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The special needs exception, first articulated in New Jersey v. T.L.O., makes the warrant and probable cause requirements of the Fourth Amendment unnecessary “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement,” make it impracticable. In Vernonia School District 47J v. Acton, the Supreme Court, relying on the special needs exception, held that random suspicionless drug testing of high school students who participated in the school’s athletic program did not violate the Fourth Amendment. Finding that “special needs” existed in the context of public schools, the Court engaged in a three-pronged balancing test to determine the reasonableness of the proposed intrusion, weighing the “nature of the privacy interest,” the “character of the intrusion,” and the “nature and immediacy of the governmental concern at issue . . . and the efficacy of the means for meeting it.” As commentators have recognized, the special needs balancing test has created an increasingly larger exception to the Fourth Amendment’s protection: many courts, relying on a broad reading of Vernonia, have expanded the application

2 Id. at 357 (Blackmun, J., concurring in the judgment).
4 See id. at 664–65. Originally, the only specified hurdle in identifying a special need was whether the program in question served a need beyond law enforcement. See The Supreme Court, 1996 Term—Leading Cases, 111 HARV. L. REV. 289, 294 & n.50 (1997). However, in Chandler v. Miller, 117 S. Ct. 1295 (1997), the Court seemingly raised this bar, stating that “the proffered special need for drug testing must be substantial — important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion.” Id. at 1303 (emphasis added). It seems more likely, however, that rather than altering the standard for special needs, the Court was simply defining a special need as a need that survives the balancing test elucidated in Vernonia. See The Supreme Court, 1996 Term—Leading Cases, supra, at 294–96.
5 Vernonia, 515 U.S. at 653.
6 See id. at 652–65.
7 Id. at 654.
8 Id. at 658.
9 Id. at 660.
of the special needs exception in the public school setting. In January 1998, in *Todd v. Rush County Schools*, the Seventh Circuit followed this trend and held that random suspicionless drug testing of high school students participating in any extracurricular activity did not violate the Fourth Amendment. In light of Supreme Court precedent dealing with suspicionless drug testing, the Seventh Circuit incorrectly applied the special needs exception by neglecting to recognize the narrow circumstances that justified the holding in *Vernonia*.

In 1996, the School Board of Rush County, Indiana, enacted a drug testing program that prohibited high school students from participating in any extracurricular activities or driving to and from school unless the students and their parents or guardians consented to random urinalysis testing for drugs, tobacco, and alcohol. A positive test result barred a student from extracurricular activities and driving to and from school unless she could produce either a valid explanation or, upon retesting, a negative test result.

As a consequence of their parents’ refusal to consent to drug testing, the plaintiff students were barred from participating in any extracurricular activity. The plaintiffs filed a § 1983 action against the Rush County School District claiming a violation of the Fourth Amendment. The district court granted the school district’s motion for summary judgment, finding the Rush County program sufficiently similar to the program in *Vernonia* to uphold the Rush County drug-testing program.

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12 133 F.3d 984 (7th Cir.), cert. denied, 119 S. Ct. 68 (1998).

13 See id. at 985-87.

14 *Todd* did not involve a challenge to the driving element. See id. at 985 n.1.

15 See id. at 984.

16 See id. at 985.


18 See id. at 801. The plaintiffs also claimed that the program violated the Indiana Constitution. See id.

19 See id. at 807. Once the district court dismissed the plaintiffs’ federal claim, it no longer had original jurisdiction over the state constitutional claim, and it accordingly dismissed the state claim without prejudice pursuant to 28 U.S.C. § 1367(c)(3) (1990). See id.

20 See id. at 806-07.
The Seventh Circuit affirmed. Writing for a unanimous court, Judge Cummings asserted that *Vernonia* and *Schaill v. Tippecanoe County School Corp.* controlled the outcome. Initially, he explained that the testing program "was undertaken in furtherance of the school districts' 'responsibilities, under a public school system, as guardian and tutor of children entrusted to its care'" as a means of deterring drug use. Judge Cummings then stated that the justifications for testing athletes in *Vernonia* were applicable to students in all extracurricular activities in three respects. First, "successful extracurricular activities require healthy students." Second, the drug-testing program, like those in *Vernonia* and *Schaill*, was only applicable to those students who voluntarily participated in extracurricular activities, which the court characterized as a privilege. Third, like athletes, participants in extracurricular activities serve as role models for other students, and it "is not unreasonable to couple [this] benefit with an obligation to undergo drug testing." Judge Cummings concluded by emphasizing the need to provide school administrators with a reasonable means with which they can control the drug problem facing American schools.

The Seventh Circuit denied the plaintiffs' petition for rehearing en banc. In dissent, Judge Ripple argued that extending *Vernonia* to apply to all students participating in extracurricular activities ignores the Supreme Court's holding in *Chandler v. Miller*. Judge Ripple explained that *Chandler* struck down the testing program because the targeted group neither had a "high degree of drug use" nor performed "highly sensitive safety-related tasks" that would justify the testing.

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21 See *Todd*, 133 F.3d at 987.
22 Judges Manion and Evans joined Judge Cummings's opinion.
23 864 F.2d 1309, 1318–22 (7th Cir. 1988) (holding that a high school's random suspicionless drug testing program designed to target athletes and cheerleaders was reasonable).
24 See *Todd*, 133 F.3d at 986.
26 Id.
27 See id. The Seventh Circuit's recent decision in *Willis II v. Anderson Community School Corp.*, No. 98-1227, 1998 WL 569114 (7th Cir. Sept. 9, 1998), emphasized this point. See id. at *6 ("[T]he *Vernonia* and *Todd* drug testing could be construed as part of the 'bargain' a student strikes in exchange for the privilege of participating in favored activities.").
28 *Todd*, 133 F.3d at 986 (quoting *Schaill*, 864 F.3d at 1320) (internal quotation marks omitted).
29 See id.
30 See *Todd v. Rush County Sch.*., 139 F.3d 571, 571 (7th Cir. 1998).
31 Judge Rovner joined Judge Ripple's dissent. Judge Wood's dissent, which Judge Flaum joined, did not reach the merits of the case. See id. at 573 (Wood, J., dissenting from the denial of rehearing en banc). Judge Wood argued that questions regarding *Vernonia's* holding would most likely reappear, making it important for the Seventh Circuit to explain how it interpreted *Vernonia* instead of "simply say[ing] 'see *Vernonia*' and leav[ing] it at that." Id.
32 117 S. Ct. 195, 1298 (1997) (refusing to apply the special needs exception to a testing program that required certain state office candidates to submit to drug testing); see *Todd*, 139 F.3d at 571 (Ripple, J., dissenting from denial of rehearing en banc).
33 *Todd*, 139 F.3d at 572 (Ripple, J., dissenting from the denial of rehearing en banc).
Judge Ripple applied this reasoning to Todd: "[T]here is . . . certainly no showing that the targeted group, all students participating in any extracurricular activity, presents a particularized need."

The Seventh Circuit failed to address critical distinctions between the targeted groups in Vernonia and Todd and thus erroneously likened Rush County's drug testing program to the one in Vernonia. As Judge Ripple's dissent suggested, the court ignored the clear command of precedent that, when suspicion-based testing will not adequately address the problem in a special needs setting, suspicionless testing of groups is reasonable, but only to the extent that there is a recognizable correlation between the targeted group and the problem to be addressed. Creating a testing program in light of this correlation limits testing to those groups that are actually suspected of engaging in the proscribed activity. The Seventh Circuit's failure to consider the lack of correlation in Rush County allows the school to test any number of students without a modicum of suspicion of drug use and therefore provides no limitation for who can be tested.

The Supreme Court's previous decisions concerning suspicionless drug testing emphasized that testing should be limited to groups that correlate with a drug problem. First, in Skinner v. Railway Labor Executives' Ass'n, the Court applied the special needs exception in upholding a suspicionless drug-testing program designed to test railroad employees after they were involved in an accident, which cer-

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34 Id. Judge Ripple suggested that by ignoring Chandler's holding, the court condoned testing the entire student body. See id. He pointed to two aspects of the panel's decision that are equally applicable to the entire student body and not limited to extracurricular activities: the needs for "healthy students" and drug-free role models. Id. Judge Ripple also argued that the panel erred in assuming that participation in extracurricular activities is voluntary, implicitly rejecting the argument that a waiver of privacy rights is part of the bargain in choosing to participate in extracurricular activities. See id. at 573.

35 See id. at 572–73.

36 See generally Willis II v. Anderson Community Sch. Corp., No. 98-1227, 1998 WL 569114, at *4 (7th Cir. Sept. 9, 1998) (suggesting that Supreme Court precedent "strongly indicate[s] that the feasibility of a suspicion-based search is a key consideration in determining whether it is reasonable for the government to implement a suspicionless regime").

37 The Seventh Circuit also failed to address other distinctions between Vernonia and Todd that undermine the court's analogical reasoning. For example, the Court in Vernonia emphasized that athletes have a diminished expectation of privacy because of their common state of undress. See Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657 (1995). Students in other extracurricular activities have no reason to possess this lower expectation of privacy. See Trinidad Sch. Dist. No. 1 v. Lopez, No. 97SCI24, 1998 WL 373305, at *11 (Colo. June 29, 1998) (en banc).

38 The Court has recognized two distinct bases of correlation that have justified suspicionless drug testing of a group: the group is suspected of drug use or the group performs highly sensitive safety-related tasks that create a unique risk to others if exposed to drugs. Because students do not engage in such safety-sensitive tasks, see Todd, 139 F.3d at 572 (Ripple, J., dissenting from the denial of rehearing en banc); infra note 42, this comment examines the correlation between the target groups and suspected drug use.


40 See id. at 609, 619, 633–34.
tainingly created a reasonable suspicion of drug use. Second, in *National Treasury Employees' Union v. Von Raab*, the Court upheld the suspicionless drug testing of Customs Service agents, but limited its holding to those agents whose drug use would create a unique danger to others. Third, in *Vernonia*, the Court justified the drug testing of high school athletes by emphasizing that members of the athletic teams were believed to be the "leaders of the drug culture." In all three cases, there existed a reason to suspect a clear correlation between the target group and a drug problem. Finally, drawing upon these decisions, the Court in *Chandler* refused to extend the special needs doctrine to allow drug testing of certain state office candidates because "in contrast to the effective testing regimes upheld in *Skinner, Von Raab,* and *Vernonia*, Georgia's certification requirement was not well designed to identify candidates who violated antidrug laws." The *Chandler* Court, therefore, found that the lack of a correlation between the target group and the drug problem warranted striking down the testing scheme.

The Seventh Circuit erred by not finding dispositive the fact that there was no showing of a correlation between participants in extracurricular activities and drug use at Rush County High School. The district court admitted that there was "very little to indicate that stu-

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41 *489 U.S. 656 (1989).*

42 *See id. at 678–79.* Although there was no notable drug use among Customs Service agents, the Court found that there was a unique risk involved with their use of drugs because of the safety-sensitive nature of their duties. *See id. at 671* ("Customs employees...plainly 'discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.'"); *see also Chandler, 117 S. Ct. at 1304* (explaining that "[h]ardly a decision opening broad vistas for suspicionless searches, *Von Raab* must be read in its unique context" in which Customs Service agents were exposed to illegal drugs on a daily basis). Under *Von Raab*, the suspicionless drug testing of a group that is not suspected of actual drug use requires that an extraordinary risk of harm result from a single member's drug use. In *Von Raab*, agents who were constantly exposed to drugs were authorized to use deadly force and carry a firearm; an agent's use of drugs could have had disastrous consequences. Such dramatic risks do not exist in the public school context.


44 *Chandler, 117 S. Ct. at 1303–04.*

45 *See id. at 1303–05; see also Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 765 (S.D. Tex. 1989) ("While the discouragement of the use of drugs and alcohol by young people is honorable, if the means of the discouragement are not narrowly tailored to that goal, then they are not reasonable in the constitutional sense."); Nathan A. Brown, Recent Developments, *Reining in the National Drug Testing Epidemic: Chandler v. Miller, 33 Harv. C.R.-C.L. L. Rev. 253, 272* (1998) ("[T]he category of permissible searches absent individualized suspicion must remain narrowly tailored to legitimate governmental interests.").

46 The Seventh Circuit did suggest that participants in extracurricular activities serve as role models for other students, *see Todd, 133 F.3d at 986,* which arguably could provide a justification to test them as a group in order to deter drug use. However, the Supreme Court has explicitly rejected this justification as a motivation for special needs. *See Chandler, 117 S. Ct. at 1305* ("Indeed, if a need of the 'set a good example' genre were sufficient to overwhelm a Fourth Amendment objection, then the care this Court took to explain why the needs in *Skinner, Von Raab,* and *Vernonia* ranked as 'special' wasted many words... ").
dents in extracurricular activities were 'ringleaders' of a drug rebellion, as in *Vernonia*:" and the only substance-related injury linked to extracurricular activities occurred during a single athletic event in the 1970s. The court's failure to consider the lack of correlation in its decision completely removes the element of suspicion from the determination of who should be subjected to testing, and as a result, future application of its rationale would warrant testing every student. The Supreme Court did not intend to sanction such a broad and invasive search in *Vernonia*. Furthermore, such a broadly applied intrusion of privacy is exactly what the Court sought to avoid in *Skinner*, *Von Raab*, and *Chandler* when it emphasized the need to tailor the testing program narrowly.

The Seventh Circuit's decision in *Todd* ignored the Court's correlation limitation expressed in similar cases. As a result, the court sanctioned a broad intrusion of students' privacy interest without any modicum of suspicion, which only serves to erode further the importance of suspicion in Fourth Amendment jurisprudence.

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47 *Todd v. Rush County Sch.*, 983 F. Supp. 799, 805 (S.D. Ind. 1997). The district court claimed that these facts were insignificant because "when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." *See id.* at 806 (quoting *Vernonia*, 515 U.S. at 665) (internal quotation marks omitted). However, the district court's argument relies on the unreasonable assumption that reasonable guardians suspect their wards of drug use and consequently would subject them to drug testing despite the fact that there is no showing that they actually are at risk of using drugs.

48 *See id.* at 803.

49 It could be argued that the determination of exactly which cases present a sufficient correlation between drug use and the targeted group to survive Fourth Amendment scrutiny presents judges with a question of degree that has no clear answer. However, the inability to draw clear lines for judges to determine the outcomes of specific cases is inherent in the nature of the balancing test used in applying the special needs doctrine. *See supra* sources cited in note 10. Furthermore, even if relying upon a correlation between drug use and the targeted group creates a spectrum of instances in which the special needs doctrine should be applied, it is clear that *Todd* falls at the no correlation end of the spectrum.

50 In fact, the larger the group that a school seeks to target is, the more likely it is that the program will be upheld because it will be less likely that individualized suspicion will be able to address the problem. *See Willis II v. Anderson Community Sch. Corp.*, No. 98-1227, 1998 WL 569114, at *7 (7th Cir. Sept. 9, 1998) (comparing the efficacy of individualized suspicion to identify drug users in any extracurricular activity with identifying drug users among those suspended from school and concluding that individualized suspicion is less effective for the former because it is the larger, less observed group).

51 *See Vernonia*, 515 U.S. at 666 (Ginsburg, J., concurring) ("[T]he Court's opinion ... reserv[es] the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school."); *see also* *Schall v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1319 (7th Cir. 1988) ("Random testing of athletes does not necessarily imply random testing of band members or the chess team.").

52 *See Vernonia*, 515 U.S. at 684-86 (O'Connor, J., dissenting) (arguing that the breadth and imprecision of blanket student searches is inconsistent with Fourth Amendment protections); *Buffalo*, *supra* note 10, at 557 ("[B]oth the historical record and the overwhelming body of case law interpreting the requirements of the Fourth Amendment illustrate that individual suspicion has always been an essential element of a search judged to be reasonable.").
In the 1993 case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Supreme Court held that expert scientific testimony is admissible only if it is both relevant and reliable. Although the Court listed factors for determining the admissibility of such testimony, lower courts have struggled to implement the *Daubert* test in specific cases. In *Moore v. Ashland Chemical Inc.*, the Fifth Circuit entered this evidentiary fray by applying *Daubert* to a clinical physician's testimony on medical causation. The Fifth Circuit's decision to apply *Daubert* was correct, but the court erred in its manner of applying that ruling to the testimony at issue. The court made the unreasoned assumption that *Moore* fit the modern paradigm of a case of toxic tort, a paradigm in which expert opinions on causation have a special need for strong scientific support. Consequently, the court was content to examine each of the testimony's evidentiary bases merely for its individual sufficiency under *Daubert*. The court never addressed a crucial complementary issue: whether the evidentiary bases collectively sufficed to establish the reliability of the expert's opinion.

On April 23, 1990, Bob T. Moore, a truck driver for Consolidated Freightways, Inc. (Consolidated), was instructed by supervising personnel of Consolidated's customer, Ashland Chemical Inc. (Ashland), to clean up a spill of a toxic toluene solution in his trailer. About an

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2 See id. at 589.
3 The five factors are: (1) whether the methodology upon which the testimony is based has been, or can be, tested; (2) whether the methodology "has been subjected to peer review and publication"; (3) the methodology's "known or potential rate of error"; (4) the availability and use of standards to control the methodology's operation; and (5) the extent to which the methodology is generally accepted in the relevant scientific community. Id. at 593-95.
5 151 F.3d 269 (5th Cir. 1998) (en banc).
6 See id. at 274.
7 See Moore v. Ashland Chem., Inc., 126 F.3d 679, 693 (5th Cir. 1997), rev'd on reh'g en banc, 151 F.3d 269 (5th Cir. 1998). Ashland's plant manager had obtained a copy of the manufacturer's material safety data sheet, which stated that fumes from the solution could cause injury to a vari-
hour after completing the cleanup, Moore began experiencing dizziness, watery eyes, and difficulty breathing.\textsuperscript{8} Consolidated's company doctor treated Moore with oxygen and inhalants.\textsuperscript{9} Subsequent treatment did not end Moore's ills, and within months he left his job.\textsuperscript{10}

During the summer of 1990, Moore met three times with Dr. Daniel E. Jenkins, a board-certified pulmonary specialist with four decades of clinical experience.\textsuperscript{11} Dr. Jenkins diagnosed Moore as having reactive airways dysfunction syndrome (RADS), an asthma-like condition.\textsuperscript{12} A second pulmonary specialist, Dr. Alvarez, confirmed Dr. Jenkins's diagnosis and treated Moore for RADS.\textsuperscript{13}

Moore and his wife filed suit against Ashland in state court, alleging, in part, that Ashland negligently caused his illness by requiring his exposure to toxic fumes.\textsuperscript{14} Invoking diversity jurisdiction, the defendants removed the case to the District Court for the Southern District of Texas.\textsuperscript{15}

In pretrial proceedings, Moore offered Dr. Jenkins as an expert witness on two issues: first, that Moore suffered from RADS and, second, that exposure to the toluene solution caused Moore's RADS.\textsuperscript{16} The district court disallowed Dr. Jenkins's proposed testimony on causation,\textsuperscript{17} and a jury determined that the defendants' negligence had not proximately caused Moore's illness.\textsuperscript{18} The Moores appealed, claiming that the district court had erred in excluding Dr. Jenkins's testimony.\textsuperscript{19} After an en banc hearing, the Fifth Circuit affirmed.\textsuperscript{20}

Writing for the court of appeals, Judge Davis\textsuperscript{21} stated that \textit{Daubert} set the standard for the district court's decision to exclude Dr.
Jenkins’s testimony, and that General Electric Co. v. Joiner set the standard for review of that decision on appeal. Hence, the Fifth Circuit needed to determine whether the district court had abused its discretion in deciding that Dr. Jenkins’s testimony did not meet Daubert’s dual requirement of relevance and reliability.

According to the court of appeals, Dr. Jenkins’s testimony failed to meet that standard. The court found that because Dr. Jenkins had never before treated a patient who had contracted RADS from exposure to toluene, Dr. Jenkins’s personal training and experience only indirectly supported his testimony. The court further determined that given the absence of a systematic study suggesting a connection between RADS and toluene, Dr. Jenkins’s testimony lacked a solid foundation in the medical literature. Finally, the court concluded that without other reliable evidence of causation, temporal proximity could not provide a reliable basis for Dr. Jenkins’s opinion.

Judge Benavides wrote a one-paragraph concurrence, emphasizing that because the issue was close, the result lay within the trial court’s discretion.

Judge Dennis dissented. He argued that under Daubert the key question is whether the proffered testimony is "soundly grounded in the methodology of the expert’s discipline." The district court had therefore erred in excluding the testimony of a physician who had arrived at his opinion through well-established medical techniques — even though those techniques did not meet the rigorous expectations of hard science.

22 See Moore, 151 F.3d at 274–76.
24 See Moore, 151 F.3d at 274 (explaining that General Elec. Co. held that a trial court’s decision on the admissibility of expert testimony is reversible only for abuse of discretion).
25 See id. at 274–75.
26 See id. at 277–79.
27 See id. at 277–78.
28 See id. According to the court, the manufacturer’s material safety data sheet did not suffice because Dr. Jenkins knew neither the specific tests performed by the manufacturer nor the specific levels of exposure to which the data sheet’s findings applied. See id. at 278.
29 See id. at 278.
30 See id. at 279 (Benavides, J., concurring).
31 Judges Parker and Stewart joined Judge Dennis’s opinion.
32 Moore, 151 F.3d at 283 (Dennis, J., dissenting). Judge Dennis believed that such a flexible standard would ensure fidelity to the liberal intent of both Daubert, see id. at 285, and the Federal Rules of Evidence, see id. at 290. Judge Dennis noted that the majority’s stringent standards would make it very difficult for single plaintiffs to obtain admissible expert opinions. See id. at 281, 286. Particularly troublesome for Judge Dennis were the majority’s denigration of the significance of temporal proximity, see id. at 286, and its insistence on precise knowledge of the level of exposure, see id. at 287–88.
The Fifth Circuit correctly decided to apply *Daubert* to the expert testimony of a clinical physician. Nevertheless, by reviewing the bases for Dr. Jenkins's opinion merely individually — without discussing their collective significance — the court created a misleading impression of how to implement the *Daubert* test. The court summarily assumed that the case fit the paradigm of the generic "toxic tort" — a class of cases typically characterized by weak arguments for causation, which can be rendered reliable by only the most rigorous science. Under this paradigm, the Fifth Circuit might have been fully justified in approaching the admissibility issue as it did — by sequentially examining, and rejecting, the separate bases for Dr. Jenkins's opinion.

The Fifth Circuit's approach was flawed, however, in that the court never justified its adoption of the toxic tort paradigm. Without such justification, the court's sequential analysis failed to explain why the evidentiary bases were "collectively inadequate." The court demonstrated that each basis was itself insufficient to establish reliability. However, as the court acknowledged, these bases were not completely valueless. Therefore, it was still conceivable that, like experts in other fields, a medical expert could construct reliable testi-

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34 There may already be judicial consensus that trial judges must screen all expert testimony for reliability. See 2 STEPHEN A. SALTBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL 1244-45 (7th ed. 1998). However, some commentators oppose applying *Daubert* so broadly. See GRAHAM (Supp. 1998), supra note 4, § 702.5 (arguing that *Daubert* gatekeeping should apply only to hard science); 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266, at 289-93 (1997) (arguing that trial judges should address reliability issues only when juries cannot reasonably be expected to resolve them). In reviewing *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433 (11th Cir. 1997), cert. granted sub nom. *Kumho Tire Co. v. Carmichael*, 118 S. Ct. 2339 (1998), the Supreme Court will clarify whether *Daubert* extends to the testimony of an expert on tire failure, see *Carmichael*, 131 F.3d at 1434 — thereby determining whether *Daubert* covers experts even further removed from hard science than clinical physicians.

35 Judge Davis's opinion for the court began, "In this toxic tort case . . . ." Moore, 151 F.3d at 271.

36 The paradigmatic toxic tort involves diffusion and breadth, either through the existence of a large number of essentially generic victims or through the fact of long periods of exposure or latent illness. See, e.g., PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 3-12 (1987). The judicial decisions most important to the current treatment of scientific expert testimony fit within this paradigm. See General Elec. Co. v. Joiner, 118 S. Ct. 512, 515-16 (1997) (involving the development of cancer several years after alleged exposure to hazardous chemicals); *Daubert*, 509 U.S. at 582 (involving a prescription drug that was administered to millions). The resulting evidentiary criteria might ill suit other kinds of cases. See Joseph Sanders, Scientific Validity, Admissibility, and Mass Torts After *Daubert*, 78 MINN. L. REV. 1387, 1434 (1994).

37 See Moore, 151 F.3d at 278-79.

38 Id. at 277.

39 According to the court, the material safety data sheet had "limited value," and temporal proximity carried "little weight." Id. at 278.
mony from the individually inadequate — but not meaningless — bases with which Dr. Jenkins worked.\textsuperscript{40}

Having assumed that the toxic tort paradigm applied, the Fifth Circuit neglected to discuss this possibility.\textsuperscript{41} Without strong support from at least one of the Daubert factors, Dr. Jenkins’s opinion, which relied primarily upon a gestalt view of the evidence, lacked the rigor needed to untangle the complicated causal chain that the paradigm presupposed.\textsuperscript{42} Given the Fifth Circuit’s background assumptions, Dr. Jenkins’s testimony could not be considered reliable.

Judge Dennis’s dissent shows the consequences of a different vantage. For Judge Dennis, the proper paradigm was the classic “single plaintiff negligence action\textsuperscript{p}”\textsuperscript{43} — the “slip and fall,”\textsuperscript{44} in which a failure of care essentially coincides with straightforward physiological harm.\textsuperscript{45} In such a simple case, temporal proximity could establish

\textsuperscript{40} In Bourjaily v. United States, 483 U.S. 171 (1987), the Supreme Court observed that “[t]he sum of an evidentiary presentation may well be greater than its constituent parts.” Id. at 180. Indeed, scientists routinely use individually unimportant pieces of data to reach reliable results. Cf. Anthony Z. Roisman, The Courts, Daubert, and Environmental Torts: Gatekeepers or Auditors?, 14 PAC ENVTL. L. REV. 545, 565 (1997) (asserting that courts subvert scientific methodology by testing data piecemeal). For example, a biologist can use individual — and separately insignificant — DNA matches to develop a reliable opinion about the relation of two genetic samples. See NATIONAL RESEARCH COUNCIL, DNA TECHNOLOGY IN FORENSIC SCIENCE 4 (1992). The methodology for deriving a conclusion from the sort of non-quantitative data that Dr. Jenkins possessed could not be as well-defined as that for comparison of strands of DNA. However, exclusion based solely upon this difference might conflict with Daubert’s implicit recognition that the contours of science are indeterminate and context-dependent. See Bert Black, The Supreme Court’s View of Science: Has Daubert Exorcised the Certainty Demon?, 15 CARDOZO L. REV. 2129, 2137 (1994).

\textsuperscript{41} The court came closest to such a discussion when it acknowledged that, under certain circumstances, temporal proximity can carry significant evidentiary weight. See Moore, 151 F.3d at 278 (quoting Cavallo v. Star Enter., 892 F. Supp. 756 (E.D. Va. 1995), aff’d in part, 100 F.3d 1150 (4th Cir. 1996)). The court did not explain, however, why Moore did not involve such circumstances.

\textsuperscript{42} Kenneth Foster and Peter Huber describe the kind of Bayesian analysis that may have lain behind the Fifth Circuit’s reasoning. See KENNETH R. FOSTER & PETER W. HUBER, JUDGING SCIENCE: SCIENTIFIC KNOWLEDGE AND THE FEDERAL COURTS 115–30 (1997). By classifying Moore as a case of toxic tort, the Fifth Circuit created an implicit presumption that the allegation of causation possessed only a low background probability of being true. Under Bayesian analysis, such a presumption almost inevitably dooms testimony such as Dr. Jenkins’s because even extremely precise scientific procedures lack reliability in testing for unlikely events. See id. at 119. Conversely, when an event has a high background probability, even crude tests are likely to lead to correct results. See id. at 117.

\textsuperscript{43} Moore, 151 F.3d at 280 (Dennis, J., dissenting). Judge Dennis’s opinion for the panel began, “In this negligence case . . . .” Moore v. Ashland Chem., Inc., 126 F.3d 679, 682 (5th Cir. 1997), rev’d on rehe’g en banc, 151 F.3d 269 (5th Cir. 1998).

\textsuperscript{44} Ellen Relkin, Some Implications of Daubert and Its Potential for Misuse: Misapplication to Environmental Tort Cases and Abuse of Rule 706(a) Court-Appointed Experts, 15 CARDOZO L. REV. 2255, 2256 (1994) (noting that in the traditional negligence case a physician’s testimony on causation was generally allowed).

\textsuperscript{45} Judge Dennis’s panel opinion questioned reliance upon cases involving claims of “surreptitious causation of insidious diseases,” as opposed to “episodic traumatic injuries and disorders.” Moore, 126 F.3d at 707–08.
Moore’s exposure as one of the primary potential causes of his illness. By ruling out other primary potential causes, Dr. Jenkins’s diagnostic techniques could furnish a substantial, reliable basis for an expert opinion.

Hence, the analyses of the majority and the dissent followed not as much from the intrinsic quality of Dr. Jenkins’s evidentiary bases, as from each side’s perception of the essential nature of the case. Each side should have articulated and justified its background assumptions, rather than simply asserting derivative conclusions. The Fifth Circuit might still have found that it could defend treating Moore like the paradigmatic toxic tort. However, by explicitly defending its choice of paradigm, the court would at least have correctly signaled that in determining admissibility, a trial court must consider the overall nature of the case — as well as the individual strengths of an expert’s evidentiary bases.

As Moore v. Ashland Chemical Inc. illustrates, fully developed standards for admitting expert testimony are not likely to emerge soon. Indeed, the current state of perplexity reflects a large and perhaps intractable problem of modern jurisprudence: the struggle between the paradigm of the mass toxic tort and that of the isolated individual accident. Judges should not seek to end such perplexity through reliance on disputable, yet unexplained, assumptions. In their desire to chart a course of collective progress, judges should take heed that individual voyagers still sail in progress’s wake.

\[\text{Note:}\]

46 Under Bayesian analysis, recognition of Moore’s exposure as a primary potential cause would properly lead a court to perceive Dr. Jenkins’s expert testimony as more reliable than if the background probability of causation was less substantial. See supra note 42.

47 The majority neglected to explain why differential etiology, which Moore’s physicians used in running a battery of tests to rule out alternative causes, see Moore, 126 F.3d at 694, 666–97, failed to provide at least a partial scientific basis for Dr. Jenkins’s opinion. See Moore, 151 F.3d at 277–78. The majority’s omission contrasts with the treatment of differential etiology in Ambrosini v. Labarreque, 101 F.3d 129 (D.C. Cir. 1996), in which the District of Columbia Circuit found that to establish an adequate basis for causation testimony, a physician need not eliminate all alternative causes, see id. at 140.

48 Moreover, it might have found that even if the proper paradigm was the “slip and fall,” the trial court did not abuse its discretion in barring Dr. Jenkins’s testimony. See MIRJAN R. DAMASKA, EVIDENCE LAW ADRIFT 151–52 (1997) (anticipating a gradual adaptation of Anglo-American adjudication to modern science). Proposed revisions to the Federal Rules of Evidence would make clear that Daubert gatekeeping applies to all expert testimony, but would not give detailed instructions on the factors for determining admissibility. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE 119–29 (1998).

TITLE VII — STANDING — FOURTH CIRCUIT DENIES STANDING TO WHITE MEN ADVANCING CLAIM OF HOSTILE ENVIRONMENT DUE TO DISCRIMINATION AGAINST COWORKERS. — Childress v. City of Richmond, 134 F.3d 1205 (4th Cir.) (per curiam) (en banc), cert. denied, 118 S. Ct. 2322 (1998).

Title VII of the Civil Rights Act of 1964 allows any "person claiming to be aggrieved" by an "unlawful employment practice" to file charges against the employer. Because the Civil Rights Act is chiefly enforced through the actions of private citizens, courts have typically construed the phrase "person claiming to be aggrieved" broadly in order to confer standing to the fullest extent available under Article III of the Constitution. In January 1998, a split developed among the Courts of Appeals on the exact reach of the statute when the Fourth Circuit divided evenly en banc in Childress v. City of Richmond. This division, which produced a per curiam opinion with no analysis, affirmed a lower court's decision to deny Title VII standing to white male plaintiffs who alleged that their superior's disparaging comments toward blacks and women created a hostile working environment that impeded the plaintiffs' ability to cooperate with their coworkers and perform their jobs effectively. In their opinions, both Judge Luttig, writing in concurrence with the Fourth Circuit, and Judge Williams of the district court evaded the substance of the plaintiffs' complaints, choosing to reinterpret the claims to fit more neatly into preconceived notions of gender and race relations. In so doing, both judges demonstrated a disregard for the value of a nondiscriminatory workplace.

In 1995, seven white male and two white female police officers filed suit against the City of Richmond and its Chief of Police. They

1 42 U.S.C. § 2000e-5 (1994). Title VII defines an "unlawful employment practice" as employer discrimination "against any individual ... because of such individual's race, color, religion, sex, or national origin." Id. § 2000e-2(a)(1). Title VII also forbids retaliation against employees who oppose unlawful practices or assist with investigations into unlawful practices. See id. § 2000e-3.


3 See, e.g., EEOC v. Mississippi College, 626 F.2d 477, 482 (5th Cir. 1980) (white woman suing for discrimination against blacks); Gray v. Greyhound Lines, E., 545 F.2d 169, 176-77 (D.C. Cir. 1971) (current black employees suing for discrimination in hiring against blacks); Hackett v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971) (former employee suing as an "employee" within the meaning of Title VII).

4 134 F.3d 1205 (4th Cir.) (per curiam) (en banc), cert. denied, 118 S. Ct. 2322 (1998).

5 See id. at 1207-08.

alleged that the racist and sexist remarks made by their white male supervisor, Lt. Arthur T. Carroll, created a hostile working environment in violation of Title VII. The plaintiffs also claimed that after submitting a formal complaint questioning Lt. Carroll's "mental stability" they were subjected to "adverse treatment," constituting the additional Title VII violation of retaliation.

Judge Williams, Senior District Judge, disallowed the plaintiffs' claims, asserting that to establish discrimination under Title VII a plaintiff must demonstrate "membership in a protected class." He drew parallels to cases refusing to recognize claims for same-sex sexual harassment to support the proposition that a member of one group cannot have "protected class" status with respect to another member of the same group. Accordingly, he dismissed the white males' claims of gender discrimination, and all of the plaintiffs' claims of racism. He also dismissed the males' claims of retaliation on the ground that a successful retaliation claim can only be made if the underlying discrimination claim is, if not ultimately meritorious, at least "reasonable" — a threshold that these complaints did not reach.

On appeal, the Fourth Circuit held that the phrase "person aggrieved" in Title VII is sufficient to confer standing on white males who have suffered as a result of a hostile environment created by their supervisor's biases against others. The court relied on the Supreme

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7 See Brief of the EEOC as Amicus Curiae at 6, Childress v. City of Richmond, 120 F.3d 476 (4th Cir. 1997) (No. 96-1585). The officers also alleged violations of § 1981 and § 1983 and the public policy of Virginia; the district court disposed of these claims in largely the same manner as the Title VII claims. See Childress, 907 F. Supp. at 940–42. On appeal, the Fourth Circuit affirmed the district court's treatment of these claims. See Childress, 134 F.3d at 1207–08.

8 Childress, 907 F. Supp. at 938.

9 See id. at 940. Judge Williams used language relevant both to the question of standing and to the question whether Title VII permits a cause of action such as that advanced by the plaintiffs, but did not clearly distinguish these two concepts. See id. at 939-40. The Fourth Circuit similarly blurred the line between "standing" and "cause of action." See Childress, 134 F.3d at 1209 (Luttig, J., concurring); Childress, 120 F.3d at 478–81. There is, however, no reason to believe that a separation of these questions would have resulted in a different analysis.

10 Childress, 907 F. Supp. at 939 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

11 See id. (citing Mayo v. Kiwest Corp., 898 F. Supp. 335, 337 (E.D. Va. 1995)). At this time, the Supreme Court had yet to decide Oncale v. Sundowner Offshore Services, 118 S. Ct. 998 (1998), which interpreted Title VII to encompass claims by plaintiffs alleging same-sex sexual harassment, see id. at 1003.

12 Childress, 907 F. Supp. at 939.

13 See id. at 939-40.

14 See id. Judge Williams reconsidered these issues in 1996 after the male plaintiffs amended their complaints to allege that they were retaliated against not only for their own charges, but also for assisting the female officers' charges. See Childress v. City of Richmond, 919 F. Supp. 216, 217 (E.D. Va. 1996). Judge Williams dismissed the new retaliation claims for procedural reasons, and then reiterated his rationale for dismissing the plaintiffs' original retaliation claims. See id. at 218–19.

15 Childress v. City of Richmond, 120 F.3d 476, 481 (4th Cir. 1997), rev'd en banc, 134 F.3d 1205 (4th Cir. 1998).
Court's holding in *Trafficante v. Metropolitan Life Insurance Co.*,\(^{16}\) in which, on the rationale that whites were deprived of the "benefits from interracial associations" when forced to live in segregated housing, standing had been extended to white plaintiffs suing under Title VIII to combat housing discrimination against blacks.\(^{17}\) The *Childress* court highlighted the similarities in language between Title VII and Title VIII, and noted that all other circuits to consider the issue had granted Title VII standing to nonminority plaintiffs.\(^{18}\)

The court's judgment was vacated later that year\(^{19}\) and the case reheard en banc.\(^{20}\) The en banc panel split evenly on the Title VII claims, thus reinstating the district court's ruling without additional comment in a per curiam opinion.\(^{21}\) Judge Luttig wrote a separate concurrence to affirm his agreement with the district court\(^{22}\) on the ground that *Trafficante* was not controlling precedent.\(^{23}\) Judge Luttig noted that Title VIII, and not Title VII, provided a broad definition of the term "aggrieved person"; he interpreted the undefined use of the phrase "person claiming to be aggrieved" in Title VII to evince a congressional intent to import "prudential standing limitations" into the statute, rather than an intent to extend standing to the fullest extent allowable under the Constitution.\(^{24}\) As such limitations include bars on third-party standing, Judge Luttig concluded that the claims of the white male plaintiffs must fail.\(^{25}\)

In their opinions, both Judge Luttig and Judge Williams addressed claims not actually advanced by the plaintiffs in order to deny them standing. Judge Luttig described the plaintiffs as "alleg[ing] that their white male superiors made disparaging comments about black and female co-workers, thus subjecting these co-workers to a hostile work environment."\(^{26}\) This statement is irreconcilable with the plaintiffs' brief, which alleged an environment hostile to *all* of the police officers,

\(^{16}\) 409 U.S. 205 (1972).
\(^{17}\) Id. at 210.
\(^{18}\) See *Childress*, 120 F.3d at 481. The Fourth Circuit also reversed the district court's dismissal of the male officers' new retaliation claims. See id. at 483.
\(^{19}\) See id. at 476.
\(^{21}\) See id. at 1207.
\(^{22}\) See id. at 1208 (Luttig, J., concurring). Judge Luttig's opinion was joined by Judges Wilkins and Williams.
\(^{23}\) See id. at 1209–10.
\(^{24}\) Id.
\(^{25}\) See id. at 1209. In addition, Judge Luttig argued that the different legislative histories of Title VII and Title VIII demonstrate that different meanings were intended for those sections. See id. at 1210 n.3. He pointed out that harm to members of the majority forced to live in segregated housing had been mentioned during the subcommittee hearings on Title VIII as one of the evils the statute was designed to prevent, yet no similar history could be found to justify such an interpretation of Title VII. See id.
\(^{26}\) Id. at 1208 (emphasis added).
including the plaintiffs themselves. Yet Judge Luttig barely acknowledged this aspect of the plaintiffs’ claims, writing instead that the plaintiffs had complained of a work environment hostile “for blacks and women.” With this new interpretation of the plaintiffs’ asserted injuries in hand, Judge Luttig had no trouble reaching the conclusion that Title VII’s breadth is not commensurate with Article III and therefore does not encompass “third-party” claims. Though, filtered through Judge Luttig’s lens, these claims surely were “third-party,” this was not the plaintiffs’ argument; rather, the plaintiffs claimed a violation of their own rights to be free of a discriminatory environment. Authority for the validity of such a claim can be found in the Trafficante opinion’s failure even to address the possibility that the claims of nonminority plaintiffs could be termed “third-party.”

Judge Williams also argued that the officers were “attempting to recover for violations of other people’s civil rights,” but unlike Judge Luttig, did not perceive the plaintiffs to be complaining of a work environment hostile to blacks and women. Rather, he conducted his analysis as though the officers were alleging discrimination against themselves in the form of “better treatment.” He concluded that a white male cannot discriminate against another white male on the theory that to be eligible for Title VII protection, a member of a group must be protected relative to someone else, namely, the person accused of acting in a discriminatory fashion. The Supreme Court rejected this “relational” interpretation of Title VII in the same-sex sexual har-

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27 See Brief of Appellants at 17, Childress v. City of Richmond, 120 F.3d 476 (4th Cir. 1997) (No. 96-1585) (“[T]his bias supposedly in the plaintiffs’ favor actually created a hostile working environment in which the police officers were divided by gender and race.”).
28 See Childress, 134 F.3d at 1208 (Luttig, J., concurring) (“[T]he plaintiffs . . . allege that . . . [they] have suffered . . . the breakdown of esprit de corps that results from working in a racially or sexually polarized environment.”).
29 Id.
30 Judge Luttig’s argument seems out of step with Supreme Court jurisprudence, as the Court relied on just such a broad interpretation of Title VII to support its interpretation of Title VIII in Trafficante. See Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 209 (1972) (quoting Hackett v. McGuire Bros., 445 F.2d 442, 446 (3d Cir. 1971)).
31 Judge Luttig also argued that Title VIII should be interpreted to confer broader standing than Title VII because Title VIII is enforced completely by private suits, whereas Title VII is enforced partially by suits brought by the EEOC. See Childress, 134 F.3d at 1210 n.3 (Luttig, J., concurring). However, originally neither Title VIII nor Title VII allowed for agency enforcement, and thus there could have been no difference in congressional intent on this point. See Waters v. Heublein, Inc., 547 F.2d 466, 469–70 (9th Cir. 1976). Further, it is unlikely that Congress intended to limit standing when it increased Title VII’s protections by amending the statute to allow the EEOC to bring suit. See id.
32 See Brief of Appellants at 13, 17–18, Childress, 120 F.3d 476 (4th Cir. 1997) (No. 96-1585).
34 Id. at 940 (emphasis removed) (“At its heart, the officers’ Title VII claim either attempts to assert the civil rights of others or alleges that they were discriminated against by being provided . . . better treatment than their black peers.”).
35 See id. at 939.
assessment case Oncale v. Sundowner Offshore Services, decided only two months after the Fourth Circuit's holding in Childress. Judge Williams's insistence that a white male cannot be in a protected class with respect to another white male is plainly inconsistent with Oncale.

That the claim presented in Oncale hardly seems comparable to the situation in Childress only underscores Judge Williams's flawed reasoning, that is, his use of modes of analysis intended for more traditional Title VII cases. Even in assessing the claims of retaliation, Judge Williams wrote that "the record does not show that the white male plaintiffs suffered discrimination for their gender or race, nor does it show that the white males' EEOC charge to that effect was the motivation for retaliation." However, the plaintiffs were not claiming they themselves were discriminated against; rather, they were claiming that discrimination against their coworkers resulted in injuries to themselves by disrupting the relationships necessary for police officers to function. By devoting the bulk of his argument to a claim the plaintiffs had not made, Judge Williams left the central question unanswered: Does Title VII authorize a remedy for injuries inflicted on a plaintiff as a result of illegal discrimination against another party?

Some insight into both judges' reasoning may be found in portions of their opinions suggesting that their approach to Title VII standing was less a product of statutory interpretation than an unacknowledged consideration of the merits of the officers' claims. Although Judge Luttig wrote that the officers had complained of a breakdown in "esprit de corps," he refused to interpret the plaintiffs' claims as alleging the presence of an environment hostile to themselves — implying that he did not sense the existence of such an environment. Similar threads are present in the district court's opinions: the plaintiffs alleged that their supervisor's actions created intolerable tensions in the workplace, but the district court repeatedly characterized Lt. Carroll's remarks —

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36 118 S. Ct. 998 (1998). Justice Scalia, writing for a unanimous Court, stated that "it would be unwise to presume as a matter of law that human beings of one definable group will not discriminate against other members of that group." Id. at 1001 (quoting Castaneda v. Partida, 430 U.S. 482, 499 (1977)) (internal quotation marks omitted).

37 For instance, the court used the "protected class" test articulated in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), see Childress, 907 F. Supp. at 939, even though this test was created to establish criteria for a prima facie case of discrimination in which the motivation for the employer's actions was in dispute, see McDonnell Douglas, 411 U.S. at 796–797, 802. In Childress, however, the supervisor's biases were not in dispute, which should have indicated that the McDonnell Douglas test would be of limited use.


39 See Brief of Appellants at 13, 17–18, Childress v. City of Richmond, 120 F.3d 476 (4th Cir. 1997) (No. 96-1585).


41 Childress, 134 F.3d at 1208 (Luttig, J., concurring).
lantes’ and his “pussy posse" — as somehow conferring a benefit on the male officers. The court asserted that the officers complained of “favoritism in [their] favor" and portrayed their claimed interest not as a right to a discrimination-free workplace, but as one “to be free of tensions caused by special treatment."

This repeated recasting of the substance of the officers’ claims reveals the unwillingness of Judges Luttig and Williams to perceive any injury to the officers, thus leading them to cloak their decisions on the merits in the rhetoric of standing. Both judges apparently conceive of race and gender relations as a zero-sum game in which a loss to one is a gain to another, in direct contrast to other courts, which have held that the provisions of the Civil Rights Act are meant to enforce the rights of all employees to benefit from “advantageous personal, professional or business contacts" free from the interference of a racially or sexually discriminatory environment. The Act’s purpose requires that all plaintiffs who allege injuries to themselves as a result of being deprived of a nondiscriminatory environment be able to sue in court and have the merits of their individual claims judged at trial, not through the concept of “standing.”

42 Childress, 907 F. Supp. at 938.
43 Childress, 919 F. Supp. at 219.
44 Childress, 907 F. Supp. at 939. The City argued this point explicitly in its brief to the Supreme Court opposing certiorari: “If females or blacks are the direct victims of the discrimination, males and whites are the indirect beneficiaries.” Respondents’ Brief in Opposition at 12, Childress v. City of Richmond, 118 S. Ct. 2322 (1998) (No. 97-1723).

Additionally, the district court held the officers’ complaint to be so “spurious” that it could not even support a retaliation claim, see Childress, 919 F. Supp. at 219, despite abundant precedent from other circuits affirming the viability of such claims by nonminority plaintiffs. See cases cited supra note 6. The district court did not acknowledge this line of cases, writing instead that “the Court’s research ... discloses no direct precedent for the instant case.” Childress, 907 F. Supp. at 939. Though none of the Childress opinions addresses the issue, it could be argued that Childress does differ from cases decided in other circuits in that the Childress plaintiffs sought both legal and equitable relief. Because the Civil Rights Act did not authorize monetary damages for emotional distress resulting from hostile work environments until the 1991 amendments, see Winbush v. Iowa, 66 F.3d 1471, 1477 n.8 (8th Cir. 1995), none of the precedential circuit court decisions (all decided prior to 1991) confront the question whether standing should be extended to nonminority plaintiffs seeking money damages. However, neither the district court’s opinion nor Judge Luttig’s concurrence draws a distinction between legal and equitable remedies, and therefore they appear to deny standing for both kinds of claims.

45 Waters v. Heublein, Inc., 547 F.2d 466, 469 (9th Cir. 1976). Courts and commentators have noted in a variety of contexts that a cooperative, diverse environment benefits all who are a part of it, not just those who were previously excluded. See, e.g., Metro Broad., Inc. v. FCC, 497 U.S. 547, 556 (1990) (noting the benefits of diversity in radio programming for both majority and minority listeners), overruled on other grounds by Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995); Regents of the Univ. of Calif. v. Bakke, 438 U.S. 265, 312–13 (1978) (opinion of Powell, J.) (noting the benefits of student diversity in the university context); Robert Allen Sedler, Standing, Justiciability, and All That: A Behavioral Analysis, 25 VAND. L. REV. 479, 500–01 (1972) (arguing that all persons, regardless of skin color, have an interest in living in a nonracist society and should have standing in court to enforce that interest).
Recent attempts by state legislatures to ban partial-birth abortions have been repeatedly challenged in federal courts.\(^1\) Almost invariably, these constitutional cases turn on questions of statutory interpretation, as federal courts attempt to construe state laws.\(^2\) When ruling on constitutional challenges to statutes, federal courts must comply with the Supreme Court’s “cardinal principle” of statutory interpretation: courts should attempt to find any “fairly possible” constitutional interpretation of a law, rather than hold it unconstitutional.\(^3\) This principle is “mandated by our federalism” and requires federal courts to “presume[e] the statute constitutional.”\(^4\)

Recently, in *Women's Medical Professional Corp. v. Voinovich*,\(^5\) the Sixth Circuit Court of Appeals held unconstitutional an Ohio law banning dilation and extraction\(^6\) (“D & X”) abortions and all abortions after fetal viability.\(^7\) In so doing, the Sixth Circuit turned the Supreme Court’s “cardinal principle” on its head: at each perceived ambiguity, instead of seeking a constitutional interpretation, the court employed precisely the interpretive stance and reading that would invalidate the ban.

In 1995, Women’s Medical Professional Corporation, an Ohio abortion clinic, brought a facial challenge to the constitutionality of Ohio’s House Bill 135 (“the Act”).\(^8\) The Act imposed civil and criminal penalties on doctors who performed D & X abortions, which it defined as “the termination of a human pregnancy by purposely inserting a suc-
tion device into the skull of a fetus to remove the brain." The Act allowed doctors to invoke the affirmative defense that D & X was the safest available means of abortion in a particular case,10 and exempted suction curettage abortions.11 The Act also banned all post-viability abortions except to prevent death or "substantial and irreversible impairment of a major bodily function" of the mother, and required viability testing for all nonemergency abortions after twenty-two weeks of pregnancy.12 The district court granted an injunction, holding the ban on D & X abortions unconstitutionally vague and the ban on post-viability abortions both unconstitutionally vague and insufficient in its protection of the mother's mental health.13

A divided three-judge panel of the Sixth Circuit Court of Appeals affirmed, "but through somewhat different reasoning."14 Writing for the court, Judge Kennedy first addressed the proper standard for reviewing facial challenges to abortion regulations.15 The court acknowledged that outside the First Amendment context facial challenges are generally governed by the rule of United States v. Salerno,16 under which facial challenges succeed only when "no set of circumstances exists under which the [statute] would be valid."17 However, the court concluded that in the abortion context the Salerno test had been silently supplanted by the "undue burden" standard of Planned Parenthood v. Casey,18 under which a law unconstitutional in a "substantial percentage" of its applications falls to a facial challenge.19 Judge Kennedy proceeded to evaluate the D & X ban under the Casey standard. Judge Kennedy found the D & X ban unconstitutional because the statutory definition of the D & X procedure also en-

9 OHIO REV. CODE ANN. § 2919.15(A) (Banks-Baldwin 1998).
10 See id. § 2919.15(C)(1).
11 See id. § 2919.15(A). Suction curettage abortions entail dilation of the cervix followed by the suctioning of the entire fetus with a vacuum apparatus known as a suction curette. See Voinovich, 130 F.3d at 198.
12 OHIO REV. CODE ANN. § 2919.17–2919.18.
14 Voinovich, 130 F.3d at 198.
15 See id. at 193–97.
16 See id. at 193–94 (discussing United States v. Salerno, 481 U.S. 739 (1987)).
17 Salerno, 481 U.S. at 745.
18 See Voinovich, 130 F.3d at 194–97 (discussing Planned Parenthood v. Casey, 505 U.S. 833 (1992)).
19 Id. at 194 (citing Casey, 505 U.S. at 895). Several circuits have interpreted the Casey plurality's opinion as implicitly overruling Salerno in the abortion context. See, e.g., Jane L. v. Bangerter, 102 F.3d 1112, 1116 (10th Cir. 1996) (holding that Casey governs facial challenges to abortion laws, despite Salerno); A Woman's Choice — East Side Women's Clinic v. Newman, 904 F. Supp. 1434, 1447–48 (S.D. Ind. 1995) ("Like the Third and Eighth Circuits, this court believes that Casey effectively displaced Salerno's application to abortion laws."). But see Barnes v. Moore, 970 F.2d 12, 14 n.2 (5th Cir. 1992) ("We do not interpret Casey as having overruled, sub silentio, longstanding Supreme Court precedent governing challenges to the facial constitutionality of statutes.").
RECENT CASES

compassed the constitutionally protected dilation and evacuation ("D & E") procedure. In some D & E abortions, the fetus’s torso and head are too well-developed to allow the doctor to remove the entire fetus with a suction curette alone. In this subset of D & E abortions, "[p]hysicians have developed different methods of removing the head." In one of these "different methods," "some physicians" compress the skull by suctioning out the fetus’s brain.

Relying on this subset of D & E abortions, Judge Kennedy determined that "the Act’s definition of the D & X procedure encompassed the D & E procedure, because the D & E procedure can also entail suctioning the skull contents of the fetus." The court rejected the State’s assertion that suctioning the brain at the end of such D & E abortions does not "terminate" the pregnancy as prohibited by the Act, because the fetus has already been "substantially dismembered." The court interpreted the Act’s reference to "termination of a human pregnancy" to mean the completion of the abortion, and thus held that the Act bans the subset of D & E abortions in which the brain is suctioned, even though the fetus is already dead.

In addition, the court found that the D & E abortion procedure was not exempted by the Act’s suction curettage exception. The court found that suction curettage was only "a step in [the] process" and that the exception did not cover the D & E procedure. The court concluded that the Act "bans the use of both the D & E and D & X procedures" and thus presents an unconstitutional "undue burden" under Casey. Furthermore, Judge Kennedy ruled that the ban on post-viability abortions was unconstitutional in that the Act’s exception for medical emergencies was vague (because it lacked a sufficient scienter requirement) and because it inadequately protected the mother’s mental health.

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20 See Voinovich, 130 F.3d at 201.
21 A curette is "a spoon-shaped instrument for removing material from the wall of a cavity or other surface." DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 406 (1988).
22 Voinovich, 130 F.3d at 198.
23 Id.
24 Id. at 199.
25 Id. (quoting Brief of Defendants-Appellants at 32).
26 Id. The court explained that "'[p]regnancy' describes the woman's condition, which we do not believe is terminated until the abortion has been completed." Id.
27 See id. at 200.
28 Id.
29 Id.
30 Id. at 201.
31 See id. at 203-11. Although recognizing that the state may, under Casey, proscribe post-viability abortions except where deemed necessary for the preservation of the life or health of the mother, the court found vague the requirement that physicians determine the necessity for an abortion "in good faith and in the exercise of reasonable medical judgment." Id. at 204 (quoting OHIO REV. CODE ANN. § 2919.16(F) (Banks-Baldwin 1998)) (internal quotation marks omitted). The court concluded that the phrase imposed both subjective and objective requirements, and
Judge Boggs dissented, noting that federal courts "are to interpret statutes so as to avoid difficult constitutional questions where possible." Judge Boggs observed that the majority had "strain[ed] to interpret" the Act "so as to make the burden . . . appear 'undue.'" In response to the claim that the D & X ban includes some constitutionally protected D & E abortions, Judge Boggs stated that hearing testimony proved that "doctors who perform abortions have no difficulty discerning the conduct prohibited by the statute." Judge Boggs also found that the statute's ban on post-viability abortions was not vague and that severe mental harm would come within the Act's medical necessity exception.

Judge Boggs was correct when he charged the majority with straining to find that the Act imposed an undue burden, particularly with respect to the D & X ban. Directly contradicting Supreme Court precedent, the Voinovich court failed to seek a constitutional interpretation of the D & X ban. Rather than adopting a consistent method of statutory interpretation, the court repeatedly changed its interpretive position in order to push the law toward unconstitutionality.

Judge Kennedy's interpretation of the D & X ban was initially very broad. Although the legislature, the attorney general, and the governor all insisted that the statute covered only D & X abortions (and not D & E abortions), and although the statute specifically mentioned D & X as the banned procedure, Judge Kennedy held that the statute was broad enough to encompass some portions of some D & E abortions. This expansive reading rests on the court's interpretation of the phrase "termination of a human pregnancy" to refer to a completed abortion.

relied on Colautti v. Franklin, 439 U.S. 379 (1979), in which the Supreme Court ruled a statute unconstitutionally vague because it was unclear whether the statute imposed a purely subjective standard or a mixed subjective and objective standard. See Voinovich, 130 F.3d at 204 (citing Colautti, 439 U.S. at 391). Furthermore, the court rejected the state's assertion that the provision's initial phrase, "[n]o person shall purposely," imparts a scienter requirement to the medical necessity exceptions. Id. at 206 (quoting OHIO REV. CODE ANN. § 2919.17(A)). The court concluded that this scienter requirement applied only to the performance of an abortion and not to the determination of medical necessity. See id. Finally, although it stated that it "need not consider" the constitutionality of the Act's lack of a mental health exception, id., the court concluded that this absence was also unconstitutional, as it failed to protect the mother, see id. at 209.

32 Id. at 212 (Boggs, J., dissenting).
33 Id.
34 Id. at 215.
35 See id. at 215–16.
36 See id. at 215–19.
37 See Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 629 (1993) (stating that courts should "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided" and that "a construction that would render a statute unconstitutional should be avoided").
38 See Brief Amicus Curiae On Behalf of a Majority of the Members of the Ohio General Assembly in Support of Defendant-Appellants, Voinovich, 130 F.3d 187 (Nos. 96-3157, 96-3159).
40 See Voinovich, 130 F.3d at 200.
and not to the death of the fetus. Judge Kennedy's interpretation, however, renders the statute meaningless. If pregnancy is terminated only when the fetus is removed, no pregnancy could ever be terminated by suctioning the brain of the fetus. The dead fetus would still have to be removed in order to "terminate[e]" the pregnancy. The court's interpretation would thus render the law inapplicable in all cases, depriving it of all meaning.

While the court read the ban itself very broadly, it read the suction curettage exception very narrowly, excluding the D & E procedure from the protective exception. The Act exempts from the ban "the suction curettage procedure of abortion," and the court's own definition of the D & E procedure mentions suction curettage four times. Nevertheless, the court ruled that because physicians understand suction curettage and D & E to be distinct methods of abortion, the suction curettage exception cannot protect the D & E procedure. The court thus used inconsistent interpretive methods to find the D & X ban unconstitutional, contradicting the Supreme Court's "cardinal principle" of statutory interpretation: that courts should construe statutes to be constitutional when possible.

Not surprisingly, the court's underlying reasoning in employing these competing modes of interpretation was fraught with contradiction. When deciding that the ban itself covers some D & E abortions, the court looked to the statutory definition of the D & X procedure (though disregarding its explicit identification of D & X abortions as the banned procedure), even though "doctors who perform abortions have no difficulty distinguishing between the two procedures. Yet when ruling that the suction curettage exception cannot protect the D & E procedure, the court rested its decision on doctors' understanding

\[41\] Id. at 199.
\[42\] In rejecting this distinction between the D & E and D & X procedures, the court correctly noted that in some D & X procedures, like D & E procedures, the fetus is dead before the suctioning. The court failed to recognize, however, that if some D & X abortions are not covered by the statute, a constitutional interpretation would simply state that the law does not apply to those D & X abortions. The court ignored this chance to narrow the scope of the ban. See id.
\[43\] See id. at 200.
\[44\] Id.
\[45\] See id. at 198. The court described the D & E procedure as follows:

\[A\] suction curette ... is placed through the cervix and into the uterus. With the suction curette, the physician can remove some or all of the fetal tissue. However, the torso and the head of the fetus often cannot be removed using the suction curette. Therefore, the D & E procedure typically entails dismembering the fetus, beginning with the extremities, by means of suction curettage and forceps.

\[46\] See id. at 200.
\[47\] See Concret Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 629 (1993). In fact, a court truly faithful to its duty to adopt a constitutional interpretation would read the ban itself narrowly and the exception broadly, so as to limit the law and avoid constitutional questions.
\[48\] Voinovich, 130 F.3d at 215 (Boggs, J., dissenting).
that suction curettage and D & E are "two different abortion procedures." Similarly, the court concluded that the D & X ban covers D & E abortions because some D & E abortions include suctioning the brain; yet it also concluded, inconsistently, that the suction curettage exception does not cover D & E abortions, even though all D & E abortions include suction curettage. Just as with broad and narrow readings, the court looked to medical understanding and characterized an entire procedure by its component parts only when these actions pushed the statute toward unconstitutionality. When the same tactics would have saved the statute, they were discarded.

Finally, the court applied the "undue burden" test to the wrong ban. Even if we accept the court's alternately broad and narrow interpretations of the Act, the only D & E abortions the Act could ban would be that subset in which "some physicians" have chosen to suction the brain. After all, the Act's definition of the banned procedure to include abortions that involve suctioning the brain was the very basis of the court's conclusion that the law could cover some D & E abortions. Remarkably, however, when the court applied the "undue burden" test, it abandoned its previously close attention to the definition and instead analyzed the statute as if it banned all D & E abortions. The court found that "[t]he undue burden . . . lies in the fact that the Act bans the most common second trimester procedure," namely, D & E. Once again, the court shifted techniques, adhering to or ignoring the definition as it suited the court's purpose.

The Sixth Circuit crafted an opinion unconstrained by the Supreme Court's "cardinal principle" or any other standard of statutory interpretation. Rather, the opinion's only consistent interpretive principle is that standards of interpretation are selectively and temporarily employed and rejected to flout the Supreme Court's mandate and find the statute unconstitutional.

49 Voinovich, 130 F.3d at 201. Interestingly, although the court defers to medical understandings of some terms, it did not seek a medical definition of the crucial phrase "terminate a pregnancy." Many medical dictionaries define pregnancy in terms of a living and developing creature in the womb, which would contradict the court's contention that pregnancy continues even after the fetus is dead. See, e.g., Dorland's Illustrated Medical Dictionary 406 (1988) (defining "pregnancy" as "the process of growth and development within a woman's reproductive organs of a new individual"); The Mosby Medical Encyclopedia 1347 (Walter D. Glanze ed., 1992) (defining pregnancy as "the condition of having a developing embryo or fetus in the body").

50 Voinovich, 130 F.3d at 198.

51 See id. at 198-99.

52 Id. at 201.
The constitutionality of school voucher programs remains hotly disputed, even as the programs garner increasing popular support. Last June, in Jackson v. Benson, the Wisconsin Supreme Court upheld the constitutionality of the Milwaukee Parental Choice Program (MPCP), one of the few publicly funded school voucher programs in the nation to allow participation by religious schools. Finding that the MPCP aids schools neutrally and indirectly, the court held that the program does not violate the Establishment Clause, even though religious schools are likely to receive the bulk of program funds. Although the court correctly identified neutrality and indirection as salient principles in recent Supreme Court Establishment Clause cases, the court’s extension of these principles to school voucher programs was premature and in direct conflict with precedent. Moreover, the court ignored important ways in which the MPCP endorses religion and risks excessive entanglement between church and state.

In 1989, the Wisconsin legislature enacted the MPCP, enabling low-income children to attend private school at no cost. The program began as a pilot project: only 1.5% of Milwaukee public school students could participate, and they could choose to attend only nonsectarian schools. In 1995, however, the legislature expanded the program tenfold and simultaneously opened the program to sectarian schools. As of the 1995–1996 school year, sectarian schools numbered 89 of the 122 private schools eligible to participate, and stood to receive well over $40 million in public funds.

Before the amended program took effect, the plaintiffs brought suit, alleging that the program violated the Establishment Clause and other state and federal constitutional provisions. The State respon-
ded by petitioning the Wisconsin Supreme Court for a declaratory judgment that the amended MPCP was constitutional. The court accepted jurisdiction, but split three to three; consequently, it dismissed the petition, effectively remanding the case to the trial court. The trial court granted summary judgment for the plaintiffs, holding that the amended MPCP violated the Wisconsin Constitution. The court of appeals affirmed. Because both courts held that the MPCP violated the state constitution, neither ruled on whether the program violated the Establishment Clause.

In a 4–2 decision, the Wisconsin Supreme Court reversed; reaching the Establishment Clause question, the court upheld the amended MPCP as constitutional. Writing for the court, Justice Steinmetz evaluated the MPCP under the test of Lemon v. Kurtzman, according to which a statute survives constitutional scrutiny only if, first, it has a secular purpose; second, it has a primary effect that neither advances nor inhibits religion; and third, it does not foster an “excessive government entanglement” with religion.

Quickly dispatching the first and third prongs of the Lemon test, the court focused on the second, “primary effect” prong. The court began by emphasizing that the primary effect prong does not absolutely bar state funds from wending their way to religious institutions. Looking to prior Supreme Court decisions on challenges to educational aid programs, the court argued that these precedents, although not entirely consistent, “establish an underlying theory based

suit also, echoing the claims of the first two suits and adding a claim that the MPCP violated the Equal Protection Clause. The trial court consolidated the three cases. See id.

12 See id.
13 See id.; State ex rel. Thompson v. Jackson, 546 N.W.2d 140, 142 (Wis. 1996) (per curiam).
14 See Jackson, 578 N.W.2d at 609-10.
15 See Jackson, 570 N.W.2d at 411.
16 See Jackson, 578 N.W.2d at 610. However, the appeals court did “consult” Establishment Clause jurisprudence in applying the religious benefits and compelled support clauses of the Wisconsin Constitution. The court found that a “primary effect” of the MPCP is the use of state funds for the benefit of religious schools, and that, under Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), this effect is unconstitutional. Jackson, 570 N.W.2d at 420–21.
17 See Jackson, 578 N.W.2d at 620. The court also held that the MPCP violated neither the Wisconsin Constitution, see id. at 620–30, nor the Equal Protection Clause, see id. at 630–32. Justice Bablitch wrote a two-sentence dissent, which Justice Abrahamson joined, merely noting agreement with the appellate court’s decision.
18 403 U.S. 602 (1971).
19 Id. at 612–13; see Jackson, 578 N.W.2d at 612.
20 The court found the secular purpose of the MPCP to be “virtually conceded.... [I]t is to provide low-income parents with an opportunity to have their children educated outside of the embattled Milwaukee Public School system.” Jackson, 578 N.W.2d at 612.
21 Finding that sectarian schools participating in the MPCP are required to meet only general, minimal state regulations, see id. at 619, and that the state is not authorized to monitor “the schools’ governance, curriculum, or day-to-day affairs,” id. at 620, the court concluded that the MPCP did not excessively entangle church and state, see id.
22 See id. at 613.
on neutrality and indirection: state programs that are wholly neutral in offering educational assistance directly to citizens ... do not have the primary effect of advancing religion.”23

The court then applied this theory to the MPCP. First, finding that sectarian and nonsectarian schools are equally eligible to participate in the program and that parents are in no way limited to choosing the former, the court concluded that the MPCP takes a neutral stance toward religion.24 Second, finding that MPCP funds reach religious schools only through the “genuinely independent and private choices” of individual parents, the court concluded that the MPCP benefits religious schools only indirectly;25 as a result, no reasonable observer would infer that the program endorses religion.26 In drawing these conclusions, the court dismissed the respondents’ argument that most program aid would likely flow to sectarian schools, finding such considerations “irrelevant to our inquiry.”27

The Jackson court erred by not following clear Supreme Court precedent that should have led it to strike down the MPCP. Moreover, the court overlooked important ways in which the MPCP violates core concerns of the Establishment Clause.

The Jackson court should have followed Committee for Public Education v. Nyquist.28 In Nyquist, the Supreme Court struck down a New York program providing tuition grants to low-income private school students.29 Although the program distributed grants without regard to whether the recipients attended sectarian or nonsectarian schools, the Court did not view the program as neutral. Citing evidence that nearly 85% of the state’s private schools were sectarian,30 the Court found that “the effect of the aid [was] unmistakably to provide desired financial support for nonpublic, sectarian institutions.”31 Given that any unrestricted aid directed exclusively to private schools would in most cases have this effect, the Court held that state funds could be made available to sectarian schools only through a general aid program benefiting public and private schools alike.32

The Jackson court conceded that the Nyquist program “closely parallels the MPCP,” but insisted that “significant distinctions” separate

23 Id.
24 See id. at 617-18.
25 Id. at 618 (quoting Witters v. Washington Dep’t of Servs. for the Blind, 474 U.S. 481, 487 (1986)).
26 See id. (citing Witters, 474 U.S. at 493 (O’Connor, J., concurring)).
27 Id. at 619 n.17 (citing Mueller v. Allen, 463 U.S. 388, 401 (1983)).
29 See id. at 780.
30 See id. at 768.
31 Id. at 783. The Court acknowledged that the program aided religious schools only through the choices of parents, but found the indirect nature of the benefits “only one among many factors to be considered.” Id. at 781.
32 See id. at 782 n.36, 783.
The court argued that the Nyquist program exclusively aided private schools and their students, whereas the MPCP gives all qualifying students the "neutral benefit" of being able to choose to attend either private or public school.\(^{34}\)

But the court's distinction cannot withstand scrutiny. Plainly, the MPCP exclusively aids private schools: every program dollar ends up in private schools' coffers. Although the MPCP does in a sense benefit low-income public school students by giving them the choice of attending private school, the same was true in Nyquist, where the tuition grants were an "attempt to enhance the opportunities of the poor to choose between public and nonpublic education."\(^{35}\) Yet the Nyquist Court specifically rejected the argument that the grants provided a neutral benefit to all students regardless of whether they chose to attend private school or not.\(^{36}\) Such an argument "proves too much," the Court opined, for it would justify subsidizing religious schools completely, as if such aid would be neutral taken together with state funding of the public schools — "a result wholly at variance with the Establishment Clause."\(^{37}\)

In support of its contrary insistence that the MPCP is neutral "viewed in its surrounding context,"\(^{38}\) the Jackson court misguidedly appealed to Witters v. Washington Department of Services for the Blind.\(^{39}\) In Witters, the Supreme Court rejected the argument that a vocational aid program advanced religion merely because a single recipient used his aid for religious studies; what was important, the Court reasoned, was the effect of the program "as a whole."\(^{40}\) But in contrast to the program in Witters, the MPCP "as a whole" stands to benefit religious schools primarily. Although the MPCP does exist alongside numerous other Wisconsin programs aiding the public schools, this "surrounding context" does not make the MPCP itself neutral. A program that primarily advances religion is not made neutral simply by being surrounded by programs that do not.\(^{41}\)

Since Nyquist, the Court has tended to uphold neutral and indirect educational aid programs against Establishment Clause challenges. But the Court has never upheld a program when it has been clearly

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\(^{33}\) Jackson, 578 N.W.2d at 614 n.9.

\(^{34}\) Id.; see also id. at 617-18 & n.16.

\(^{35}\) Nyquist, 413 U.S. at 788.

\(^{36}\) See id. at 782 n.38.

\(^{37}\) Id.

\(^{38}\) Jackson, 578 N.W.2d at 614 n.9.

\(^{39}\) See id. at 617-18 & n.9 (citing Witters v. Washington Dep't of Servs. for the Blind, 474 U.S. 481 (1986)).

\(^{40}\) Witters, 474 U.S. at 488; see also id. at 492 (Powell, J., concurring).

\(^{41}\) Cf. Simmons-Harris v. Goff, No. 96APE08-982, 1997 WL 217583, at *8 (Ohio Ct. App. May 1, 1997) ("[W]e question the validity of the state's premise: that two separate and distinct governmental benefits, one flowing primarily to sectarian institutions and one flowing primarily to secular institutions[,] can, in the aggregate, be neutral for Establishment Clause purposes.").
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foresaw that it would substantially aid religious schools.\footnote{In every major case cited by the \textit{Jackson} court upholding a program against Establishment Clause challenge, see \textit{Jackson}, 578 N.W.2d at 614–17, the aid received by religious schools was found insubstantial. See \textit{Agostini} v. \textit{Felton}, 117 S. Ct. 1997, 2013 (1997) ("No [public] funds ever reach the coffers of religious schools."); \textit{Rosenberger} v. \textit{Rector of the Univ. of Va.}, 555 U.S. 819, 843–44 (1995) (describing aid as "incidental"); \textit{Zobrest} v. Catalina Foothills Sch. Dist., 509 U.S. 1, 10 (1993) (same as \textit{Agostini}); \textit{Witters}, 474 U.S. at 488 ("[I]naturally, nothing ... indicates that ... any significant portion of the aid ... will end up flowing to religious education."); \textit{Mueller} v. \textit{Allen}, 463 U.S. 388, 400 (1983) (describing aid as "attenuated").} Nyquist remains good law, and the \textit{Jackson} court should have applied it.\footnote{The Court has termed an institution "pervasively sectarian" when its secular functions are inextricably intertwined with its religious functions, so that any state aid directed to the institution inevitably serves religious as well as secular ends. \textit{Hunt} v. \textit{McNair}, 413 U.S. 734, 743 (1973); \textit{Lemon} v. \textit{Kurtzman}, 403 U.S. 602, 657 (1971). Religious elementary and secondary schools are virtually presumed to be pervasively sectarian. See, e.g., School Dist. v. \textit{Ball}, 473 U.S. 373, 384 (1985). Moreover, the \textit{Jackson} record makes clear that many religious schools participating in the MPCP are pervasively sectarian in fact. See \textit{Jackson} v. \textit{Benson}, 570 N.W.2d 407, 413 (Wis. Ct. App. 1997).}

Even putting \textit{Nyquist} aside, the \textit{Jackson} court should still have held that the MPCP violates core prohibitions of the Establishment Clause: that the government neither endorse nor become excessively entangled with religion. The MPCP endorses religion by using pervasively sectarian institutions\footnote{\textit{Cf.} \textit{Washington} v. \textit{Davis}, 426 U.S. 229, 253 (1976) (Stevens, J., concurring) (arguing that, in racial discrimination cases, the line between a legislature's purpose and the effect of its action is often blurred, "[f]or normally the actor is presumed to have intended the natural consequences of his deeds").} as an arm of state education policy. By specifically amending the MPCP to include religious schools, the Wisconsin legislature presumably intended that many students would choose to attend them.\footnote{\textit{Cf.} \textit{Bowen} v. \textit{Kendrick}, 487 U.S. 589, 608–11 (1988). Although the \textit{Bowen} Court held that, in general, religious institutions may participate in publicly sponsored social welfare programs, the Court limited its holding to cases in which no significant portion of program funds would be disbursed to "pervasively sectarian" institutions. \textit{Id.} at 610. Contrary to the \textit{Jackson} court's declaration that such concerns are "irrelevant," see \textit{Jackson}, 578 N.W.2d at 619 n.17, the Court noted that "a relevant factor in deciding whether a particular statute [impermissibly advances religion] is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions," \textit{Bowen}, 487 U.S. at 610. Indeed, the \textit{Bowen} Court specifically remarked that "[t]his is not a case ... where the challenged aid [will flow] almost entirely to parochial schools." \textit{Id.} at 610–11.}

Indeed, providing students this option was part of the state's plan to improve education through competition. Thus, the flow of MPCP funds to religious schools was not the sort of unplanned side effect at issue in \textit{Witters} and similar cases. Although its purpose may have been simply to improve education, the legislature clearly sought to employ religious schools to accomplish this purpose.\footnote{\textit{Cf.} \textit{Bowen} v. \textit{Kendrick}, 487 U.S. 589, 608–11 (1988). Although the \textit{Bowen} Court held that, in general, religious institutions may participate in publicly sponsored social welfare programs, the Court limited its holding to cases in which no significant portion of program funds would be disbursed to "pervasively sectarian" institutions. \textit{Id.} at 610. Contrary to the \textit{Jackson} court's declaration that such concerns are "irrelevant," see \textit{Jackson}, 578 N.W.2d at 619 n.17, the Court noted that "a relevant factor in deciding whether a particular statute [impermissibly advances religion] is the determination of whether, and to what extent, the statute directs government aid to pervasively sectarian institutions," \textit{Bowen}, 487 U.S. at 610. Indeed, the \textit{Bowen} Court specifically remarked that "[t]his is not a case ... where the challenged aid [will flow] almost entirely to parochial schools." \textit{Id.} at 610–11.}
where secular means would suffice,"47 the MPCP creates a "symbolic union of church and state . . . [that] threatens to convey a message of state support for religion to students and to the general public."48

Moreover, the MPCP threatens impermissibly to entangle church and state by making religious schools dependent on government funding. The MPCP already stands to provide tens of millions of dollars to religious schools; as the program continues to grow, the funds at stake are sure to increase. Once religious schools depend on such funds to cover tuition costs, they are made subject to the governmental carrot and stick, and their religious freedom may thereby be compromised. Although the Jackson court accurately noted that Wisconsin currently imposes few eligibility requirements on MPCP schools, political circumstances can quickly change, and nothing would prevent the state in the future from conditioning eligibility on acceptance of controversial policies — for example, a requirement that birth control be taught in health courses, or that creationism not be taught in biology courses.49 Precisely to avoid such conflicts, the Supreme Court has upheld "the cardinal principle that the State may not in effect become the prime supporter of the religious school system."50 Yet the MPCP could easily have just this effect.

In sum, the Jackson court should have struck down the MPCP. By upholding it, the court not only ignored precedent, but also failed to heed the dangers the Establishment Clause aims to suppress.

47 Walz v. Tax Comm'n, 397 U.S. 664, 680 (1970) (Brennan, J., concurring) (listing the kinds of government involvement with religion that "the Framers meant to foreclose"). One might argue that, in this case, secular means would not suffice for the state's purposes: without the participation of religious schools, the number of private schools remaining eligible to participate in the MPCP might fail to generate meaningful competition. However, this is merely a problem of short-run supply that Wisconsin could address in other ways, for example, by providing seed money for the creation of new secular private schools or the expansion of existing ones. See Jonathan B. Cleveland, School Choice: American Elementary and Secondary Education Enter the "Adapt or Die" Environment of a Competitive Marketplace, 29 J. MARSHALL L. REV. 75, 129-30 (1995) (considering ways to create school competition in the short run).

48 Ball, 473 U.S. at 398; see also Bowen, 487 U.S. at 640-41, 651-52 (Blackmun, J., dissenting). One might argue that presumably the legislature did not open the MPCP to religious schools because they are religious; it valued the educational, not the religious, function the schools serve. Therefore, one might conclude that the legislature should not be viewed as having endorsed religion. Cf. Jackson, 578 N.W.2d at 618. But given the schools' pervasively sectarian nature, their educational function cannot be separated from their religious function. It is as if the state were to fund church services while intending merely to promote good morals: it cannot consistently endorse the end while disavowing the means.

49 See Bowen, 487 U.S. at 640 n.10 (Blackmun, J., dissenting) ("A government program that provides funds for religious organizations to carry out secular tasks inevitably risks promoting the pernicious tendency of a state subsidy to tempt religious schools to compromise their religious mission without wholly abandoning it." (internal quotation marks omitted)); Lemon v. Kurtzman, 403 U.S. 602, 621 (1971) ("The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow.").