERIT Act on First Amendment grounds and as outside the scope of Congress's Spending Clause power. With careful drafting and clear emphasis on certain purposes for passing the bill, Congress may be able to preempt these challenges and strengthen the legislation. There are also strong political reasons Congress should consider for passing the MERIT Act, including that universities are unlikely to mount a legal challenge to the end of legacy and donor preferences in admissions.

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student at the University of Mississippi in 1962, leading to the governor defying federal court rulings and a mob of hundreds of civilians engaging in violent conflict with the U.S. Army after President John F. Kennedy ordered the university to allow Mr. Meridith to attend).

[303] *See infra* notes 304–307 and accompanying text.

[304] *See* Press Release, Tim Kaine, *supra* note 16 (explaining that the MERIT Act is designed to take prevent economic or legacy status from disadvantaging an applicant's chances or admission to college); Gómez, *supra* note 294 (justifying merit-based changes to college admissions processes through the accreditation process with policy and public opinion justifications). "Education is the silver bullet." *The West Wing: Six Meetings Before Lunch* (NBC television broadcast Apr. 5, 2000) (providing a quote from Sam Seaborn, the Deputy White House Communications Director in the television show *The West Wing*).

[305] *See* Arcidiacono et al., *supra* note 3, at 40 (providing statistics on the significant advantage applicants to Harvard have when they have a legacy or donor connection); Gómez, *supra* note 294 (providing data that legacy and donor applicants have a leg up in admissions, but that the public is strongly against these practices).

[306] *See* Abigail Hess, *Rich Students Get Better SAT Scores—Here's Why*, CNBC: MAKEIT (Oct. 3, 2019), https://www.cnbc.com/2019/10/03/rich-students-get-better-sat-scores-heres-why.html [https://perma.cc/YT7S-8U8S] (explaining that students from wealthier families have greater opportunities to work with tutors and are more likely to receive tutoring in preparation for the SAT and other tests).

[307] *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal . . . .").