

GRUTTER'S FIRST AMENDMENT

PAUL HORWITZ*

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

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

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INTRODUCTION

No shortage of ink has already been spilled on the U.S. Supreme Court's decisions in the affirmative action cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*.¹ And little imagination was needed to predict how much of that commentary would run—as praise for the Court's cautious, Solomonic balancing of the conflicting concerns of formal equality and racial justice, or as condemnation of an unprincipled, unsound departure from fundamental principles of equal justice under law.² In any event, the *subject* of the symposia, colloquia, special

¹ See *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

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

issues, and other countless discussions devoted to these cases³ have been clear: *Grutter* and *Gratz* belong to Fourteenth Amendment case law, subgenus affirmative action.

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

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

Grutter v. Bollinger, 152 U. PA. L. REV. 347, 381–82 & nn.163–66 (2003) (collecting positive public reactions to *Grutter*); Joel K. Goldstein, *Beyond Bakke: Grutter-Gratz and the Promise of Brown*, 48 ST. LOUIS U. L.J. 899, 901 (2004) (calling the decisions “a triumph for those advocating racial preferences in admissions decisions”); Goodwin Liu, *Brown, Bollinger, and Beyond*, 47 HOW. L.J. 705, 705 (2004) (noting that “civil rights advocates across the country proclaimed victory” following the issuance of *Grutter*). For remarks that are broadly critical of *Grutter*, see generally Larry A. Alexander & Maimon Schwarzschild, *Grutter or Otherwise: Racial Preferences and Higher Education*, 21 CONST. COMMENT. 3 (2004); Abigail Thernstrom & Stephan Thernstrom, *Secrecy and Dishonesty: The Supreme Court, Racial Preferences, and Higher Education*, 21 CONST. COMMENT. 251 (2004). For discussions of *Grutter* that are also critical but come from the other end of the spectrum, see generally Barbara J. Flagg, *Diversity Discourses*, 78 TUL. L. REV. 827 (2004); Daria Roithmayr, *Tacking Left: A Radical Critique of Grutter*, 21 CONST. COMMENT. 191 (2004); Girardeau A. Spann, *The Dark Side of Grutter*, 21 CONST. COMMENT. 221 (2004).

³ For a sampling, see generally *Affirmative Action in the 21st Century: Reflections on Grutter v. Bollinger and Gratz v. Bollinger: Special Issue*, 30 HASTINGS CONST. L.Q. 425 (2003); *Affirmative Action Symposium*, 28 S. ILL. U. L.J. 519 (2004); Symposium, *From Brown to Bakke to Grutter: Constitutionalizing and Defining Racial Equality*, 21 CONST. COMMENT. 1 (2004); Symposium, *From Brown to Grutter: Affirmative Action and Higher Education in the South*, 78 TUL. L. REV. 1765 (2004); Symposium, *Law, Ethics, and Affirmative Action in America*, 72 U. CIN. L. REV. 873 (2004); Symposium, *On Grutter and Gratz: Examining “Diversity” in Education*, 103 COLUM. L. REV. 1588 (2003).

⁴ For broadly similar conclusions from differing points along the political spectrum, see RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 139–40 (1999); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* 117–36 (1999).

Fourteenth Amendment article at all. The question raised by this Article is quite different.

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

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

⁵ *Grutter*, 539 U.S. at 328.

⁶ *Id.* at 329.

⁷ *Id.*

⁸ *See id.*

⁹ *Id.* (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.)) (internal quotation marks omitted).

¹⁰ *Grutter*, 539 U.S. at 329 (quoting *Bakke*, 438 U.S. at 313 (opinion of Powell, J.) (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967))) (internal quotation marks omitted).

¹¹ *Id.*

¹² *See id.*

interest of "student body diversity"¹³ and the level of deference accorded the university in tailoring its admission policies.

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

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

Yet *Bakke* receives virtually no mention in any of the leading First Amendment treatises and casebooks.¹⁸ Indeed, most of these promi-

¹³ *Id.* at 325.

¹⁴ *See id.* at 328, 329.

¹⁵ 438 U.S. 265 (1978).

¹⁶ *See Grutter*, 539 U.S. at 329 (noting that Justice Lewis Powell's opinion in *Bakke* "invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy"). The parallels between *Bakke* and *Grutter* are all the more striking in that they extend to the level of public reaction. *See* John C. Jeffries, Jr., *Bakke Revisited*, 55 SUP. CT. REV. 1, 8–10 (2003) (discussing the public reaction to *Bakke*, which split between praise for Justice Powell's Solomonic opinion and criticism of the opinion for being disturbingly unreasoned).

¹⁷ J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 257 (1989) (emphasis added).

¹⁸ In fact, I could find only one mention of *Bakke* in any of the many casebooks and treatises devoted solely to First Amendment law that I surveyed. *See* 1 RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 12:21, 13:20, 17:34 (1996). Indeed, although some casebooks and treatises pay attention to issues concerning free speech in the public school context, few devote any space at all to First Amendment issues dealing with academic freedom in higher education.

nent texts deal briefly or not at all with the entire subject of academic freedom, on which both *Bakke* and *Grutter* are grounded.¹⁹ Nor have the law reviews done much to fill the gap. Although there is obviously an extraordinary amount of legal scholarship dealing with *Bakke* as a Fourteenth Amendment case and a significant but somewhat isolated volume of legal scholarship dealing with academic freedom on its own terms, very few scholars have dug deeply into the question of the relationship between *Bakke*—and now *Grutter*—and the First Amendment.²⁰ And those few treatments generally have not pressed the question whether the First Amendment principles announced in *Bakke*, and reaffirmed in *Grutter*, have (or should have) any application beyond the narrow context of race-conscious admissions policies in public higher education. That general reluctance to make a home for *Bakke* and its newest progeny in First Amendment scholarship, let alone to deal seriously with its implications, is unfortunate.

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

¹⁹ Cf. Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 557 (2003) (arguing that "[a]cademic freedom has become something of a pariah concept").

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

For some pre-*Grutter* attempts to address these issues, see generally Alfred B. Gordon, *When the Classroom Speaks: A Public University's First Amendment Right to a Race-Conscious Classroom Policy*, 6 WASH. & LEE RACE & ETHNIC ANC. L.J. 57 (2000); Darlene C. Goring, *Affirmative Action and the First Amendment: The Attainment of a Diverse Student Body Is a Permissible Exercise of Institutional Autonomy*, 47 U. KAN. L. REV. 591 (1999).

The answers to that question are surprisingly wide-ranging. *Grutter*, if read for all it is worth as a First Amendment opinion, yields a wide harvest of potential implications for a variety of subjects, some closely related to the First Amendment and others ranging farther afield in constitutional law.

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

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

²¹ See *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 233–34 (3d Cir. 2004).

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

Looking at this list of possible extensions of *Grutter* makes a few things clear. First, each of these prospects should prove attractive to at least some constitutional scholars. Second, it is unlikely that any individual scholar will find all of them attractive. Third, some who support one of the potential outcomes listed above will find others on the list utterly repugnant to their understanding of the First Amendment or other constitutional values. Yet, on this reading,²² all of these applications of *Grutter's* First Amendment are compelled equally by the logic of the decision.²³

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

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

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

²² See *infra* notes 208–396 and accompanying text.

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

²⁴ See *infra* notes 397–437 and accompanying text.

approach taken to the First Amendment in that case and the approach taken elsewhere in First Amendment doctrine.²⁵ Although an argument could be made that *Grutter's* view of the First Amendment is consistent with the approach taken elsewhere by some of the majority, one or more of the Justices in the majority clearly adopt a different approach in most of their First Amendment jurisprudence.²⁶ Conversely, a number of the Justices who dissented in *Grutter* have been described elsewhere as taking a strong view on the importance of intermediary institutions in the law²⁷—a position that is arguably consistent with the majority in *Grutter* and inconsistent with the dissenters' position in that case.

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

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

²⁵ See *infra* notes 397–437 and accompanying text.

²⁶ See *infra* notes 438–471 and accompanying text.

²⁷ See generally, e.g., John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002).

²⁸ See Byrne, *supra* note 17, at 320 ("One reason that institutional academic freedom remains little more than a potential constitutional right is that it has not been explained satisfactorily by legal scholars."); see also Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. (forthcoming 2005), available at <http://ssrn.com/abstract=668521> (date posted Feb. 18, 2005).

²⁹ Professor Byrne suggests the same thing about *Bakke's* First Amendment implications:

An early reader of *Bakke* could be pardoned if she doubted that the Court was serious about a First Amendment right of institutional academic freedom.

Grutter, in their First Amendment dimensions at least, are the proverbial tickets good for one trip only.³⁰ Thus, the relative lack of attention to *Bakke*'s First Amendment implications, and what I venture to predict will be a similar silence with respect to *Grutter*'s meaning as a First Amendment case, may be simply a tacit acknowledgement that the First Amendment aspects of these cases are mere makeweights, best left forgotten lest they complicate matters if imported into other areas.

If that were the only conclusion that could be drawn from the relative neglect of the First Amendment consequences of *Bakke* and *Grutter*, it would still deserve public comment. Recent history suggests that constitutional scholars do not care much for restricted-ticket cases.³¹ Less trivially, however, it is surely worth pointing out that the Court and constitutional scholars alike have treated *Bakke* seriously (and will do the same for *Grutter*) as a case about affirmative action, while paying far less careful attention to the First Amendment implications of those cases. The first two readings of *Grutter* that I offer here, with all their implications, problems, and potential, suggest that this relative inattention has been a mistake.

But these readings of *Grutter* are not the only way to understand the First Amendment implications of the case. A third reading of *Grutter* is also available, one that ultimately forms the most important contribution of this Article. In this reading, *Grutter*, with its expansive deference to educational institutions, is a rare case in the Supreme Court's recent First Amendment jurisprudence—because it takes institutions seriously in the First Amendment.³²

Was it not merely a chimera of a doctrine, affirmed only for that day, to provide an acceptable ground on which Justice Powell could preserve affirmative action while condemning racial preferences?

Byrne, *supra* note 17, at 315. Professor Byrne further suggests that the principle has had at least some vitality beyond *Bakke*. See *id.* at 316.

³⁰ See, e.g., Mark G. Yudof, *The Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 855–56 (1987) (suggesting that *Bakke* is a ticket good for one trip only in terms of its First Amendment implications).

³¹ For an example of this treatment, see generally *Bush v. Gore*, 531 U.S. 98 (2000), and the already voluminous scholarship criticizing the Court's opinion in that case on precisely this ground. See, e.g., Pamela S. Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in Bush v. Gore*, 64 OHIO ST. L.J. 265, 281–82 (2003); David A. Strauss, *Bush v. Gore: What Were They Thinking?*, 68 U. CHI. L. REV. 737, 749–51 (2001); Laurence H. Tribe, *Erog .v Hsub and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 HARV. L. REV. 170, 270–73 (2001).

³² For excellent discussion of this issue, see generally Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998).

For the most part, the Court's First Amendment jurisprudence in recent decades has proceeded along very different lines. The Court has refused to confer rights on the press that differ from those enjoyed by other speakers, notwithstanding the separate presence of the Press Clause in the First Amendment.³³ It has focused increasingly on content-neutrality as the linchpin of free speech analysis, including much speech by religious individuals and institutions.³⁴ It has refused to single out religious conduct for special accommodation against generally applicable rules.³⁵ All of these developments speak to the same trend. The Court repeatedly has sought to use generally applicable principles, such as neutrality and equality, as its guiding principles in First Amendment jurisprudence.

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

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

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

³³ See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 798–802 (1978); *Brandenburg v. Hayes*, 408 U.S. 665, 691–92 (1972) (Burger, C.J., concurring).

³⁴ See, e.g., Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000).

³⁵ See *Employment Div. v. Smith*, 494 U.S. 872, 878–80 (1990).

³⁶ Schauer, *supra* note 32, at 87.

³⁷ See *infra* notes 496–504 and accompanying text.

stitution-sensitive approach to the First Amendment in the context of educational institutional autonomy—pitfalls that in some ways are exemplified by *Grutter* itself. Although I believe this institution-sensitive reading of *Grutter* has much to recommend it as a shift in First Amendment doctrine, and strongly argue for that approach here, the concerns it presents deserve attention as well.

Part I of this Article provides some necessary background.³⁸ It discusses the development of the concept of academic freedom outside the courts, and describes some of the contending justifications for what I call professional academic freedom.³⁹ The second half of Part I discusses the development of the constitutional law of academic freedom, tracing its development from the early cases to *Bakke* and *Grutter*.⁴⁰ Part II fleshes out the possible implications of *Grutter*.⁴¹ It begins by imagining some of the possible implications if, as one reading of *Grutter* suggests, the Court has concluded that universities must be given substantial deference in taking steps in service of *any* proper academic goal.⁴² It then discusses the ramifications of a second possible reading of *Grutter*—one in which the Court did not simply defer to the academic judgment of the Law School, but positively endorsed a substantive, democratically oriented conception of academic freedom.⁴³ Finally, Part III discusses the First Amendment implications of *Grutter's* willingness to take universities seriously, and accord them special status, as First Amendment institutions.⁴⁴

I. PROFESSIONAL AND CONSTITUTIONAL ACADEMIC FREEDOM

A. *The Roots of Professional Academic Freedom*

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

³⁸ See *infra* notes 45–207 and accompanying text.

³⁹ See *infra* notes 45–101 and accompanying text.

⁴⁰ See *infra* notes 102–207 and accompanying text.

⁴¹ See *infra* notes 208–471 and accompanying text.

⁴² See *infra* notes 208–396 and accompanying text.

⁴³ See *infra* notes 397–437 and accompanying text. As a normative matter, it bears emphasis that I am not endorsing either of these readings of *Grutter*, let alone endorsing each of the sometimes conflicting ramifications of these readings. Rather, the task of Part II is to explore these possible readings of *Grutter* and their implications. See *infra* notes 208–471 and accompanying text. By contrast, Part III does champion *Grutter* as a case about taking First Amendment institutions seriously. See *infra* notes 472–575 and accompanying text.

⁴⁴ See *infra* notes 466–569 and accompanying text.

of academic freedom as a constitutional value over the past fifty years, it was not writing on a blank page.⁴⁵ Academic freedom in the United States is the product of almost 150 years of discussion and development within the academy itself. To understand the growth of *constitutional* academic freedom, then, we must begin with an understanding of the *professional* notion of academic freedom.

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

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

⁴⁵ See *infra* notes 102–207 and accompanying text.

⁴⁶ For examples of more detailed treatments, see generally THE CONCEPT OF ACADEMIC FREEDOM (Edmund L. Pincoffs ed., 1975); RICHARD HOFSTADTER & WALTER P. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES (1955); Byrne, *supra* note 17; Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817 (1983); Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, in FREEDOM AND TENURE IN THE ACADEMY 3 (William W. Van Alstyne ed., 1993) [hereinafter Metzger, 1940 Statement]; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265 (1988) [hereinafter Metzger, *Profession and Constitution*]; David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405 (1988) [hereinafter Rabban, *Faculty Autonomy*]; David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, in FREEDOM AND TENURE IN THE ACADEMY, *supra*, at 227 [hereinafter Rabban, *Functional Analysis*].

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

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

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

For German universities of the era, academic freedom consisted of three central principles. First, *Lehrfreiheit*, roughly translated as "teaching freedom," distinguished academics, who were civil servants,

⁴⁷ See *infra* notes 472-575 and accompanying text.

⁴⁸ See Byrne, *supra* note 17, at 269.

⁴⁹ See, e.g., *id.*; Finkin, *supra* note 46, at 822.

⁵⁰ See HOFSTADTER & METZGER, *supra* note 46, at 279; Byrne, *supra* note 17, at 269; Metzger, *Profession and Constitution*, *supra* note 46, at 1267-68 (noting that American college professors in this era had been "pedagogues pure and simple").

⁵¹ HOFSTADTER & METZGER, *supra* note 46, at 279.

⁵² See *id.* at 280-81.

⁵³ See Finkin, *supra* note 46, at 822.

⁵⁴ See, e.g., HOFSTADTER & METZGER, *supra* note 46, at 279; Byrne, *supra* note 17, at 268-69.

⁵⁵ For a more extended discussion, see HOFSTADTER & METZGER, *supra* note 46, at 320-412; Byrne, *supra* note 17, at 269-73.

⁵⁶ Metzger, *Profession and Constitution*, *supra* note 46, at 1269; see also HOFSTADTER & METZGER, *supra* note 46, at 367-412; Finkin, *supra* note 46, at 822-29.

from other government employees. Under this principle, professors could pursue their teaching and scholarship "without seeking prior ministerial or ecclesiastical approval or fearing state or church reproof."⁵⁷ Significantly, *Lehrfreiheit* was a "distinctive prerogative of the academic profession" in Germany and not a subpart of the civil liberties generally enjoyed by German citizens.⁵⁸

Lernfreiheit, roughly translated as "learning freedom," amounted to an acknowledgement that German university students were to be treated as "mature and self-reliant beings, not as neophytes, tenants, or wards."⁵⁹ Thus, students were free of the supervisory rules that governed American college students of the same period. German students were free to choose their own courses, largely free of attendance or examination requirements, free to live in lodgings of their own choosing, and free to govern their own lives.⁶⁰

Finally, German universities enjoyed the right of *Freiheit der Wissenschaft*: the right of academic self-governance. Notwithstanding the status of the German university as a state-funded institution, with substantial state control over appointments, universities were entitled to make their own decisions on internal matters under the direction of the senior faculty.⁶¹ The concept of academic self-governance that undergirds *Freiheit der Wissenschaft* is recognizable as a forerunner of the emphasis on institutional autonomy that developed in the courts' discussions of academic freedom and that culminated in *Grutter v. Bollinger*.⁶²

Although the American conception of academic freedom had its roots in the German university system of the nineteenth century, it was not until early in the twentieth century that it had its proper birth, with the establishment of the American Association of University Professors (the "AAUP") and the drafting of its 1915 Declaration of Principles (the "Declaration").⁶³ Some aspects of the Declaration are of particular relevance here. First, as Walter Metzger notes, the drafters of the Declaration "evolved a functional rather than idealistic

⁵⁷ Metzger, *Profession and Constitution*, *supra* note 46, at 1269; see also HOFSTADTER & METZGER, *supra* note 46, at 386-87.

⁵⁸ HOFSTADTER & METZGER, *supra* note 46, at 387.

⁵⁹ Metzger, *Profession and Constitution*, *supra* note 46, at 1270.

⁶⁰ See, e.g., *id.*

⁶¹ See Finkin, *supra* note 46, at 823; Metzger, *Profession and Constitution*, *supra* note 46, at 1270.

⁶² See, e.g., Metzger, *Profession and Constitution*, *supra* note 46, at 1312-19.

⁶³ For this history, see, for example, HOFSTADTER & METZGER, *supra* note 46, at 468-506; Byrne, *supra* note 17, at 276-79; Metzger, *Profession and Constitution*, *supra* note 46, at 1267-85.

rationale for freedom of teaching and research."⁶⁴ That function revolved around the search for truth.⁶⁵ The primary purpose of the university was to "promote inquiry and advance the sum of human knowledge."⁶⁶ Modern academic scholarship had an "essentially scientific character"⁶⁷ that could best thrive if researchers were afforded "complete and unlimited freedom to pursue inquiry and publish [their] results."⁶⁸

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

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

⁶⁴ Metzger, *Profession and Constitution*, *supra* note 46, at 1274.

⁶⁵ See Byrne, *supra* note 17, at 279 (indicating that "the American tradition of academic freedom emerged from the professional organization of scholars dedicated to the scientific search for truth").

⁶⁶ AM. ASS'N OF UNIV. PROFESSORS, GENERAL REPORT OF THE COMMITTEE ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), *reprinted in* FREEDOM AND TENURE IN THE ACADEMY 393, 397 (William W. Van Alstyne ed., 1993) [hereinafter FREEDOM AND TENURE].

⁶⁷ Byrne, *supra* note 17, at 277.

⁶⁸ AM. ASS'N OF UNIV. PROFESSORS, *supra* note 66, *reprinted in* FREEDOM AND TENURE, *supra* note 66, at 398.

⁶⁹ *Id.*, *reprinted in* FREEDOM AND TENURE, *supra* note 66, at 398.

⁷⁰ Byrne, *supra* note 17, at 277.

⁷¹ AM. ASS'N OF UNIV. PROFESSORS, *supra* note 66, *reprinted in* FREEDOM AND TENURE, *supra* note 66, at 398.

⁷² *Id.*, *reprinted in* FREEDOM AND TENURE, *supra* note 66, at 399; see also DEREK BOK, BEYOND THE IVORY TOWER: SOCIAL RESPONSIBILITIES OF THE MODERN UNIVERSITY 5 (1982).

Second, it is worth noting that the Declaration concerned itself only with academic freedom for *academics*. *Lehrfreiheit* was the concern here, not *Lernfreiheit*.⁷³ Thus, although the AAUP often addressed issues of student speech, its founding principles dealt only with research and speech by professors themselves.⁷⁴

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

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

⁷³ See AM. ASS'N OF UNIV. PROFESSORS, *supra* note 66, reprinted in FREEDOM AND TENURE, *supra* note 66, at 393 (suggesting that "[i]t need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher[,] [not the student]").

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

⁷⁵ *Id.* at 1276.

⁷⁶ See Byrne, *supra* note 17, at 275–76.

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

⁷⁸ *Id.* at 1280.

⁷⁹ See *id.* at 1274–76.

⁸⁰ Byrne, *supra* note 17, at 277.

⁸¹ AM. ASS'N OF UNIV. PROFESSORS, *supra* note 66, reprinted in FREEDOM AND TENURE, *supra* note 66, at 401; see also Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J.C. & U.L. 1, 2–3 (1993).

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

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

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

⁸² AM. ASS'N OF UNIV. PROFESSORS, *supra* note 66, reprinted in FREEDOM AND TENURE, *supra* note 66, at 401.

⁸³ See Byrne, *supra* note 17, at 277-78.

⁸⁴ See generally AM. ASS'N OF UNIV. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), reprinted in FREEDOM AND TENURE, *supra* note 66, at 407.

⁸⁵ See Metzger, 1940 Statement, *supra* note 46, at 3.

⁸⁶ AM. ASS'N OF UNIV. PROFESSORS, *supra* note 84, reprinted in FREEDOM AND TENURE, *supra* note 66, at 407.

⁸⁷ *Id.*, reprinted in FREEDOM AND TENURE, *supra* note 66, at 407.

⁸⁸ See *id.*, reprinted in FREEDOM AND TENURE, *supra* note 66, at 407-08.

⁸⁹ *Id.*, reprinted in FREEDOM AND TENURE, *supra* note 66, at 407.

self-governance. Because American academics feared interference from internal forces rather than external forces, their version of academic freedom emphasized the neutrality of the academic institution rather than its insulation from outside influence. Third, it recognized that any academic bill of rights must be accompanied by a set of obligations, subject only to the limitation that these obligations were to be enforced by other academics rather than by lay governors. Academics were to adhere to the accepted standards of their field of study. Academic freedom was not a liberty; it was a conditional license.

For present purposes, let us focus on the first conclusion—that professional academic freedom was justified on truth-seeking grounds. Two aspects of this conclusion are of particular interest here. First, as Professor J. Peter Byrne has noted, this argument for academic freedom has long been a site of contestation.⁹⁰ A variety of competing values have been advanced as additional, or even primary, values served by higher education. In particular, a number of scholars have argued for a “democratic value in higher education.”⁹¹

Broadly speaking, the democratic justification for higher education “view[s] education as instrumental, conferring benefits on the general public, rather than as a good in itself or in its diffuse, long-term consequences.”⁹² Higher education thus is not valued, simply or even primarily, for its contribution to the search for truth through research and teaching. It is not simply a repository of experts. Nor does it strive for neutrality among various visions of the good. Rather, democratic education seeks to serve specific, non-neutral goals directly linked to society at large:

[It] is . . . committed to allocating educational authority in such a way as to provide its members with an education adequate to participating in democratic politics, to choosing among (a limited range of) good lives, and to sharing in the several sub-communities, such as families, that impart identity to the lives of its citizens.⁹³

⁹⁰ See Byrne, *supra* note 17, at 279.

⁹¹ *Id.* at 281. See generally AMY GUTMANN, *DEMOCRATIC EDUCATION* (1987); CLARK KERR, *THE USES OF THE UNIVERSITY* (1963).

⁹² Byrne, *supra* note 17, at 281.

⁹³ GUTMANN, *supra* note 91, at 42 (stating that “a democratic state of education tries to teach . . . what might best be called *democratic* virtue: the ability to deliberate, and hence to participate in conscious social reproduction”). See generally Suzanna Sherry, *Republican Citizenship in a Democratic Society*, 66 TEX. L. REV. 1229 (1988) (reviewing GUTMANN, *supra* note 91).

Obviously, this is a starkly different vision of the values and functions of higher education, and it may coexist uneasily with the classical vision of the university and of academic freedom described above.⁹⁴ Certainly the differing emphases of these two visions of higher education may result in different views about what are acceptable practices in an institution of higher education. Thus, a purely truth-oriented vision of the university *could* lead to a strict principle of nondiscrimination, whether favorable or invidious, in university admissions.⁹⁵ By contrast, to the extent an emphasis on the democratic values of higher education stresses the importance of universities in preparing and filling the ranks of future leaders, affirmative action in admissions would be "relevant to one of [the] legitimate social functions" of the university.⁹⁶ Thus, democratic educational values may complement or diverge from truth-seeking justifications for higher education; the question will depend on whether the "ideal of the true" and the ideal of the "useful" lead to the same policy prescriptions.⁹⁷

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

⁹⁴ Of course, it is also quite possible to construct democratic justifications for a broad defense of academic freedom. See, e.g., GUTMANN, *supra* note 91, at 175–81.

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

⁹⁶ GUTMANN, *supra* note 91, at 210.

⁹⁷ Byrne, *supra* note 17, at 283.

⁹⁸ See *id.* at 279–80 (discussing the so-called "humanistic" justification for higher education).

questioned whether an argument for academic freedom can be made on *any* stable and defensible grounds.⁹⁹ It is thus unsurprising that, as we shall see, the courts have seesawed among various visions of what constitutional academic freedom means.

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

B. *The Roots of Constitutional Academic Freedom*

1. The Pre-*Regents of the University of California v. Bakke* Cases: The Birth Pangs of Constitutional Academic Freedom

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

⁹⁹ See generally THE FUTURE OF ACADEMIC FREEDOM (Louis Menand ed., 1996); Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 VAL. U. L. REV. 499 (2001) (discussing problems with foundationalist arguments for academic freedom, but defending it on non-foundationalist grounds); David M. Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 CAL. L. REV. 1377 (1998) (reviewing THE FUTURE OF ACADEMIC FREEDOM, *supra*).

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

¹⁰¹ See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003).

As is the case for most First Amendment jurisprudence, academic freedom as a constitutional value is primarily a creature of the twentieth century.¹⁰² Although academic freedom made its first appearance as a potential First Amendment value in a dissent by Justice William Douglas in 1952,¹⁰³ its true lineage can be traced to a case decided by the Supreme Court five years later, *Sweezy v. New Hampshire*.¹⁰⁴ Pursuant to a state statute, Paul Sweezy was subpoenaed and questioned by the Attorney General of New Hampshire on a host of subjects, including lectures he had delivered at the University of New Hampshire.¹⁰⁵ He refused to answer and was jailed for contempt.¹⁰⁶

The Court overturned the conviction on narrow grounds: the state legislature's delegation of authority to the Attorney General was so vague that it was unclear what questions the legislature would have wanted that officer to pursue. Holding Paul Sweezy in contempt for failure to answer these questions thus violated his due process rights.¹⁰⁷ Before reaching this conclusion, however, the Court detoured for a discussion of the First Amendment implications of the case. Writing for a plurality of the Court, Chief Justice Earl Warren bluntly asserted that the questions posed to Paul Sweezy constituted "an invasion of petitioner's liberties in the area of academic freedom and political expression—areas in which government should be extremely reticent to tread."¹⁰⁸ The next passage is worth quoting at length:

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

¹⁰² That is not to say that it does not have earlier, deeper roots. For a discussion of those roots, see Finkin, *supra* note 46, at 830-40.

¹⁰³ See *Adler v. Bd. of Educ.*, 342 U.S. 485, 509 (1952) (Douglas, J., dissenting) (criticizing the threat of loyalty proceedings under state law as rendering members of subversive organizations ineligible for employment as public school teachers because "[t]he very threat of such a procedure is certain to raise havoc with academic freedom").

¹⁰⁴ See generally 354 U.S. 234 (1957).

¹⁰⁵ *Id.* at 236-45 (plurality opinion). For biographical information on Paul Sweezy, see Louis Uchitelle, *Paul Sweezy*, 93, *Marxist Publisher and Economist*, *Dies*, N.Y. TIMES, Mar. 2, 2004, at A25.

¹⁰⁶ *Sweezy*, 354 U.S. at 244-45 (plurality opinion).

¹⁰⁷ *Id.* at 251-55 (plurality opinion).

¹⁰⁸ *Id.* at 250 (plurality opinion).

coveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.¹⁰⁹

Some themes sounded in this passage are worth noting. First, the Court's novel assertion that academic freedom would join political expression as an area "in which government should be extremely reticent to tread"¹¹⁰ clearly presages the Court's modern approach, prominent in *Grutter*, of deferring to higher educational institutions—for the Court makes clear that its concern is with the academic freedom of universities, not elementary or secondary schools.

It is equally clear, however, that this statement cannot be over-extended. Nothing in the plurality opinion in *Sweezy* suggests that the Court thinks government ought to defer to university decision making as a general matter.¹¹¹ Its clear concern is with the regulation of *speech* made in an academic context.¹¹² There is no hint at this point that government ought to steer clear of other aspects of university life. Nor does the Court indicate that it would be concerned with restrictions on speech initiated by a public university itself, rather than the state. Moreover, although the passage embraces "[t]eachers and students" alike, it leaves unaddressed the questions of whether a university is entitled to restrict or to penalize speech by teachers, whether a university may restrict speech by students, and whether teachers in turn may restrict student speech.¹¹³

Second, the Court's conception of academic freedom is grounded first and foremost on the view that academic freedom is necessary to safeguard the search for truth. Academic freedom is necessary to ensure an environment in which "new discoveries," whether in the hard sciences or in the social sciences, are possible.¹¹⁴ To be sure, the Court looks beyond the college gates to the "vital role in a democracy that is played by those who guide and train our youth."¹¹⁵ But the Court here

¹⁰⁹ *Id.* (plurality opinion)

¹¹⁰ *Id.* (plurality opinion)

¹¹¹ *Sweezy*, 354 U.S. at 235–55 (plurality opinion).

¹¹² *See id.* at 249–50 (plurality opinion).

¹¹³ *See id.* at 250 (plurality opinion).

¹¹⁴ *Id.* (plurality opinion)

¹¹⁵ *Id.* (plurality opinion)

is not subscribing to the view that academic freedom is important to inculcate democratic values *within* the university. Rather, academic freedom is prized primarily because its contribution to truth-seeking will yield discoveries or insights that ultimately will benefit society at large. Chief Justice Warren's opinion in *Sweezy* is thus far closer in spirit to the Declaration than it is to the vision of academic freedom articulated in *Bakke* and in *Grutter*.

Justice Felix Frankfurter, joined by Justice John Harlan, concurred in the result, but based the concurrence directly on First Amendment grounds. Like the plurality, Justice Frankfurter viewed universities as serving a truth-seeking function, not a democratic function. The public benefit of a university, in his view, was not to create better citizens, but to advance human knowledge.¹¹⁶ He stated, "In a university knowledge is its own end, not merely a means to an end."¹¹⁷ If Justice Frankfurter thus sought to protect a university's "atmosphere" of "speculation, experiment and creation,"¹¹⁸ it was for truth-seeking purposes, not in order to serve some larger vision of public dialogue or deliberative democracy.

Like the plurality, Justice Frankfurter argued that universities ought to be left undisturbed by the state. As Professor Byrne notes, Justice Frankfurter "would have held that university freedom for teaching and scholarship without interference from government is a positive right,"¹¹⁹ which may be abrogated only for "exigent and obviously compelling" reasons.¹²⁰ But Justice Frankfurter gave more content to this right, setting out its boundaries more clearly than the plurality's opinion had done. Quoting approvingly from a statement by a group of South African academics, he suggested that "four essential freedoms" govern the life of a properly functioning university: the freedom "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹²¹

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

¹¹⁷ *Id.* at 262 (Frankfurter, J., concurring in the result) (quoting CONFERENCE OF REPRESENTATIVES OF THE UNIV. OF CAPE TOWN & THE UNIV. OF THE WITWATERSRAND, THE OPEN UNIVERSITIES IN SOUTH AFRICA 12 (1957) (presenting a statement of a conference of South African senior scholars)).

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

¹¹⁹ Byrne, *supra* note 17, at 290.

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

¹²¹ *Id.* at 263 (Frankfurter, J., concurring in the result) (quotations omitted). For a discussion of the historical background of the South African scholars' statement, see Richard H. Hiers, *Institutional Academic Freedom vs. Faculty Academic Freedom in Public Colleges and Universities: A Dubious Dichotomy*, 29 J.C. & U.L. 35, 43-57 (2002).

In those words—the freedom “to determine . . . who may be admitted to study”—lie the jurisprudential roots of *Bakke* and *Grutter* and their command of deference to university admissions programs. But if Justice Frankfurter's *Sweezy* concurrence has provided fertile ground for future doctrinal developments, it is not because his opinion provides a meaningful definition of constitutional academic freedom or proper guidance on its application. To the contrary, *Sweezy*'s influence stems from the combination of its sweeping grandiloquent rhetoric and its lack of real guidance for future courts.¹²²

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

Compounding this uncertainty is a further question: how strongly are we to read Justice Frankfurter's reference to the “four freedoms” of a university? Two questions in particular follow from this inquiry. First, are they to be read as particular freedoms available under the First Amendment, or as general examples of the kinds of liberty that will be safeguarded if the state is precluded from investigating academic *speech* only? A proper reading of the opinion, with its reference to the presumptive freedom of “thought *and action*” in the academy

¹²² See, e.g., Byrne, *supra* note 17, at 292 (noting the “fertile ambiguity” produced by “Frankfurter's loose and essayistic writing”); cf. Paul Horwitz, *Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 OSGOODE HALL L.J. 101, 120–25 (2000) (advocating an “open-textured minimalist” approach to judicial opinion writing in constitutional cases during the early stages of the development of new constitutional doctrine, which pairs a minimalist approach to the holding with “eloquent and debate-encouraging language” in dicta, to spark dialogue while leaving room for future development).

from government intrusion, suggests that Justice Frankfurter intended the broader reading to apply.¹²³ But even if the statement had come in the plurality opinion and not a mere concurrence, it again sweeps far outside the facts of the case before the Court.

The concurrence also provides minimal guidance on another question: what is the scope of these four freedoms? Are they absolute, or subject to internal or external limitations? Here, *Sweezy* provides some guidance, albeit minimal. The university is free to act within the sphere of the four freedoms to the extent its decisions are based "on academic grounds."¹²⁴ Thus, a determination such as an admission decision that is based on nonacademic grounds is entitled to no special protection under the rubric of constitutional academic freedom. That limitation, of course, begs the question as to what should be considered "academic grounds" for a decision, and on this point the opinion is silent. Nevertheless, that internal limitation underscores the importance to academic freedom doctrine of the Court's understanding of the function of universities. As the discussion of *Bakke* and *Grutter* that follows suggests, much turns on whether the Court believes universities are a site for the search for truth, or whether they serve additional functions.

In one area, at least, Justice Frankfurter is sufficiently clear. Subsequent commentators have objected that a strong principle of constitutional academic freedom would grant constitutional rights to universities or academics not enjoyed by other First Amendment speakers.¹²⁵ But the concurrence properly emphasizes that the freedoms accorded to the university do not confer a special status on the university for its own sake, but for the ultimate benefit of the public.¹²⁶ Again, this suggests that *Sweezy's* vision of academic freedom has little to do with a civic democracy view of education; the purpose of college is not simply to breed more thoughtful, sensitive citizens. Rather, it is to provide the public with the more immediate fruits of research, teaching, and scholarship—the advancement of knowledge. In any event, although the categories of academic freedom listed by Justice Frankfurter—freedom

¹²³ See *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result) (emphasis added).

¹²⁴ *Id.* (Frankfurter, J., concurring in the result) (emphasis added).

¹²⁵ See, e.g., *Urofsky v. Gilmore*, 216 F.3d 401, 411 n.13 (4th Cir. 2000) (en banc) (stating that "we note that the argument [that professors are entitled to academic freedom protections under the First Amendment] raises the specter of a constitutional right enjoyed by only a limited class of citizens").

¹²⁶ *Sweezy*, 354 U.S. at 262 (Frankfurter, J., concurring in the result).

to select a curriculum, to determine who may be admitted to study, and so forth—are specific to educational institutions, the opinion suggests that First Amendment academic freedom simply tracks the same core activities protected when individuals engage in political speech.¹²⁷

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

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

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

¹²⁷ See *id.* at 266 (Frankfurter, J., concurring in the result).

¹²⁸ See generally 385 U.S. 589 (1967).

¹²⁹ See *Keyishian*, 385 U.S. at 589; *Adler*, 342 U.S. at 485.

¹³⁰ *Keyishian*, 385 U.S. at 591–94.

¹³¹ *Id.* at 603–04.

Our nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the "marketplace of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."¹³²

In keeping with the narrow factual context in which it arose—state regulation of teachers' political affiliations—and the narrow legal grounds on which it was decided, although *Keyishian* sounds many of the same themes as *Sweezy*, the discussion of academic freedom is equally unnecessary. It situates academic freedom squarely within the First Amendment and treats it as a right against the state, without addressing how or whether the public university itself may govern speech on campus. And it emphasizes that any special rights enjoyed by the university are "of transcendent value to all of us and not merely to the teachers concerned."¹³³

What is significant here is the subtle shift in the Court's justification for constitutional academic freedom. Although the passage quoted above appears to invoke the same truth-seeking value offered by the plurality and concurring opinions in *Sweezy*, there are, in fact, two justifications at work here. The Court is concerned not only with the knowledge that is the *product* of the search for truth, but with the civic value of the *process* of discussion itself. It is less concerned with the particular truths that may emerge "out of a multitude of tongues"¹³⁴ than it is with the capacity of vigorous discussion to produce citizens who are accustomed to the "robust exchange of ideas."¹³⁵

Keyishian's reference to the classroom as "peculiarly the 'marketplace of ideas'" is, on this reading, misleading.¹³⁶ The marketplace of

¹³² *Id.* at 603 (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

¹³³ *Id.*

¹³⁴ *Id.* (quoting *Associated Press*, 52 F. Supp. at 372).

¹³⁵ *Keyishian*, 385 U.S. at 603.

¹³⁶ *Id.* (quoting *Associated Press*, 52 F. Supp. at 372). For discussions of *Keyishian* that focus on the marketplace of ideas concept, see, for example, Rabban, *Functional Analysis*, *supra* note 46, at 228, 240; John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government*,

ideas metaphor is generally understood to relate directly to the search for truth: "the best test for truth is the power of the thought to get itself accepted in the competition of the market."¹⁹⁷ *Keyishian*, on the other hand, is less interested in the results of that competition than it is in the social value of training future leaders and other citizens in the habit of vigorous dialogue. If *Keyishian* finds its roots elsewhere in First Amendment doctrine, then, they lie not in Justice Oliver Wendell Holmes's *Abrams v. United States* dissent but in Justice Louis Brandeis's concurring opinion in *Whitney v. California*,¹⁹⁸ which was similarly concerned with inculcating a free citizenry that is accustomed to public discussion and debate.¹⁹⁹

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

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

the Academy, and the McCarran-Walter Act, 66 TEX. L. REV. 1481, 1520-46 (1988); Yudof, *supra* note 30, at 841-58.

¹⁹⁷ *Abrams v. United States*, 250 U.S. 616, 630 (1920) (Holmes, J., dissenting).

¹⁹⁸ *Whitney v. California*, 274 U.S. 357, 372-80 (1927) (Brandeis, J., concurring).

¹⁹⁹ For discussion of *Whitney*, see generally Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653 (1988); Paul Horwitz, *Citizenship and Speech*, 43 MCGILL L.J. 445 (1998).

quent case law did little to give further shape to the doctrine.¹⁴⁰ In one 1972 case, *Healy v. James*,¹⁴¹ the Court did offer some additional views about the scope of academic freedom. In holding that Central Connecticut State College had improperly denied the campus chapter of Students for a Democratic Society certification as a campus group, the Court necessarily suggested that academic freedom may in proper circumstances be a right held against the public university itself by members of the university community—in this case, students. To be sure, as in *Sweezy* and *Keyishian*, the Court could have reached the same ruling without referring to academic freedom. It could have held simply that the college had failed to act in a viewpoint-neutral fashion with respect to speech within what was basically a public forum. But the Court went further, situating the student group's claim within "this Nation's dedication to safeguarding academic freedom."¹⁴²

Healy thus suggests that the "four freedoms" identified in Justice Frankfurter's *Sweezy* concurrence—including, presumably, the freedom to determine who may be admitted to study—do not delineate spheres of absolute nonintrusion for university officials. They are not only subject to the requirement that the university act on "academic" grounds, but they also may potentially be subject to whatever competing academic freedom rights can be asserted by other members of the university community.¹⁴³

At the same time, *Healy* suggests that those limits work both ways. The Court made clear that student groups on campus would still be required to abide by generally applicable rules of conduct governing the university. Students for a Democratic Society could not "infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education."¹⁴⁴ Again, that conclusion is an unexceptional exercise of time, place, and manner doctrine. Because the *Healy* Court invoked academic

¹⁴⁰ See, e.g., Ailsa W. Chang, Note, *Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond Pickering and Connick*, 53 STAN. L. REV. 915, 922 (2001). But see William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, in FREEDOM AND TENURE IN THE ACADEMY, *supra* note 46, at 79, 118 (purporting to find "some clearer sense of what counts as an academic freedom interest" in the post-*Keyishian* case law).

¹⁴¹ 408 U.S. 169, 194 (1972).

¹⁴² *Id.* at 180–81.

¹⁴³ See, e.g., *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result). For a discussion of the competing interests involved in intramural speech within the university, see generally Matthew W. Finkin, *Intramural Speech, Academic Freedom, and the First Amendment*, 66 TEX. L. REV. 1323 (1988).

¹⁴⁴ *Healy*, 408 U.S. at 189.

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

2. *Bakke*: "... Who May Be Admitted to Study"

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

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

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

¹⁴⁵ *Id.* at 176.

¹⁴⁶ See generally 438 U.S. 265 (1978).

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

¹⁴⁸ See Byrne, *supra* note 17, at 313.

¹⁴⁹ See, e.g., Yudof, *supra* note 30, at 854.

¹⁵⁰ *Bakke*, 438 U.S. at 269-70 (opinion of Powell, J.).

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

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

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

¹⁵¹ *Id.* at 311 (opinion of Powell, J.).

¹⁵² *Id.* at 312 (opinion of Powell, J.).

¹⁵³ *Id.* (opinion of Powell, J.).

¹⁵⁴ *Id.* (opinion of Powell, J.) (quoting *Keyishian*, 385 U.S. at 603).

¹⁵⁵ *Bakke*, 438 U.S. at 312 (opinion of Powell, J.).

¹⁵⁶ *Id.* at 313 (opinion of Powell, J.).

¹⁵⁷ Cf. Robert G. Dixon, Jr., *Bakke: A Constitutional Analysis*, 67 CAL. L. REV. 69, 75-76 (1979) (observing that Justice Powell's reliance on diversity in *Bakke* focused on "an interest of the institution . . . rather than an interest held by the represented minority group") (emphasis omitted).

¹⁵⁸ See Byrne, *supra* note 17, at 314 ("To the drafters of the AAUP's 1915 Statement, benefitting a scholar because of his race would have been as repulsive in principle as penalizing him."); Timothy L. Hall, *Educational Diversity: Viewpoints and Proxies*, 59 OHIO ST. L.J. 551, 578-79 (1998).

demic freedom in terms closer to those used in *Keyishian*: universities must be free to seek a diverse student body because the nation's future leaders ought to be exposed to a wide range of "ideas and mores."¹⁵⁹

Bakke is also noteworthy for its indication that academic freedom means universities "must have wide discretion in making the sensitive judgments as to who should be admitted."¹⁶⁰ As Timothy Hall observes, it was on this ground that the university staked its argument in *Bakke*.¹⁶¹ But whatever autonomy the universities may have won in *Bakke*, it is far from unbounded. Institutional autonomy is still subject to the constraint of "constitutional limitations protecting individual rights."¹⁶²

Moreover, by settling on and emphasizing diversity as a compelling state interest, Justice Powell specifies the grounds on which universities may engage in admissions decisions, rather than leaving those institutions free to make admissions decisions on any academic grounds they wish to select. If any opinion in *Bakke* truly represents the institutional autonomy strand of academic freedom, it is not Justice Powell's, but Justice Harry Blackmun's.¹⁶³ Rather than focus on the particulars of the admissions program at issue, Justice Blackmun simply places his faith in the hands of the universities, arguing that "[t]he administration and management of educational institutions are beyond the competence of judges and . . . within the special competence of educators," subject to constitutional limits.¹⁶⁴

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

¹⁵⁹ See *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

¹⁶⁰ *Id.* at 314 (opinion of Powell, J.).

¹⁶¹ Hall, *supra* note 158, at 581.

¹⁶² *Bakke*, 438 U.S. at 314 (opinion of Powell, J.).

¹⁶³ On this point, Professor Wendy Parker observes that Justice Harry Blackmun's opinion is the true predecessor of Justice Sandra Day O'Connor's opinion in *Grutter v. Bollinger*. See Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1700 n.51 (2004).

¹⁶⁴ *Bakke*, 438 U.S. at 404 (Blackmun, J., concurring in the judgment in part and dissenting in part).

But it is at least evident that the Justice Powell opinion in *Bakke* had moved a considerable distance from the truth-seeking justification offered in support of academic freedom by the AAUP and the Supreme Court's earlier decisions. Nevertheless, given the peculiar place of academic freedom in the case—its status as a “countervailing constitutional interest” rather than as a clearly defined ground for decision—*Bakke*'s import as a First Amendment case was far from clear.¹⁶⁵

3. *Grutter*: Revisiting Constitutional Academic Freedom

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

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

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

¹⁶⁵ *Id.* at 313 (opinion of Powell, J.).

¹⁶⁶ Yudof, *supra* note 30, at 855–56; see Byrne, *supra* note 17, at 315.

¹⁶⁷ See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226–28 (1985); *Bd. of Curators v. Horowitz*, 435 U.S. 78, 79–80 (1978). *Horowitz* actually was decided shortly before *Bakke*.

¹⁶⁸ *Ewing*, 474 U.S. at 225; *Horowitz*, 435 U.S. at 90–91, 96 n.6.

¹⁶⁹ See Yudof, *supra* note 30, at 856–57.

faculty to participate in policy making in academic institutions."¹⁷⁰ Thus, notwithstanding the Court's repeated call for deference to academic decisions based on "the faculty's professional judgment," faculty were not constitutionally entitled to participate in the formulation of academic policy.¹⁷¹ And in refusing to grant a university any privilege against the disclosure of confidential peer review materials in job discrimination suits, the Court emphasized that its "so-called academic-freedom cases" all involved instances of content-specific speech regulation and nothing more.¹⁷² As Yudof notes, "[t]he post-*Bakke* decisions [thus] appear[ed] to reinforce the view that institutional academic freedom in the public sector is a make-weight."¹⁷³

The Court's decision in *Grutter* makes clear that *Bakke* was something more than a ticket good for one day and time only. In holding that the Law School had "a compelling interest in attaining a diverse student body," based on principles of academic freedom grounded in the First Amendment, the Supreme Court gave a far more detailed explanation of the purpose and scope of educational institutional autonomy than the discussion offered by Justice Powell in *Bakke*.¹⁷⁴ Justice O'Connor's discussion of academic freedom in *Grutter* may be considered more carefully by looking in turn at a number of key elements.

a. Deference to Educational Institutions

The most significant hurdle facing the Law School in *Grutter* was the Court's increasingly demanding use of strict scrutiny in reviewing all governmental classifications by race, whether for benign or invidious purposes.¹⁷⁵ Although the Court purported to be applying strict scrutiny here, it is surely right to observe that its actual approach demonstrated "remarkable latitudinarianism."¹⁷⁶ The key to understanding that ap-

¹⁷⁰ 465 U.S. 271, 287 (1984).

¹⁷¹ See *id.* at 288.

¹⁷² *Univ. of Pa. v. EEOC*, 493 U.S. 182, 197 (1990).

¹⁷³ Yudof, *supra* note 30, at 857. But see Bruce C. Hafen, *Developing Student Expression Through Institutional Authority: Public Schools as Mediating Structures*, 48 OHIO ST. L.J. 663, 716 (1987) (arguing that the Court's reliance on institutional academic freedom in *Ewing* demonstrates that Justice Powell's discussion of educational institutional autonomy in *Bakke* was not merely a "theoretical stretch made necessary by the peculiar demands of affirmative action as a national policy").

¹⁷⁴ *Grutter*, 539 U.S. at 328.

¹⁷⁵ See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989).

¹⁷⁶ Peter H. Schuck, *Reflections on Grutter*, JURIST (Sept. 5, 2003), at <http://jurist.law.pitt.edu/forum/symposium-aa/schuck.php>.

proach lies in the Court's posture of deference toward academic institutions. The Court places its approach within its purported "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."¹⁷⁷ Thus, Justice O'Connor suggests, strict scrutiny of the Law School's admissions policies must "tak[e] into account complex educational judgments in an area that lies primarily within the expertise of the university," albeit within constitutional limits.¹⁷⁸

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

Moreover, notwithstanding the Court's rhetoric, it is unlikely that the deference the Court showed toward the Law School can be based simply on the fact that universities make "complex educational judgments."¹⁷⁹ Every institution makes complex judgments. As Peter Schuck notes, those institutions whose programs had failed strict scrutiny between *Bakke* and *Grutter*—local governments, government agencies, and others—are not situated so differently from academic institutions.¹⁸⁰ They all operate with some greater level of expertise and experience with respect to their own affairs than a court would be likely to possess. They presumably structure their policies with the particular circumstances of their institution in mind. And they are subject to a host of "political, ideological, competitive, social, legal, and institutional pressures," both internal and external.¹⁸¹ The Court's hands-off treatment of the Law School's program must have been based on its regard for the special social role of educational institutions, and not merely on its respect for the expert judgment of educators.

Finally, if one takes the Court's opinion seriously, it is clear that deference to the Law School's educational judgment performed real work in *Grutter*. In the face of the Court's stringent approach in recent cases to the requirement that racial distinctions be "narrowly tailored to achieve [the] compelling state interest,"¹⁸² it is hard to believe that

¹⁷⁷ *Grutter*, 539 U.S. at 328.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 328.

¹⁸⁰ Schuck, *supra* note 176.

¹⁸¹ *Id.*

¹⁸² *Grutter*, 539 U.S. at 378 (Rehnquist, C.J., dissenting).

the Court would have left the Law School so free a hand to shape its admissions policies had it not proceeded from a posture of deference to university decision making.¹⁸³ So, if one assumes the Court meant what it said and did not refer simply to the need to defer to educational institutions as a makeweight in support of its Fourteenth Amendment conclusions, deference made a significant difference in *Grutter*.

The Court's approach is all the more remarkable because it is not clear that the level of deference displayed in *Grutter* is justified by the case law. Although the Court cites its decisions in *Regents of the University of Michigan v. Ewing* and *Board of Curators v. Horowitz* in addition to *Bakke*, and both cases speak in strong terms about the importance of respecting the discretion of university faculties, neither opinion comes close to suggesting the kind of deference applied here.¹⁸⁴ Those cases merely held that even if students were entitled to due process protection when public universities made decisions affecting their enrollment, the procedures in place at those schools were sufficient to satisfy those rights. Neither case suggested that the Court would pay universities the level of deference that they were given by the *Grutter* majority.

Conversely, when universities argued on institutional autonomy grounds for a limited carve-out from the Equal Employment Opportunity Commission's disclosure requirements for peer review materials, the Court did not hesitate to shut down the argument, asserting the right to determine for itself what constitutes legitimate or illegitimate academic decision making.¹⁸⁵ It is a curious form of deference to deny a university the right to maintain the confidentiality of peer review materials while permitting it to exercise its own best judgment in crafting admissions policies that may skirt the boundaries of the Fourteenth Amendment.

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

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

¹⁸⁵ See *Univ. of Pa.*, 493 U.S. at 198-99.

b. *Academic Freedom and Institutional Autonomy*

Justice O'Connor's opinion in *Grutter* links the Court's deferential treatment of the Law School to the broader constitutional value of academic freedom. "[U]niversities," the Court makes clear, "occupy a special niche in our constitutional tradition."¹⁸⁶ Specifically, the Court affirms Justice Powell's statement in *Bakke* that universities enjoy a constitutional "dimension" of "educational autonomy," including the right to make their own decisions regarding whom to admit to study.¹⁸⁷ The Court did not note, as it has in the past, the shifting and uneasy nature of the question whether academic freedom inheres in the individual, the institution, or both.¹⁸⁸

What is not clear from *Grutter* is whether *any* exercise of institutional autonomy by a university, or at least one involving "academic decisions,"¹⁸⁹ operates within a sphere of government noninterference. The Court seconded Justice Powell's invocation of the university's right to "make its own judgments as to . . . the selection of its student body."¹⁹⁰ But that point is tied closely to the Court's discussion of the particular merits of diversity in education, which I discuss immediately below. Would a university's invocation of academic freedom insulate from attack some other set of admissions criteria not tied to diversity, if those criteria raised constitutional questions? *Grutter* does not answer that question. The implications of this unresolved issue are treated at length later in this Article.

c. *Academic Freedom and Student Diversity*

The core of *Grutter's* First Amendment discussion is its treatment of the Law School's proffered compelling interest: "obtaining the educational benefits that flow from a diverse student body."¹⁹¹ On this point, the Court provided an illuminating discussion with profound potential implications for constitutional academic freedom. Drawing

¹⁸⁶ *Grutter*, 539 U.S. at 329.

¹⁸⁷ *Id.*

¹⁸⁸ See *Ewing*, 474 U.S. at 226 n.12 ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decisionmaking by the university itself . . .") (citations omitted); see also *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985). For criticism of the Supreme Court's reliance in *Grutter* on institutional autonomy, see generally Hiers, *supra* note 20.

¹⁸⁹ *Grutter*, 539 U.S. at 328.

¹⁹⁰ *Id.* at 329 (internal quotation marks and citations omitted).

¹⁹¹ *Id.* at 317 (internal quotation marks and citation omitted).

on Justice Powell's citation of *Keyishian* in *Bakke*, the Court accepted that a diverse student body will contribute to the "robust exchange of ideas," and held that the Law School's search for a critical mass of minority students would serve that end.¹⁹²

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

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

Certainly that reading of the Court's treatment of the Law School's diversity argument is supported by the depth and breadth of its discussion of the benefits of racial and ethnic diversity in education. Far from quietly relying on the Law School's own determination on that issue, the Court provided extensive discussion of the educational benefits of student exposure to classmates of different backgrounds: it "promotes cross-racial understanding, helps to break down

¹⁹² *Id.* at 329.

¹⁹³ *Id.*

¹⁹⁴ *Grutter*, 539 U.S. at 328.

racial stereotypes, and enables [students] to better understand persons of different races."¹⁹⁵

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

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

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

¹⁹⁵ *Id.* at 330 (alteration in original) (quotations and citations omitted).

¹⁹⁶ *See id.* at 330–33.

¹⁹⁷ *Id.* at 331 (emphasis added).

¹⁹⁸ *See id.* at 331–33.

¹⁹⁹ *Grutter*, 539 U.S. at 332.

²⁰⁰ *Bakke*, 438 U.S. at 312 (opinion of Powell, J.) (quotation omitted).

shares that concern, but adds something more.²⁰¹ Here, the concern is not merely with the *quality* of education, with its capacity to prepare students for work and citizenship; the Court is concerned that education be *representative*, irrespective of the immediate educational benefits supplied by a diverse student body.²⁰²

To be sure, that reasoning follows as much (or more) from the Court's Fourteenth Amendment premises as its First Amendment premises. But the two cannot be easily disaggregated. *Grutter* presents a detailed vision of the social role of education, particularly elite higher education. Although that vision necessarily sounds in terms of equal protection, it is ultimately still a statement about the "proper institutional mission" of the university, and thus about the basis for constitutional academic freedom.²⁰³

I do not mean at this juncture to criticize that vision. Indeed, whether or not *Grutter* is a sound application of the specific principles of constitutional academic freedom, it arguably is consistent not only with our constitutional ideals, but also with a longstanding stream of thought about the broader democratic purposes of the university.²⁰⁴ But *Grutter's* vision of academic freedom is still indisputably one that would be unrecognizable to the framers of the Declaration and to the drafters of the early academic freedom cases.²⁰⁵

In sum, then, *Grutter* may represent a significant moment in the development of the law of academic freedom. Again, as with *Bakke*, whether it does or not will depend on whether the Court takes its own words seriously or treats the case as a sport for First Amendment purposes.²⁰⁶ But as a First Amendment case, *Grutter* raises a number of issues worthy of serious attention and reflection. First, it buttresses the view that educational institutions are entitled, on First Amendment grounds, to substantial autonomy in their decision making. Second, it reaffirms that "complex educational judgments" will be given substan-

²⁰¹ See *Grutter*, 539 U.S. at 330 (discussing diversity's contribution to lively classroom discussion).

²⁰² See *id.* at 330-32.

²⁰³ See Jack Greenberg, *Diversity, the University, and the World Outside*, 103 COLUM. L. REV. 1610, 1619 (2003) ("Justice O'Connor structures her argument so that preparation for the world beyond graduation has the constitutional protection of being a subset of academic freedom.").

²⁰⁴ See Lee C. Bollinger, *A Comment on Grutter and Gratz v. Bollinger*, 103 COLUM. L. REV. 1589, 1591-92 (2003).

²⁰⁵ See Hall, *supra* note 158, at 578-79 (making a similar point with respect to *Bakke*).

²⁰⁶ See Yudof, *supra* note 30, at 855-56 (discussing the fate of *Bakke* as an academic freedom case).

tial deference by the courts—indeed, enough deference to overcome strict scrutiny under the Equal Protection Clause.²⁰⁷ Third, although it is difficult to discern which elements of the Court's discussion of educational diversity speak to its First Amendment understanding and which speak to issues of equal protection, *Grutter* also may represent a further move away from a truth-seeking rationale for constitutional academic freedom, and toward one that focuses instead on the internal and external democratic goals served by higher education.

II. TAKING *GRUTTER* SERIOUSLY

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

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

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

²⁰⁷ *Grutter*, 539 U.S. at 328.

²⁰⁸ See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003).

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

²¹⁰ 539 U.S. at 328; see also Katyal, *supra* note 19, at 558 (warning that universities should resist the temptation "to use their autonomy wantonly to carry out policies that cross the constitutional line").

tion of higher education—its role in preparing students to serve as citizens and in serving as an entry point for a more representative set of elite professionals, citizens, and leaders.²¹¹ This approach to *Grutter* carries a different set of implications for particular First Amendment disputes. More importantly, however, this reading of *Grutter* suggests that significant fault lines exist between the Court's approach in this case and its approach in other areas of First Amendment doctrine.

A. Institutional Autonomy and Its Implications

Begin with the assumption that *Grutter* stands for the proposition that courts will defer to a substantial degree, though within loosely defined constitutional limits, to an institution of higher education's academic judgments about whether certain programs or measures will serve its educational interests.²¹² What measures might a university justify under this standard?

1. Hate Speech on Campus

An obvious candidate for reexamination under *Grutter's* strongly deferential approach to university officials is the question of the constitutionality of campus speech codes. The late 1980s and early 1990s saw a flurry of efforts by universities to regulate hostile speech targeted at individuals on campus by virtue of their race, sex, ethnicity, and so forth.²¹³ The University of Michigan, for example, adopted a policy on discrimination and discriminatory harassment that created grounds for disciplining anyone who engaged in "[a]ny behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status," provided the behavior met certain other conditions.²¹⁴ Among the specified circumstances in which this sort of speech would be grounds for discipline were cases in which the speech "has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University spon-

²¹¹ See *Grutter*, 539 U.S. at 331–32.

²¹² See *id.* at 328 ("The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer... within constitutionally prescribed limits.").

²¹³ The materials discussing this topic are voluminous. For a history of these developments, see generally TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* (1998).

²¹⁴ *Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856 (E.D. Mich. 1989).

sored extra-curricular activities or personal safety."²¹⁵ Although these measures sparked enormously heated debates, they were largely abandoned or allowed to fade into obscurity after several courts found such codes unconstitutional.²¹⁶

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

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

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

²¹⁵ *Id.*

²¹⁶ See ROBERT M. O'NEIL, *FREE SPEECH IN THE COLLEGE COMMUNITY* 20–21 (1997); *Doe*, 721 F. Supp. at 852; see also *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177, 1184–85 (6th Cir. 1995).

²¹⁷ See *Doe*, 721 F. Supp. at 852.

²¹⁸ *Id.* at 863.

²¹⁹ See AVERN COHN, *A Federal Trial Judge Looks at Academic Freedom*, in UNFETTERED EXPRESSION: FREEDOM IN AMERICAN INTELLECTUAL LIFE 117, 131 (Peggie J. Hollingsworth ed., 2000) ("[I]n my written decision I used the words *academic freedom* only twice and then obliquely. My concerns were directed to the First Amendment implication of the code in action.").

²²⁰ See generally *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

"served to advance no academic message" and therefore did not "[e]nter the [m]arketplace of [i]deas [o]r the [r]ealm of [a]cademic [f]reedom."²²¹ *Dambrot* thus admitted the relevance of academic freedom to its First Amendment inquiry, while narrowing the scope of academic freedom to embrace only classroom speech. Like other courts faced with academic freedom claims, the Sixth Circuit resolved the issue by using First Amendment doctrine that is generally applicable to other public employees.²²²

The speech code cases thus are marked by two distinguishing factors. First, they proceed on the view that standard First Amendment analysis—are the codes content-neutral or content-based, and is the university, or some parts of it, a public forum?—may be applied in the context of university speech as it would be applied elsewhere. Second, and relatedly, they pay lip service to academic freedom but are unwilling to let claims based on academic freedom shift the balance. If hate speech is susceptible to regulation on campus, the university must perforce address the same speech in the same way as any other public body, and it may restrict only speech that otherwise properly would be subject to regulation by any other public institution.²²³

In the heyday of the speech code debate, a number of academics entered the lists in favor of a more permissive approach to the regulation of discriminatory speech on campus.²²⁴ Those advocates argued in part that the law had failed to take adequate account of the harms wreaked by discriminatory speech on its targets—failed, in Professor Mari Matsuda's words, to consider the victim's story.²²⁵ But they argued as well that campus speech codes could be justified on pedagogical grounds. Thus, Professor Matsuda argued that students on campus, young and often far from home for the first time, are espe-

²²¹ 55 F.3d 1177, 1188, 1190 (6th Cir. 1995).

²²² See *id.* at 1185–86 (discussing application of *Connick v. Myers*, 461 U.S. 138 (1983), and similar cases); see also *Urofsky v. Gilmore*, 216 F.3d 401, 415 (4th Cir. 2000) (en banc) (adopting same approach); Rebecca Gose Lynch, *Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm*, 91 CAL. L. REV. 1061, 1074–98 (2003); Chang, *supra* note 140, at 926–28.

²²³ See Rodney Smolla, *Academic Freedom, Hate Speech, and the Idea of a University*, in *FREEDOM AND TENURE IN THE ACADEMY*, *supra* note 46, at 196, 224 n.125.

²²⁴ See generally MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993); Richard Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U. L. REV. 343 (1991).

²²⁵ See generally Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, in MATSUDA ET AL., *supra* note 224, at 17.

cially vulnerable to racist speech, and that universities therefore carry a special obligation not to tolerate such conduct.²²⁶

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

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

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

²²⁷ Mary Becker, *The Legitimacy of Judicial Review in Speech Cases*, in *THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY* 208, 211 (Laura J. Lederer & Richard Delgado eds., 1995).

²²⁸ KENT GREENAWALT, *FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH* 76 (1995). For a similar approach, see CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 197–204 (1993).

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

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

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

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

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

²³¹ See, e.g., Donald J. Weidner, *Academic Freedom and the Obligation to Earn It*, 32 J.L. & EDUC. 445, 465 (2003); Vince Herron, Note, *Increasing the Speech: Diversity, Campus Speech Codes, and the Pursuit of Truth*, 67 S. CAL. L. REV. 407, 434 (1994).

²³² Kwok, *supra* note 226, at 505; see Robert C. Post, *Free Speech and Religion, Racial and Sexual Harassment: Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 321 (1991).

²³³ See, e.g., Charles R. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452.

schools.²³⁴ This approach respects the fact that there is, finally, no *one* "educational mission." Different universities may properly emphasize different aspects of the academic mission.²³⁵ One school may emphasize pure research and truth-seeking, or believe that learning ought to occur in an unchecked environment of vigorous and even out-of-bounds debate. Another may focus on teaching over research, and come near adopting an *in loco parentis* relationship toward its students. Another may believe in the exchange of ideas among a diverse (and ethnically diverse in particular) range of individuals, but believe that this kind of exchange is most likely to flourish if it is subject to a carefully bounded set of civility norms.²³⁶ Surely all of these fall well within what a university may properly view as its educational mission. Indeed, a campus is a large and varied place, and a university or its component faculties may believe that different missions are at the forefront of different sectors of university life.

On all these matters, according to the deference reading of *Grutter*, the courts must remain agnostic. A university may set its own course, and having done so, the courts must respect its considered determination that some set of rules or policies is vital to the fulfillment of that mission. According to this view, courts err when they apply standard First Amendment analysis, without more, to the case of a campus speech code. Those distinctions that a university may choose to draw between different kinds of speech, or different types of offensive speech, are not mere content distinctions; they are also a product of the university's "complex educational judgments" and should be respected.²³⁷

²³⁴ *Grutter*, 539 U.S. at 328.

²³⁵ See GREENAWALT, *supra* note 228, at 74.

²³⁶ I therefore think that criticisms of the University of Michigan and other, similarly situated schools along the lines of those offered by Brian Fitzpatrick—that it is hypocritical to laud diversity in admissions while discouraging diversity in speech—are only superficially attractive. See Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J.L. & PUB. POL'Y 385, 392–93 (2003); cf. Robert F. Nagel, *Diversity and the Practice of Interest Assessment*, 53 DUKE L.J. 1515, 1521 (2004) (noting "the anomaly that the diversity movement . . . should have come into full flower during approximately the same period when many universities have undertaken strenuous efforts to sanitize discourse"). It seems entirely plausible that a school may think the two policies are not inconsistent, but complementary. That certainly does not render either policy wise as a matter of educational policy or constitutional law, but it does render the general criticism unpersuasive without additional support.

²³⁷ *Grutter*, 539 U.S. at 328; cf. W. Bradley Wendel, *A Moderate Defense of Hate Speech Regulations on University Campuses*, 41 HARV. J. ON LEGIS. 407, 408 (2004) (advancing a defense of campus hate speech regulation in particular circumstances where the university is operating within the sphere of its expertise and according to its mission).

Thus, the gift of *Grutter's* deference to educational mission is the same with respect to speech codes as it is with respect to admissions policies: the gift of discretion. A university may conclude quite reasonably that a campus speech code is unwarranted or that it conflicts with its educational mission. But if it believes that its vision of its educational mission would be better served by imposing restrictions on campus speech, it ought to have wide latitude to do so. In each case, the determination rests with the school. If a university enforces a speech code upon careful professional judgment about its own desired ends, "the state is powerless to interfere."²⁹⁸

The few courts that have examined campus speech codes have thus arguably fallen into error by assuming that academic freedom concerns do not alter the need to perform the traditional First Amendment analysis that would be performed in other speech contexts. Under *Grutter's* First Amendment, their task would be quite different. First, they must look for evidence that the university's restrictions on speech were justified by reference to its educational mission. Second, they must ask whether the restrictions were the product of a genuinely "academic" decision-making process. Finally, given a finding that the university met the first and second conditions, the courts should accord wide latitude to the nature and scope of the measures adopted by the university. In that inquiry, the courts must assume the university's good faith absent contrary evidence.²⁹⁹

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

²⁹⁸ J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 425 (1991). Professor Byrne limits his recommendation to cases in which the university "acts to safeguard liberal education, which is understood both as the disinterested pursuit of truth according to disciplinary criteria and the elaboration and instruction in culture." *Id.* That analysis assumes that prohibitions of racist speech on campus are justified only when they serve the particular functions of a university, which Professor Byrne is concerned to identify. Because this Section assumes that the *Grutter* Court privileged deference to academic institutions generally over any particular vision of the university, it need not accept that aspect of Professor Byrne's argument. It does, however, play a more significant role in the next Section of this Article. See *infra* notes 397–437 and accompanying text.

²⁹⁹ *Grutter*, 539 U.S. at 329.

Interestingly, in his concurrence in 2000 in *Board of Regents of the University of Wisconsin System v. Southworth*, Justice David Souter (joined by Justices John Paul Stevens and Stephen Breyer) recognized that a strong institutional autonomy approach to university policies affecting student speech might carry precisely this implication.²⁴⁰ As he recognized, an institutional autonomy approach like that suggested by Justice Frankfurter in *Sweezy v. New Hampshire* "might seem to clothe the University with an immunity to any challenge to regulations made or obligations imposed in the discharge of its educational mission."²⁴¹ For that very reason, Justice Souter was at pains to emphasize the limited nature of the Court's prior academic freedom jurisprudence and the fact that *Southworth* interposed student First Amendment rights as against the university's First Amendment right to institutional autonomy. "[I]t is enough to say," he concluded, "that protecting a university's discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees."²⁴²

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

Ultimately, I take no position on whether such codes are wise.²⁴³ The question here is simply whether they are *permissible*. Under *Grutter's* First Amendment, as long as the wisdom of campus speech restrictions is left in the university's hands, the court need not conduct the same searching inquiry into constitutionality. Thus, *Grutter's* First Amendment may well support the imposition of speech codes on campus.

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

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

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

²⁴³ See GREENAWALT, *supra* note 228, at 72–73 (noting that the constitutionality and the wisdom of university speech regulations are two different questions).

2. Content Distinctions on Campus, with Special Attention to Religious Speech

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

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

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

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

²⁴⁴ See, e.g., *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 837–46 (1995); *Widmar v. Vincent*, 454 U.S. 263, 264–65 (1982).

²⁴⁵ See generally, e.g., Steven G. Gey, *When Is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379.

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

²⁴⁷ See *id.* at 275.

²⁴⁸ See *id.* at 267–70.

consideration of whether the university truly had engaged in content discrimination, or whether the case actually involved some form of viewpoint discrimination,²⁴⁹ would receive more careful consideration in *Rosenberger v. Rector & Visitors of the University of Virginia*.²⁵⁰

The *Widmar* Court did acknowledge that a university is not, in all respects, the same as a traditional public forum, and the Court suggested that its decision did not question a university's "authority to impose reasonable regulations compatible with [its educational] mission upon the use of campus and facilities."²⁵¹ At the same time, it asserted that persons entitled to be on campus, including students, enjoy the usual array of First Amendment rights.²⁵²

In rejecting any special right of the university to exclude the religious speech at issue, moreover, Justice Powell turned in part to the Court's own prior academic freedom jurisprudence. Because the university "is peculiarly the marketplace of ideas," he suggested, it was under a particular obligation not to discriminate among the speakers in that "marketplace."²⁵³ Of course, that phrase had found its way into the academic freedom jurisprudence in *Keyishian*. In *Bakke*, Justice Powell had quoted that case (carefully omitting the sentence containing that phrase) for the proposition that a university may select for diversity when choosing its students.²⁵⁴ The marketplace of ideas metaphor thus supported the university's discretion in *Bakke*. Here, the same phrase served to narrow that discretion. Thus, despite its mention of academic freedom and its suggestion that universities might enjoy some breathing room in the grant of access to university facilities, *Widmar* again proceeded on a standard First Amendment analysis basis that rendered any constitutional principle of academic freedom irrelevant.

²⁴⁹ See *id.* at 284 n.2 (White, J., dissenting).

²⁵⁰ See 515 U.S. at 819.

²⁵¹ *Widmar*, 454 U.S. at 268 n.5. The *Widmar* Court provided the following explanation:

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

Id. at 276 (citations omitted) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)).

²⁵² See *id.* at 268-69.

²⁵³ *Id.* at 267 n.5 (quotation and citation omitted).

²⁵⁴ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.).

The Court took a similar approach in *Rosenberger*. There, again, the case turned on the workings of public forum doctrine and the requirements of content and viewpoint neutrality, not on the University of Virginia's unique status as a university. Thus, in asserting that "[t]he first danger to liberty lies in granting the state the power to examine publications to determine whether or not they are based on some ultimate idea and if so for the State to classify them," the Court seemed to assume that any constitutional test that would generally apply to state action applied in precisely the same way to a public educational institution.²⁵⁵

Indeed, to the extent that the university's status as an educational institution weighed in the balance, it was weighed *against* its discretion to regulate viewpoints on campus. As in *Widmar*, the Court treated the university's status as a locus of "thought and experiment that is at the center of our intellectual and philosophic tradition"²⁵⁶ as a *constraint* on its discretion, rather than a basis for according it autonomous status under the law. As for *Widmar's* statement that a university might be entitled to greater leeway in "mak[ing] academic judgments as to how best to allocate scarce resources,"²⁵⁷ the Court effectively cut back sharply on this apparent grant of discretion, labeling it no more than a lame recognition that a university may "determine[] the content of the education it provides."²⁵⁸

Three relevant conclusions may be drawn from these cases. First, where conflicts arise between student speech on campus and the university's own efforts to direct or to limit that speech, the Court is inclined to turn to standard First Amendment tests in resolving those conflicts.²⁵⁹ Second, as a corollary to the first conclusion, claims of constitutional academic freedom will buy universities little additional discretion. Third, to the extent academic freedom is involved in these cases, the majority of the Court has treated it as an additional obligation to follow rules of content- and viewpoint-neutrality, rather than as a grant of discretion to universities to shape and channel the content of on-campus speech more freely.

²⁵⁵ See *Rosenberger*, 515 U.S. at 835; see also *Southworth*, 529 U.S. at 229.

²⁵⁶ *Rosenberger*, 515 U.S. at 835.

²⁵⁷ *Widmar*, 454 U.S. at 276.

²⁵⁸ *Rosenberger*, 515 U.S. at 833.

²⁵⁹ See *Southworth*, 529 U.S. at 233 (indicating that the proper protection of students' First Amendment interests requires the application of a viewpoint neutrality rule where a university allocates funding support to student groups).

Grutter's First Amendment might approach these cases quite differently. Perhaps because they believe these conflicts are best dealt with under the rubric of the Establishment Clause, or perhaps because of their reasonable belief that the courts ultimately will treat these cases according to established First Amendment jurisprudence, universities have not argued that they are entitled to regulate religious speech on campus in service of their educational mission. No doubt many universities quite properly believe that because their educational mission includes the provision of access to a wide variety of forms of student speech in order to encourage a vibrant pluralism of religious and other views on campus, such an argument would actually contradict their own idea of a university.²⁶⁰ Accordingly, they may believe that if there is any basis for treating religious speech differently, it must come from the Establishment Clause.

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

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

²⁶⁰ Cf. *id.* at 233 ("The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall.").

decisions taking place in a public forum is highly exacting, and begins from the assumption that all speech that is not distinguishable on time, place, and manner grounds is equally valuable and equally entitled to share in the use of the commons. By contrast, a court starting from the position of *Grutter's* deference to an educational institution assumes that the most important factor is the university's own evaluation of the value of particular forms of speech within the college gates.

Under this approach, provided that a university can make a colorable claim that its policy is the result of a considered academic judgment, the court must treat that judgment with something less than the exacting scrutiny usually demanded under the First Amendment. Something of the flavor of this approach is evident in Justice Stevens's concurrence in *Widmar*. There, he suggested that "the use of the terms 'compelling state interest' and 'public forum' to analyze the question presented in this case may needlessly undermine the academic freedom of public universities."²⁶¹ He thus would have held that a university may limit access to speech within the college gates to a greater extent than could the administrator of other public forums, provided it can supply a valid reason for the limitation.²⁶²

Because the only reason put forward by the University of Missouri in that case was its "fear of violating the Establishment Clause," Justice Stevens concurred in the Court's judgment.²⁶³ But his approach, which refuses to "encumber[]" universities "with ambiguous phrases like 'compelling state interest,'" would plainly give greater scope to universities to move beyond an Establishment Clause rationale and advance other, more academically based reasons for imposing restrictions on certain forms of religious speech, and it would subject those reasons to a far more forgiving level of scrutiny.²⁶⁴

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

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

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

²⁶³ *Id.* (Stevens, J., concurring).

²⁶⁴ *Id.* at 279 (Stevens, J., concurring).

same kinds of scrutiny that may apply to other administrators of what may be characterized as public forums. If a university *could* advance a plausible academic argument in favor of any restrictions on particular forms of religious speech, *Grutter's* First Amendment would place a good deal of weight on that argument.

3. The Solomon Amendment

Under the bylaws of the American Association of Law Schools (the "AALS"), every member school is bound to a policy of equal opportunity in employment, including equal treatment without regard to sexual orientation.²⁶⁵ Schools are expected to limit the use of their facilities in recruitment or placement assistance to those employers who are willing to abide by these principles of equal opportunity.²⁶⁶ One potential employer is the U.S. military, which discriminates against gays and lesbians.²⁶⁷ Because of its policies, the military has been the subject of various protests, limitations, and outright restrictions on its ability to recruit law students on campus.²⁶⁸

Congress responded to this state of affairs in 1994 by passing the so-called Solomon Amendment.²⁶⁹ Under the Solomon Amendment, a university or its "subelement," such as a law school, may not prohibit or prevent the government from recruiting students on campus, or

²⁶⁵ ASS'N OF AM. LAW SCHOOLS, INC., BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. § 6.4(b) (amended 2004) [hereinafter AALS, BYLAWS], <http://www.aals.org/bylaws.html> (last visited Apr. 15, 2005). Separate principles apply to religiously affiliated law schools. See ASS'N OF AM. LAW SCHOOLS, INC., INTERPRETIVE PRINCIPLES TO GUIDE RELIGIOUSLY-AFFILIATED MEMBER SCHOOLS AS THEY IMPLEMENT BYLAW 6-4(A) AND EXECUTIVE COMMITTEE REGULATION 6.17 (1993) [hereinafter AALS, INTERPRETIVE PRINCIPLES], <http://www.aals.org/interp.html> (last visited Apr. 15, 2005).

²⁶⁶ See AALS, BYLAWS, *supra* note 265, § 6.19.

²⁶⁷ See 10 U.S.C. § 654 (2000) (mandating the discharge of members of the armed forces who engage in a "homosexual act").

²⁶⁸ See, e.g., *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 278–81 (D.N.J. 2003) (*FAIR I*), *rev'd*, 390 F.3d 219 (3d Cir. 2004) (*FAIR II*), *cert. granted*, No. 04-1152, 2005 WL 483339 (May 2, 2005).

²⁶⁹ For commentary regarding the Solomon Amendment, see, for example, W. Kent Davis, *Swords into Ploughshares: The Dangerous Politicization of the Military in the Post-Cold War Era*, 33 VAL. U. L. REV. 61, 105–07 (1998). See generally Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205 (2004); Sylvia Law, *Civil Rights Under Attack by the Military*, 7 WASH. U. J.L. & POL'Y 117 (2001); Francisco Valdes, *Solomon's Shames: Law as Might and Inequality*, 23 T. MARSHALL L. REV. 351 (1998); Amy Kapczynski, Note, *Queer Brinkmanship: Citizenship and the Solomon Wars*, 112 YALE L.J. 673 (2002); Lindsay Gayle Stevenson, Note, *Military Discrimination on the Basis of Sexual Orientation: "Don't Ask, Don't Tell" and the Solomon Amendment*, 37 LOY. L.A. L. REV. 1331 (2004); Peter H. Schuck, *Equal Opportunity Recruiting*, AM. LAW., Jan. 2004, at 57.

restrict the government's access to student information for recruiting purposes.²⁷⁰ Failure to comply with this provision carries with it significant funding consequences for both the law school and the university. A law school's non-compliance may result in the government withdrawing all Defense Department funding from the university as a whole, and a significant portion of non-defense government funding from the law school itself.²⁷¹

Since the passage of the Solomon Amendment, law schools have attempted by a variety of means to reconcile their nondiscrimination policies with its terms.²⁷² In recent years, however, the government has become increasingly strict in its interpretation of the Solomon Amendment and increasingly active in enforcing it. As a result, many law schools effectively suspended their nondiscrimination policies with respect to military recruitment.²⁷³

Recently, a number of different groups of plaintiffs brought various lawsuits challenging the government's enforcement of the Solomon Amendment.²⁷⁴ The complaints brought by these plaintiffs, who include a variety of law schools, law professors, law students, and student and professional groups, raise a number of statutory and constitutional claims, including First Amendment, due process, and equal pro-

²⁷⁰ See 10 U.S.C. § 983(b) (West Supp. 2005).

²⁷¹ See *FAIR I*, 291 F. Supp. 2d at 277–78 (discussing the current state of the Solomon Amendment and its implementing regulations). An amendment to the Solomon Amendment reinforces this legal regime by stating clearly that military recruiters must be granted the same access to students that other employers receive and by adding to the list of agencies that may withhold funding for noncompliant schools. See Pub. L. 108-375, § 552(b)(1), 118 Stat. 1811, 1911–12 (2004) (codified at 10 U.S.C. § 983(b)(1)).

²⁷² See *Law*, *supra* note 269, at 123–29. Chai Rachel Feldblum and Michael Boucai of Georgetown University Law Center have published a handbook for law schools seeking to “ameliorate” the perceived conflict between law schools’ nondiscrimination policies and their obligations under the Solomon Amendment. See CHAI RACHEL FELDBLUM & MICHAEL BOUCAI, *DUE JUSTICE, AMELIORATION FOR LAW SCHOOL COMPLIANCE WITH THE SOLOMON AMENDMENT, A HANDBOOK FOR LAW SCHOOLS 7–8* (2003), available at <http://www.law.georgetown.edu/solomon/documents/handbook.pdf>.

²⁷³ See *FAIR I*, 291 F. Supp. 2d at 282–83.

²⁷⁴ See generally *Complaint, Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (No. Civ.A.3-03-CV-1777 (JCH)), available at <http://www.law.georgetown.edu/solomon/Documents/burtvrumfeldcomplaint.doc> (last visited Apr. 15, 2005); *Complaint, Burbank v. Rumsfeld*, No. Civ.A.03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004), available at <http://www.law.georgetown.edu/solomon/Documents/UofPennFacultyComplaint.doc> (last visited Apr. 15, 2005); *Complaint, Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (No. Civ.A.3-03-CV1867 (JCH)), available at <http://www.yale.edu/outlaws/Complaint.pdf>; *Complaint, Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (*FAIR I*), (No. Civ.A.03-4433 (JCL)), available at http://www.law.georgetown.edu/solomon/documents/Sola_Compl.pdf.

tection objections to the enforcement of the Solomon Amendment. Many of these arguments sound in standard First Amendment terms—the Solomon Amendment constitutes a form of viewpoint or content discrimination, is void for vagueness, violates the plaintiffs' First Amendment association rights, and so forth.²⁷⁵ Not surprisingly, all of the plaintiffs have also argued that the Solomon Amendment violates their academic freedom.²⁷⁶ For the most part, these arguments are barely fleshed out in the complaints and appear to be mere supplements to the other arguments.²⁷⁷

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

²⁷⁵ See, e.g., Complaint ¶¶ 36–47, *Burt* (No. Civ.A.3-03-CV-1777 (JCH)); Complaint ¶ 39, *Burbank* (No. Civ.A.03-5497); Complaint ¶¶ 45–47, 51–53, *FAIR I* (No. Civ.A.03-4433 (JCL)).

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

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

²⁷⁸ FORUM FOR ACADEMIC & INSTITUTIONAL RIGHTS, QUESTIONS & ANSWERS ABOUT THE SOLOMON AMENDMENT LITIGATION 5, 11, available at <http://www.law.georgetown.edu/solomon/documents/FAIRQandA.doc> (last visited Apr. 15, 2005); see *id.* at 8 ("Our claim is that law schools are entitled to define their institutional values, at least insofar as those self-definitions do not violate rights specifically protected by the constitution.").

²⁷⁹ Complaint ¶¶ 23–25, *FAIR I* (No. Civ.A.03-4433 (JCL)).

Solomon Amendment lawsuits, FAIR and its fellow plaintiffs have said that academic freedom comprises "the principal basis of the[ir] legal challenge."²⁸⁰

The district court ultimately rejected that position, at least at the preliminary injunction stage. In *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld* (FAIR), Judge John Lifland of the District of New Jersey denied plaintiffs' motion for a preliminary injunction enjoining enforcement of the Solomon Amendment, holding that plaintiffs had standing to bring their claims (a point discussed below), but had failed to show a likelihood of success on their constitutional claims. Judge Lifland acknowledged that *Grutter* required courts to defer to academic decisions made by universities, but suggested that the fact that "such institutions occupy 'a special niche in our constitutional tradition' implies that they remain part of, and not sovereign to, that constitutional tradition."²⁸¹ Here, the court made clear, any academic freedom interests asserted by the plaintiffs failed in the balance against the asserted interests of the government itself.

More interesting was another aspect of the court's decision: its conclusion that "[t]he concept of academic freedom seems to be inseparable from the related speech and associational rights that attach to any expressive association or entity."²⁸² In other words, "the right to academic freedom is not cognizable without a foundational free speech or associational right."²⁸³ The court effectively concluded that because academic freedom is merely a "First Amendment interest,"²⁸⁴ and because the Solomon Amendment did not interfere directly with any speech act on the part of individual speakers, such as professors, any academic freedom claim in the case would have to arise from and be

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

²⁸¹ FAIR I, 291 F. Supp. 2d at 302 (quoting *Grutter*, 539 U.S. at 329).

²⁸² *Id.*

²⁸³ *Id.* at 303.

²⁸⁴ *Id.* at 302.

parasitic on some independent First Amendment violation.²⁸⁵ Because the court found no such violations here, any academic freedom claim necessarily would fail.²⁸⁶

Recently, a divided panel of the U.S. Court of Appeals for the Third Circuit reversed the district court's decision. The panel held that the Solomon Amendment violated the plaintiffs' First Amendment rights in two ways, both of which therefore violated the doctrine of unconstitutional conditions.²⁸⁷

First, drawing on a fairly aggressive reading of the Supreme Court's decision in *Boy Scouts of America v. Dale*,²⁸⁸ the court held that the plaintiff law schools are expressive associations, with "clear educational philosophies, missions and goals."²⁸⁹ One such mission is the establishment and advocacy of policies of nondiscrimination, which are to be inculcated in students "by expression and example."²⁹⁰ Because the imposition of the Solomon Amendment undermined this mission, and because the government had failed to show it was sufficiently narrowly tailored to achieve its own compelling interest in recruiting military lawyers, the Solomon Amendment violated the First Amendment.²⁹¹ Second, the court held that the Solomon Amendment was a form of compelled speech. By requiring law schools to assist military recruiters in their recruitment efforts, the Solomon Amendment required law schools to "propagate, accommodate, and subsidize" the military's recruitment program, and thus to advance a message of discrimination that ran counter to the schools' own policies and beliefs.²⁹² Because, again, the military had failed to show that it could not recruit effectively by other, less restrictive means, the provision could not survive strict scrutiny.²⁹³

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

²⁸⁵ See *id.* at 302-03 ("If the Solomon Amendment violates Plaintiffs' right to academic freedom, it is because it also intrudes on their rights to free speech and expressive association.").

²⁸⁶ See *FAIR I*, 291 F. Supp. 2d at 314.

²⁸⁷ See *FAIR II*, 390 F.3d at 229-46.

²⁸⁸ See generally 530 U.S. 640 (2000).

²⁸⁹ *FAIR II*, 390 F.3d at 231 (quoting *Circle Sch. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004)).

²⁹⁰ *Id.* at 232.

²⁹¹ See *id.* at 233-35.

²⁹² *Id.* at 242; see *id.* at 237-38.

²⁹³ See *id.* at 242.

substantial reasons to criticize the underlying policy of discrimination in the armed forces for which the Solomon Amendment serves as a supporting instrument. It is therefore not surprising that many legal scholars have welcomed the Third Circuit ruling as a strong victory in the law schools' institutional struggle against discrimination. The federal government sought Supreme Court review of the Third Circuit's opinion and, given the importance of the issues at stake, the High Court will hear the case next Term.²⁹⁴ Moreover, at least one district court has followed the Third Circuit in enjoining the application of the Solomon Amendment, in this case with respect to recruitment activities at Yale Law School.²⁹⁵ Thus, a brief examination of the *FAIR* litigation may be useful and timely. For present purposes, however, my discussion of the litigation is somewhat limited in scope. I do not want to deal substantially with the arguments that ultimately formed the basis of the Third Circuit's opinion, although I comment on one aspect of that reasoning.²⁹⁶ Rather, I want to suggest that the Solomon Amendment litigation raises several interesting points about the institutional autonomy reading of *Grutter* that I have developed here.

First, although the point is somewhat submerged in the Third Circuit's reasoning, it is strongly arguable that the course of the *FAIR* litigation was influenced significantly by *Grutter*'s principle of substantial deference to decision making by higher educational institutions. Compare the different treatment accorded to the law schools' arguments by the district court and the Third Circuit. Although the district court accurately quoted *Grutter* as speaking in terms of "a degree of deference," in reality it gave short shrift to the real degree of deference accorded there.²⁹⁷ By contrast, although the Third Circuit barely referred to *Grutter*, it did acknowledge that law schools "are entitled to at least as much deference" in setting out the nature and purpose of their existence as expressive associations "as the Boy Scouts," given *Grutter*'s recognition that "universities and law schools

²⁹⁴ See generally Petition for Writ of Certiorari, Forum for Academic & Institutional Rights, Inc. v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (*FAIR II*), 2005 WL 482352, cert. granted, No. 04-1152, 2005 WL 483339 (May 2, 2005).

²⁹⁵ *Burt*, 354 F. Supp. 2d 156, 187 (D. Conn. 2005).

²⁹⁶ Professor Michael C. Dorf provides a critical early discussion of the opinion. See Michael C. Dorf, *A Federal Appeals Court Rules That Universities Can Bar Military Recruiters Without Losing Federal Grant Money: A Welcome Result Based on Flawed Reasoning*, FINDLAW'S LEGAL COMMENT. (Dec. 8, 2004), at <http://writ.findlaw.com/dorf/20041208.html>; see also Richard W. Garnett, *Law Schools & the Military: Don't Ask, Don't Tell, Don't Recruit*, COMMONWEAL, Jan. 14, 2005, at 8.

²⁹⁷ See *FAIR I*, 291 F. Supp. 2d at 302 (quoting *Grutter*, 539 U.S. at 328).

'occupy a special niche in our constitutional tradition.'²⁹⁸ Although it was speaking in terms of what it labeled "*Dale* deference"—that is, the Supreme Court's instruction in *Dale* that the courts must defer substantially to an association's own view of what would impair its ability to operate—its decision to defer to the plaintiffs' own statements about their expressive purposes drew both on *Dale* and on "[t]he Supreme Court's academic freedom jurisprudence."²⁹⁹

Moreover, this was deference with teeth. As Judge Ruggero Aldisert noted in his dissenting opinion in the Third Circuit, courts usually defer substantially to the government in constitutional claims involving the military.³⁰⁰ "Judicial deference . . . is at its apogee when reviewing congressional decision making . . . in the realm of military affairs."³⁰¹ Yet the majority of the panel made short shrift of the government's arguments in the strict scrutiny section of its analysis. It held that the government "has ample resources to recruit through alternative means," such as placing recruitment ads on television, without any apparent deference to the presumed judgment of Congress and the military that no other means of recruitment were as effective.³⁰² Thus, this was not simply *Dale* deference; the court did not simply defer to the law schools' assessment of their goals as an expres-

²⁹⁸ *FAIR II*, 390 F.3d at 233 n.13 (quoting *Grutter*, 539 U.S. at 329).

²⁹⁹ *Dale*, 530 U.S. at 653; *FAIR II*, 390 F.3d at 233-34 & n.13. Notably, the *Burt* court stated the following in a footnote:

While not a factor in its decision, the court notes that the deference the *Dale* Court accorded expressive associations would appear to be particularly appropriate in the university setting, in light of the Supreme Court's 'tradition of giving a degree of deference. . . ' to universities because they 'occupy a special niche in our constitutional tradition.'

354 F. Supp. 2d at 186 n.29 (alteration in original) (quoting *Grutter*, 539 U.S. at 328-29) (citations omitted).

³⁰⁰ *FAIR II*, 390 F.3d at 254 (Aldisert, J., dissenting); see also *Goldman v. Weinberger*, 475 U.S. 503, 509-10 (1986) (rejecting Free Exercise claim brought by plaintiff whose religious headgear fell outside military dress regulations, at a time when incidental burdens on religious exercise still were subject to strict scrutiny); *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) (noting the great deference given to Congress in military matters).

³⁰¹ *Weiss v. United States*, 510 U.S. 163, 177 (1994) (quotations and citations omitted), quoted in *FAIR II*, 390 F.3d at 254.

³⁰² Compare *FAIR II*, 390 F.3d at 235, with *Goldman*, 475 U.S. at 509 (rejecting the argument that military dress regulation had not been supported by record evidence because "the desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment"), and *United States v. Albertini*, 472 U.S. 675, 689 (1985) (indicating that the validity of military regulations "does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant government interests").

sive association, while applying the usual level of scrutiny in cases involving clashes with military policy when it came time to balance the law schools' goals against the competing government interest. Instead, its deference to the law schools spilled over into the interest-balancing portion of its constitutional analysis, weighing heavily in the law schools' favor despite a substantial tradition of deference to military policy. As I have argued, that spillover effect is also highly evident in the *Grutter* Court's constitutional analysis, and helps explain its departure from conventional strict scrutiny.

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

Still, if we are to take *Grutter's* educational autonomy reading seriously, this may be the right outcome. Given the Supreme Court's treatment of the Law School's program in that case, *Grutter* can only be read fairly as requiring the courts to accord *substantial* deference to university decisions. As Peter Schuck has quite properly noted, the Court's "latitudinarian" treatment of the Law School's admissions policy is truly striking, particularly when contrasted with the Court's normal brand of Fourteenth Amendment strict scrutiny.³⁰³ That treatment is best read as suggesting that university decisions are insulated substantially under the First Amendment from the normal processes of judicial review.

Nor is it a sufficient rejoinder to suggest, as the district court did, that universities "remain part of, and not sovereign to," the Constitution and its limitations.³⁰⁴ If *Grutter's* gentle treatment of the Law School's program means anything, it surely means that "constitutionally prescribed limits" are themselves fluid and context-dependent.³⁰⁵ They are, in Professor Robert C. Post's terms, the product of a continuous negotiation between internal constitutional law and external cultural norms.³⁰⁶ Thus, as I have argued, *Grutter* suggests that within the bounds of institutional autonomy provided by the First Amend-

³⁰³ See Schuck, *supra* note 176.

³⁰⁴ *FAIR I*, 291 F. Supp. 2d at 302.

³⁰⁵ *Grutter*, 539 U.S. at 328.

³⁰⁶ See Robert C. Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8-9 (2003).

ment, universities enjoy substantial freedom to experiment with policies that serve their educational missions. Within those boundaries, they are free at least to flirt with, and even to bend, traditional constitutional limits.³⁰⁷ Indeed, the product of those experiments itself will go a long way toward defining the boundaries of appropriate constitutional conduct.

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

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

³⁰⁷ For expansion on this point, see *infra* notes 472–575 and accompanying text.

³⁰⁸ *FAIR I*, 291 F. Supp. 2d at 302.

³⁰⁹ *Grutter*, 539 U.S. at 328.

³¹⁰ Yudof, *supra* note 30, at 856.

ing that carries conditions that affect academic freedom.³¹¹ It is also unclear whether the Supreme Court should treat on-campus recruiting rules as a matter of "academic" policy. If they are not, those rules would not be entitled to constitutional deference under *Grutter*.³¹²

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

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

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

[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.

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

³¹² See *Grutter*, 539 U.S. at 328 (noting the Court's tradition of "deference to a university's academic decisions") (emphasis added). As a legal matter, I would find unpersuasive such an effort to place decisions about recruiting outside the province of academic policy. I think the *FAIR* plaintiffs, and the Third Circuit, overstate the connection between a law school's general academic mission and the fairly discrete activity of on-campus recruiting. Indeed, having taught through two recruitment seasons at two different law schools, I can barely recall having run across, let alone talked to, any on-campus recruiters. But, under the reading of *Grutter* that I have offered here, surely a law school's assertion that recruiting is a part of its academic mission ought to be entitled to substantial deference.

after all, concluded that academic freedom claims must be grounded on "foundational free speech or associational right[s]" to be sustainable.³¹³ Perhaps the Third Circuit, too, concluded that academic freedom claims of the kind pressed by the plaintiffs in *FAIR* are parasitic—that one cannot bring a free-standing claim of academic freedom under the First Amendment, although academic freedom itself may lend weight to arguments based on other First Amendment claims.

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

Thus, *Grutter's* command of deference to educational institutions is more than a mere atmospheric addition to the quiver of arguments in the *FAIR* litigation. It has some substantive weight of its own, although how much weight it has is still an open question. As the *FAIR* litigation advances to the Supreme Court, amici such as the AALS, if not the plaintiffs themselves, ought to make some effort to develop further the question of whether academic freedom can itself serve as a free-standing First Amendment claim.³¹⁴

I have as yet barely touched on a third issue raised in the *FAIR* litigation and in the other pending assaults on the Solomon Amendment. The district court in *FAIR* suggested that *all* of the plaintiffs in this case—*FAIR*, "an association of law schools and law faculties";³¹⁵ the Society of American Law Teachers; two law professors; three law students;

³¹³ *FAIR I*, 291 F. Supp. 2d at 303.

³¹⁴ Cf. Byrne, *supra* note 20, at 141 (arguing that academic institutions must do a better job of filing amicus briefs that address the issue of institutional academic freedom).

³¹⁵ *FAIR I*, 291 F. Supp. 2d at 275.

and two law student groups—had standing to pursue their claims against the government.³¹⁶ The court based its conclusion on the view that the individual plaintiffs and associations enjoyed First Amendment rights as “beneficiaries, senders, and recipients of the message of non-discrimination sent by their schools’ non-discrimination policies.”³¹⁷ The Third Circuit easily upheld the standing of FAIR itself, without addressing the standing of the other plaintiffs.³¹⁸

That conclusion suggests, consistent with the Court’s pre-*Grutter* academic freedom jurisprudence, that members of the university community enjoy a substantial degree of First Amendment freedom on campus, notwithstanding the institutional setting.³¹⁹ *Grutter* itself, however, sounds in institutional terms. The freedom described there is not an individual right of professors to enjoy the communicative benefits of a diverse student body, but the discretion of an educational institution to set educational policies and to make academic decisions—to fulfill a “proper institutional mission.”³²⁰

Thus, one fair reading of *Grutter* suggests that academic freedom is a fundamental institutional right, not one enjoyed by a university’s faculty or students. At the very least, it suggests that educational autonomy itself is an institutional right, not an individual right, and therefore may be invoked only by the institution itself.³²¹ That conclusion is fortified in a case like the Solomon Amendment litigation. For whatever the position of the law schools themselves with respect to the Solomon Amendment, it is far from clear that the individuals and

³¹⁶ See *id.* at 285–96.

³¹⁷ *Id.* at 294.

³¹⁸ See *FAIR II*, 390 F.3d at 228 n.7.

³¹⁹ See, e.g., *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969) (stating that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate”).

³²⁰ *Grutter*, 539 U.S. at 329 (emphasis added).

³²¹ *Id.*; cf. *Urofsky*, 216 F.3d at 412 (“Appellees ask us to recognize a First Amendment right of academic freedom that belongs to the professor as an individual. The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.”). The conclusion in *Urofsky* might be more apt in cases like *Grutter* and the Solomon Amendment litigation, which involve educational policies set by the institution as a whole, than in *Urofsky* itself, which involved state-imposed limitations on information-gathering activities by professors themselves. *Urofsky*, 216 F.3d at 404. For commentary on the standing issues raised by *Urofsky*, see Kate Williams, Note, *Loss of Academic Freedom on the Internet: The Fourth Circuit’s Decision in Urofsky v. Gilmore*, 21 REV. LITIG. 493, 507 (2002). See generally Alvin J. Schilling & R. Craig Wood, *The Internet and Academic Freedom: The Implications of Urofsky v. Gilmore Standing as a Constitutional Concern: A Required Threshold Issue*, 179 WEST’S EDUC. L. REP. 9 (2003).

groups within those institutions agree on the propriety or impropriety of on-campus military recruitment. If we permit individual students or faculty to assert institutional autonomy claims in place of the institution itself, we might face a situation in which some students and professors attempt to alter the educational policy of their institutions without apparent regard to the official policies of the institution itself, let alone the views of any professors or students who want the military to recruit on campus.³²²

Because the plaintiffs in *FAIR* apparently included at least one law school, and the faculty of another, the academic freedom claims in *FAIR* could still proceed even if they could only be invoked by educational institutions.³²³ But this reading of *Grutter* does raise questions about the status of many of the other plaintiffs in the Solomon Amendment litigation—both the *FAIR* litigation itself and the other cases still pending before other district courts. Those plaintiffs include a variety of parties other than the law schools themselves, let alone the parent universities of which the law schools are only sub-units. The membership of *FAIR* itself includes not only law schools acting collectively as corporate bodies, but also law school faculty members, acting as a body but not necessarily with the imprimatur of the institution to which they belong.³²⁴ And, of course, there are still other plaintiffs in the other Solomon Amendment cases: the Society

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

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

³²⁴ See, e.g., FORUM FOR ACADEMIC & INSTITUTIONAL RIGHTS, MEMBERSHIP FORM, available at http://www.law.georgetown.edu/solomon/Documents/membership_form12-04.pdf.

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

These plaintiffs may have standing to raise a variety of First Amendment claims in litigating against the Solomon Amendment. But it is arguable that they simply lack standing to pursue any *institutionally* based claims of academic freedom, or to demand the kind of deference that *Grutter* commands when such claims are made.³²⁵ Although this point was not at issue in *FAIR* itself, given both the proper standing of the law school members of *FAIR* and the independent grounds on which *FAIR* was decided, it might be of great importance in future cases grounded primarily on academic freedom. If the importance of the point is not apparent in *FAIR* itself, it is much clearer in the other recent challenges brought against the Solomon Amendment. The *Burt v. Rumsfeld* lawsuit was brought by forty-four members of the Yale Law School faculty and the *Student Members of SAME v. Rumsfeld* litigation was brought by Yale Law School students, yet the law school itself was not a party to either case.³²⁶ The plaintiffs in the *Burbank v. Rumsfeld* litigation are faculty and students at the University of Pennsylvania Law School, not the law school itself.³²⁷ Thus, as at least one court has recognized, whatever claims they *are* entitled to bring, they may not be entitled to rely on the educational autonomy reading of *Grutter* that I have advanced here.³²⁸ This reading of *Grutter* suggests that any academic freedom claims in those particular cases—at least, any academic freedom claims grounded on institutional autonomy rather than on some individual's right to speak or receive information—must be dismissed.

A fourth point that has occasioned some interest in the legal academy itself is the role of the AALS, which filed an amicus brief in

³²⁵ See *Urofsky*, 216 F.3d at 412.

³²⁶ See *Burt*, 322 F. Supp. 2d at 196; *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 390 (D. Conn. 2004). The court's decision granting standing to the Yale Law School faculty members who served as plaintiffs in *Burt* turned on the fact that the plaintiffs included a voting majority of the law school faculty, who thus were treated as "equivalent to [Yale Law School]" for standing purposes. See *Burt*, 322 F. Supp. 2d at 199. At the same time, the court ventured that the university "appear[ed] to have no First Amendment rights in jeopardy" in the case. *Id.* at 200 n.2. Obviously, given my reading of *Grutter* as accord[ing] educational institutions a right to deference *as institutions*, I believe the latter conclusion is simply wrong.

³²⁷ See Complaint ¶¶ 8–9, *Burbank* (No. Civ.A.03-5497).

³²⁸ See *Student Members of SAME*, 321 F. Supp. 2d at 393–94 (rejecting student groups' expressive association claim on the basis that the relevant "association" here was Yale Law School, whose policies "are set by the faculty and can change at any time," and not the student groups themselves).

the FAIR litigation but declined to join the suit as a plaintiff. Although the point is surely not dispositive, there is an irony lurking behind the academic freedom arguments that have been advanced by the law school and faculty members of FAIR. As I have noted, membership in the AALS commits law schools to a policy of equal opportunity in employment, including equal treatment without regard to sexual orientation.³²⁹ Thus, whether or not individual law schools oppose the Solomon Amendment, the benefits of membership in the AALS may subject a law school to soft or hard pressure to conform its policies on military recruitment to the position favored by the AALS. Law schools that oppose the Solomon Amendment and that want to speak out against it, but that also welcome military recruiters despite their discriminatory policies, may thus be caught between the undoubtedly more grave coercive pressure of the Solomon Amendment and the unofficial but equally real pressure brought to bear by the AALS.

This raises the awkward question whether law schools that are simply reacting to the AALS's demands rather than formulating non-discrimination policies of their own can truly be said to be entitled to the sort of deference to expert educational judgments that *Grutter*, on the reading presented here, demands.³³⁰ If they are acting in response to the top-down instructions of the AALS, have they really made a "complex educational judgment in an area that lies primarily within the expertise of the university" when they refuse to comply with the Solomon Amendment?³³¹ Similarly, if we rely on *Dale* as the Third Circuit did, is an expressive association entitled to *Dale* deference if its policies are not the result of its own considered goals as an expressive association, but rather are the product of pressures from outside that association?

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

³²⁹ See AALS, BYLAWS, *supra* note 265, § 6.3(b). Separate principles apply to religiously affiliated law schools. See AALS, INTERPRETIVE PRINCIPLES, *supra* note 265, at 1.

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

³³¹ See *Grutter*, 539 U.S. at 328; see also Memorandum from Mark V. Tushnet to the Deans of Member and Fee-Paid Schools and Members of the House of Representatives (Sept. 10, 2003) [hereinafter Tushnet Memorandum] ("Putting it bluntly . . . how can the Association assert that its member schools have made academic freedom judgments when the policies at issue were adopted because of pressure from the Association, not because of member schools' own reflection on their missions?"), <http://www.aals.org/03-33.html> (last visited Apr. 15, 2005). Professor Tushnet was the president of the AALS when he wrote the memorandum.

membership in the AALS, they are not required to do so. Choosing to continue as a member of the AALS, and thus to abide by its nondiscrimination policy, is itself a considered educational and expressive judgment. Whether they are influenced by the AALS or independently arrive at their policy, law schools are in no different a position for purposes of the *Grutter* deference argument. Still, given the disapproval in some quarters that met the AALS's refusal to join the *FAIR* lawsuit as a party, the issue—as Professor Tushnet put it, not a “technical problem,” but “only an awkwardness”—is worth noting.³³² As with the standing issue, it may not be of crucial importance in the Solomon Amendment litigation, but it may raise questions in future cases about the circumstances in which an educational institution can properly lay claim to the protective mantle of deference to its considered judgment on matters of educational policy. Perhaps the AALS was right to hesitate to join the lawsuit.

Finally, the Third Circuit's decision in *FAIR* raises important questions about the consequences of an educational autonomy reading of *Grutter*. As we have seen, this reading of *Grutter* suggests that if universities can use *Grutter* to expand the range of voices engaging in campus speech, they might be equally entitled to limit campus speech.³³³ By relying principally on the Supreme Court's decision in

³³² Tushnet Memorandum, *supra* note 331.

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

Chai Feldblum and Michael Boucai's handbook offering ways for law schools to “ameliorate” their compliance with the Solomon Amendment strikes a similarly ironic note. See generally FELDBLUM & BOUCAI, *supra* note 272. On the one hand, the authors allow that “one should expect a range of views on the part of faculty, students and staff regarding the acceptability of homosexuality,” let alone the Solomon Amendment itself. *Id.* at 8. On the other hand, they make clear that in their view, discussion of these issues in the context of “amelioration” activities such as teach-ins should be anything but free and open, on the basis that the mere fact that military recruiters are present on campus is sufficient to represent the view that “the service of openly gay individuals is destructive to the military.” *Id.* at 11. Accordingly, they would permit, if not quietly encourage, ignoring supporters of the Solomon Amendment even within teach-ins and other educational programming. See *id.* (stating that “a law school can legitimately choose not to include any panelists supporting

Dale (albeit, I have suggested, in a way that is underwritten by the profound deference exhibited by the Court in *Grutter*), the Third Circuit suggests that its ruling may have similar implications. If a university's status as an expressive association enables it to overcome even the substantial governmental interest in providing a well-staffed military, an interest that normally sweeps aside all contrary arguments in the courts, then what happens when a university cites *FAIR* for illiberal purposes? What of a university that wishes to exclude members of certain races, or to impose discriminatory policies without suffering consequences such as the deprivation of favorable tax status?³³⁴ There is no logical reason why the arguments raised in *Grutter*, *Dale*, and *FAIR* could not apply in such a case.

To be sure, the government has a compelling interest in nondiscrimination. But that argument did not defeat the Boy Scouts of America in *Dale*. Nor did the traditionally compelling interest in military policy immunize the Solomon Amendment from attack in *FAIR*.³³⁵ Thus, *FAIR*, like *Grutter*, may yet serve as the basis for decisions that may disturb those who have applauded the decision the most loudly. For those who support *Grutter's* policy of deference to educational institutions for its own sake, this may not be unduly disturbing. But for more fair-weather friends of this reading of *Grutter*, it ought to raise the question whether grounding the attacks on the Solomon Amendment on *Grutter*—or on *Dale*, for that matter—was the wisest course of action.

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

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

³³⁴ *See* *Bob Jones Univ. v. United States*, 461 U.S. 574, 579–82 (1983).

³³⁵ *See FAIR II*, 390 F.3d at 245 & n.27.

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

4. The Academic Bill of Rights

Assume that the justifications for academic freedom discussed above are correct—that academic freedom is justified because of its contribution to the search for truth or because of its contribution to a truly democratic education and, by extension, a truly democratic polity.³⁹⁶ Further assume that these are the values that undergird the Court's decision in *Grutter*. What, then, could be wrong with legislation that enshrines these values in the law? What could be wrong with legislation that purports to *support* academic freedom as I have described it?

That question is raised by recent efforts, in Congress and in the individual states, to champion legislation called the Academic Bill of Rights. Drafted by conservative commentator David Horowitz and backed by his and other groups, the document states, in part, that decisions concerning the hiring, firing, tenure, or promotion of faculty; students' grades; curriculum decisions; and other aspects of university life should not be made "on the basis of . . . political or religious beliefs."³⁹⁷ The Academic Bill of Rights is grounded on views that most readers of this Article likely support: that the university serves "the pursuit of truth," that "pluralism, diversity, opportunity, critical intelligence, openness and fairness" are "the cornerstones of American society," and that academic freedom serves to "secure the intellectual

³⁹⁶ See *supra* notes 63–97 and accompanying text.

³⁹⁷ ACADEMIC BILL OF RIGHTS, reprinted in SARA DOGAN ET AL., STUDENTS FOR ACADEMIC FREEDOM, HANDBOOK app. A, at 53, 53–56 (n.d.), available at <http://studentsforacademicfreedom.org/texts/SAF%20handbook%20FINAL%202.pdf>.

independence of faculty and students and to protect the principle of intellectual diversity."³³⁸

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

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

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

³³⁸ *Id.*

³³⁹ See Stanley Fish, "Intellectual Diversity": The Trojan Horse of a Dark Design, CHRON. HIGHER EDUC., Feb. 13, 2004, at B13 (quoting Horowitz as stating, "I encourage [students] to use the language that the left has deployed so effectively on behalf of its own agendas"); Yilu Zhao, *Taking the Liberalism out of Liberal Arts*, N.Y. TIMES, Apr. 3, 2004, at B9.

³⁴⁰ See Fish, *supra* note 339, at B13; Zhao, *supra* note 339, at B9.

³⁴¹ See H.R. Con. Res. 318, 108th Cong. (2003).

³⁴² See S.R. 661, 150th Gen. Assem., Reg. Sess. (Ga. 2004).

³⁴³ See Zhao, *supra* note 339, at B9; Memorandum of Understanding Endorsed by Elizabeth Hoffman, President of the University of Colorado, Larry Penley, President of Colorado State University, Raymond Kieft, Interim President of Metropolitan State College of Denver, Kay Norton, President of the University of Northern Colorado, and Shawn Mitchell, State Representative House District 33 (n.d.), <http://www.studentsforacademicfreedom.org/reports/comemorandumofunderstanding.htm> (last visited Apr. 15, 2005).

Again, these bills are nonbinding or, as in the Colorado case, inoperative with respect to faculty hiring and other fundamental university decisions. But what if a binding version of the Academic Bill of Rights was passed? The Academic Bill of Rights purports to stand on the same principles that the Court relied on in *Grutter*—a belief in the importance of academic freedom and intellectual diversity. What would *Grutter's* First Amendment have to say about such legislation?

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

As I noted, however, this is not without irony. For the Academic Bill of Rights is, on its face, entirely consistent with the rationales for academic freedom—truth-seeking, intellectual diversity, and the like—that the Supreme Court has typically treated as supporting a constitutional right to academic freedom. These are also the same values that undergird the institutional autonomy reading of *Grutter*.³⁴⁴ Yet, if I am correct, the rule of deference to decisions made by academic institutions that emerges from these values would foreclose the enforcement of an Academic Bill of Rights. By contrast, it is at least arguable that these values cut *against* prohibitions on hate speech or

³⁴⁴ See Fish, *supra* note 339, at B13 (“It’s hard to see how anyone who believes (as I do) that academic work is distinctive in its aims and goals and that its distinctiveness must be protected from political pressures (either external or internal) could find anything to disagree with here.”).

religious speech on campus. Yet, as I have suggested, the institutional autonomy reading of *Grutter* compels the conclusion that a university *may* impose these restrictions, as long as they are part and parcel of its academic mission.

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

The second possible conclusion points to a deeper concern, which I touched on earlier—that the academic freedom values the Academic Bill of Rights seeks to protect are themselves incoherent, inaccurate, or non-existent. If Horowitz's defense of intellectual diversity as a core value of academic freedom fails under *Grutter's* institutional autonomy principle, perhaps that is because universities do not all agree that intellectual diversity is an important value.³⁴⁵ Or perhaps they agree on the end but not the means. This again suggests, as I have argued above, that courts—and supporters of the Academic Bill of Rights—cannot rely safely on a fixed justification for or definition of academic freedom.

I will canvass those issues more fully below. For now, it is simply important to note that even as the institutional autonomy reading of *Grutter* may support efforts by *universities* to impose policies that do not treat all ideas or speakers alike, it may also bar legislators and

³⁴⁵ Cf. *id.* (arguing that neither intellectual diversity nor "[c]itizen building" are academic activities).

regulators from imposing otherwise unobjectionable norms of intellectual diversity or equal treatment on universities from above.

5. Race-Based Scholarships

Grutter's deferential First Amendment-based treatment of the university's right to determine who shall be admitted to study, and the forgiving nature of its treatment of the narrow tailoring part of its Fourteenth Amendment inquiry, suggests that courts, colleges, and state and federal education officials now may revisit another heated issue affecting university admissions—the constitutionality of race-based scholarships.³⁴⁶

The leading case on this issue, *Podberesky v. Kirwan*,³⁴⁷ addressed the University of Maryland's Banneker scholarship program, a merit-based scholarship program available only to African-Americans.³⁴⁸ The University of Maryland maintained a separate scholarship program available to all students, but that program's merit standards were more stringent. Daniel Podberesky, a Hispanic student who met the Banneker scholarship requirements but not the requirements of the generally available scholarship program, challenged the University of Maryland's maintenance of a separate program.

The U.S. Court of Appeals for the Fourth Circuit decided *Podberesky* as if *Bakke's* diversity interest did not exist, relying instead on the Supreme Court's stringent scrutiny of remedial racially conscious measures in *City of Richmond v. J.A. Croson Co.*³⁴⁹ Thus, it looked—searchingly and critically—for evidence that the scholarship program

³⁴⁶ For commentary on this issue, see generally, for example, Kirk A. Kennedy, *Race-Exclusive Scholarships: Constitutional Vel Non*, 30 WAKE FOREST L. REV. 759 (1995); Brian K. Landsberg, *Balanced Scholarship and Racial Balance*, 30 WAKE FOREST L. REV. 819 (1995); William E. Thro, *The Constitutional Problem of Race-Based Scholarships and a Practical Solution*, 111 EDUC. L. REP. 625 (1996); B. Andrew Bednark, Note, *Preferential Treatment: The Varying Constitutionality of Private Scholarship Preferences at Public Universities*, 85 MINN. L. REV. 1391 (2001); Amy Weir, Note, *Should Higher Education Race-Based Financial Aid Be Distinguished From Race-Based Admissions?*, 42 B.C. L. REV. 967 (2001); Mark Spencer Williams, Comment, *Skin Formulas Belong in a Bottle: North Carolina's Diversity Scholarships Are Unconstitutional Under Grutter & Gratz*, 26 CAMPBELL L. REV. 135 (2004). The *Wall Street Journal* has reported on the balancing act that educational institutions have engaged in with respect to race-based scholarships since *Grutter*. See Daniel Golden, *Not Black and White: Colleges Cut Back Minority Programs After Court Rulings*, WALL ST. J., Dec. 30, 2003, at A1; cf. Sara Hebel, *The Michigan Rulings: Court Rulings May Open the Door for More Use of Race in Student Aid*, CHRON. HIGHER EDUC., July 4, 2003, at S6.

³⁴⁷ 38 F.3d 147 (4th Cir. 1994).

³⁴⁸ *Id.* at 152.

³⁴⁹ *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493–94 (1989); see *Podberesky*, 38 F.3d at 152–53.

was justified as a response to "the present effects of past discrimination."³⁵⁰ The University of Maryland was unable to meet this high hurdle; whatever racial tensions still existed at the university were not sufficiently linked to past discrimination to justify the program.³⁵¹ In any event, the program—which gave scholarships to *all* qualifying African-American students, and not just those African-American students from the state of Maryland—was not narrowly tailored to remedy the past discrimination at issue.³⁵²

Given the uncertain status of *Bakke* at the time *Podberesky* was decided, it is perhaps unsurprising that the Fourth Circuit thought to apply *Croson* rather than to examine the diversity rationale in evaluating the scholarship program. Moreover, it is not clear whether the University of Maryland advanced diversity as a rationale for its program.³⁵³ It is thus understandable that commentators following *Podberesky* assumed a diversity-based argument for race-based scholarships might be unsustainable.³⁵⁴

Grutter suggests that race-based scholarships may stand on surer footing than the *Podberesky* panel assumed.³⁵⁵ This argument does not require as much detail as those offered above, because it is little more than a rehearsal of the Court's reasoning in *Grutter*. Quite simply, *Grutter* holds that universities may legitimately tailor their admissions programs to meet the educational goal of maintaining a diverse student body. That interest is grounded in the First Amendment, and measures taken by the university to ensure that diversity, short of "outright racial balancing,"³⁵⁶ will be viewed with some substantial degree of deference, despite the ostensibly "strict" level of constitutional scrutiny applied by the Court under the Fourteenth Amendment.

³⁵⁰ *Podberesky*, 38 F.3d at 153.

³⁵¹ *Id.* at 154–57.

³⁵² *Id.* at 158–59.

³⁵³ The University of Maryland's failure to raise the diversity rationale may have to do with the historical context in which it arose. The constitutionality of race-based scholarship programs was a disputed issue at this point, and at the time of the litigation, the University of Maryland may have believed the argument was not available. *See, e.g.,* Weir, *supra* note 346, at 975–76 (noting that the Department of Education had issued a statement in 1990 declaring that race-based scholarships were unconstitutional and violated Title VI of the Civil Rights Act of 1964, and only in 1994 issued revised policy guidelines suggesting that race-based financial aid was available to create a diverse student body).

³⁵⁴ *See, e.g.,* Thro, *supra* note 346, at 632.

³⁵⁵ That is not, however, necessarily what some educational institutions, which have to plan outside the sanctuary of the law reviews, have concluded. *See* Golden, *supra* note 346, at A1.

³⁵⁶ *Grutter*, 539 U.S. at 330.

That reasoning applies equally to the case of race-based scholarships. If a university has a compelling interest in a diverse student body, and may mold its admissions requirements toward that end, surely it has an equal interest in ensuring that it also can "attract and retain" those students who serve the educational mission of maintaining student diversity.³⁵⁷ This is particularly true to the extent that such scholarships enable the school to attract and to retain a critical mass of minority students.³⁵⁸ *Grutter* thus suggests that universities ought to be able to rely confidently on their educational interest in student diversity in maintaining race-based scholarship programs.³⁵⁹

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

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

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

³⁵⁷ Weir, *supra* note 346, at 987.

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

³⁵⁹ Cf. Gerald Torres, *Grutter v. Bollinger/Gratz v. Bollinger: View from a Limestone Ledge*, 103 COLUM. L. REV. 1596, 1599 (2003).

³⁶⁰ 458 U.S. 718 (1982).

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

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

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

³⁶¹ *Id.* at 727.

³⁶² *Id.* at 727 n.13.

³⁶³ *See id.* at 729.

³⁶⁴ *See id.* at 731.

³⁶⁵ *Hogan*, 458 U.S. at 730.

³⁶⁶ 518 U.S. 515, 519 (1996) (*VMI*).

³⁶⁷ *Id.* at 535.

³⁶⁸ *Id.* at 539-40.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 540.

the women's military academy established by the state to compensate for the continued sex segregation of VMI did not offer a similar adversative style of training, it was a mere "pale shadow of VMI,"³⁷¹ and could not salvage the continued maintenance of separate facilities.

For present purposes, it is important to note that neither *Hogan* nor *VMI* absolutely foreclose single-sex education.³⁷² Indeed, as Justice O'Connor observed in *Hogan*, "[i]n limited circumstances, a gender-based classification favoring one sex can be justified if it intentionally and directly assists members of the sex that is disproportionately burdened."³⁷³ And in *VMI*, the Court repeatedly emphasized the "unique" opportunity offered by VMI's long history, resources, reputation, and unusual style of instruction, adding that the Court did not "question the State's prerogative evenhandedly to support diverse educational opportunities."³⁷⁴ It is possible that Virginia's system of sex-segregated military academies could have passed muster if a court had found that such academies had been opened simultaneously and enjoyed similar resources,³⁷⁵ and perhaps had also found that there was some pedagogically sound reason for the maintenance of gender segregation in the educational system.

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

³⁷¹ *VMI*, 518 U.S. at 553 (quotation and citation omitted).

³⁷² For discussion of single-sex education, see generally, for example, William Henry Hurd, *Gone with the Wind? VMI's Loss and the Future of Single-Sex Public Education*, 4 DUKE J. GENDER L. & POL'Y 27 (1997); Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95 (1997); Amy H. Nemko, *Single-Sex Public Education After VMI: The Case for Women's Schools*, 21 HARV. WOMEN'S L.J. 19 (1998); Catherine A. O'Neill, *Single-Sex Education After United States v. Virginia*, 23 J.C. & U.L. 489 (1997); Verna L. Williams, *Reform or Retrenchment? Single-Sex Education and the Construction of Race and Gender*, 2004 WIS. L. REV. 15; Jenny L. Matthews, Comment, *Admission Denied: An Examination of a Single-Sex Public-School Initiative in North Carolina*, 82 N.C. L. REV. 2032 (2004).

³⁷³ 458 U.S. at 728.

³⁷⁴ *VMI*, 518 U.S. at 534 n.7.

³⁷⁵ See *United States v. Virginia*, 44 F.3d 1229, 1250 (4th Cir. 1995) (Phillips, J., dissenting), *rev'd*, 518 U.S. 515 (1996) (stating that completely equal but separate male and female schools, with no difference in the benefits conferred on students, might survive equal protection scrutiny).

to seek broader opportunities, including jobs in fields that traditionally have been closed to or less attractive to women, than girls or women who attend co-educational institutions.³⁷⁶ Put in *Grutter's* terms, single-sex education for women may "promote[] learning outcomes."³⁷⁷

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

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

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

³⁷⁶ See Jennifer R. Cowan, *Distinguishing Private Women's Colleges from the VMI Decision*, 30 COLUM. J.L. & SOC. PROBS. 137, 141–42 (1997); Nemko, *supra* note 372, at 59–62. See generally ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING (2003).

³⁷⁷ 539 U.S. at 330.

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

³⁷⁹ See *Grutter*, 539 U.S. at 364–66 (Thomas, J., dissenting); *United States v. Fordice*, 505 U.S. 717, 745–46 (1992) (Thomas, J., concurring).

³⁸⁰ See *Grutter*, 539 U.S. at 365 (Thomas, J., dissenting).

suggests that any pedagogical benefits claimed for historically discriminatory institutions would face the same problems that the Mississippi nursing school faced in *Hogan*. The law is clear that states may not maintain a system of racially identifiable, effectively segregated institutions.³⁸¹ Although historically black colleges and universities in the United States maintain high enrollments of African-Americans, they may not simply exclude white or other non-black students, though the number of such students is generally small.³⁸²

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

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

³⁸¹ See generally *Fordice*, 505 U.S. at 717.

³⁸² See *Grutter*, 539 U.S. at 364-66 (Thomas, J., dissenting).

³⁸³ See generally, e.g., Frank S. Adams, *Why Brown v. Board of Education and Affirmative Action Can Save Historically Black Colleges and Universities*, 47 ALA. L. REV. 481 (1996); Wendy Brown-Scott, *Race Consciousness in Higher Education: Does "Sound Educational Policy" Support the Continued Existence of Historically Black Colleges?*, 43 EMORY L.J. 1 (1994); Robert L. Carter, *Public School Desegregation: A Contemporary Analysis*, 37 ST. LOUIS U. L.J. 885 (1993); Drew Days III, *Brown Blues: Rethinking the Integrative Ideal*, 34 WM. & MARY L. REV. 53 (1992); Mark Strasser, Plessy, Brown, and HBCUs: *On the Imposition of Stigma and the Court's Mechanical Equal Protection Jurisprudence*, 40 WASHBURN L.J. 48 (2000); Pamela Smith, Note, *All-Male Black Schools and the Equal Protection Clause: A Step Forward Towards Education*, 66 TUL. L. REV. 2003 (1992); Christopher Steskal, Note, *Creating Space for Racial Difference: The Case for African-American Schools*, 27 HARV. C.R.-C.L. L. REV. 187 (1992).

³⁸⁴ See, e.g., Adams, *supra* note 383, at 483 ("Despite the view of Justice Thomas and many others [concerning] the present day value of HBCUs, the current state of the law threatens the continuing existence of these institutions in prior de jure racially segregated states . . ."); Strasser, *supra* note 383, at 64-67.

ity will yield educational benefits."³⁸⁵ Although universities are still required to act "within constitutionally prescribed limits,"³⁸⁶ *Grutter* at least suggests that a university that advanced sound pedagogical reasons for its racially exclusionary policies might be entitled to some significant leeway. This would be true at least as long as the school was not a mere vestige of *de jure* segregation, did not impact its students adversely, and "persist[ed] with[] sound educational justification."³⁸⁷

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

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

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

³⁸⁵ *Grutter*, 539 U.S. at 365 (Thomas, J., dissenting).

³⁸⁶ *Id.* at 328.

³⁸⁷ *Fordice*, 505 U.S. at 746 (Thomas, J., concurring).

³⁸⁸ See ROY L. BROOKS, *INTEGRATION OR SEPARATION? A STRATEGY FOR RACIAL EQUALITY* 235-43 (1996) (providing an admiring account).

³⁸⁹ Brown-Scott, *supra* note 383, at 10-11.

³⁹⁰ See Adams, *supra* note 383, at 496-97 (quoting James Washburn, Note, *Beyond Brown: Evaluating Equality in Higher Education*, 43 DUKE L.J. 1115, 1151-52 (1994)); see also Leland Ware, *The Most Visible Vestige: Black Colleges After Fordice*, 35 B.C. L. REV. 633, 635 (1994) (discussing benefits of historically black colleges and universities).

well-being of the African-American community and are not seen as mere vestiges of segregation.³⁹¹

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

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

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

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

³⁹³ Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 771 (1997).

³⁹⁴ Goodwin Liu, Remarks at the American Constitution Society Conference, Session E: Segregation, Integration and Affirmative Action After *Bollinger* 33–34 (Aug. 2, 2003) (noting that the "academic freedom argument . . . would seem to swing both ways" and could support arguments for segregated universities if they could be justified on educa-

Grutter certainly does not absolutely compel the conclusion that courts must accept a regime of single-sex or racially segregated higher education. *Hogan*, *United States v. Fordice*, and other cases suggest most institutions would be hard pressed to prove that any racially exclusive admissions policies were motivated by purely pedagogical purposes. Nevertheless, the "tension" acknowledged by the supporters of *Grutter's* acceptance of the diversity rationale is not a mere phantom. *Grutter's* logic compels the conclusion that a wide range of educational missions may be entitled to deference on constitutional academic freedom grounds, even if they skirt different boundaries of the Fourteenth Amendment than did the Law School's admissions policy in *Grutter* itself.

7. Conclusion

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

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

tional grounds), available at <http://www.acslaw.org/pdf/Affirmative%20Action.pdf>; see John Payton, Remarks at the American Constitution Society Conference, Session E: Segregation, Integration and Affirmative Action After *Bollinger* 34 (Aug. 2, 2003) ("acknowledg[ing] the tension [in the academic freedom argument]" and suggesting that the Law School "tried not to make too much of the academic freedom point" in its brief to the Supreme Court), available at <http://www.acslaw.org/pdf/Affirmative%20Action.pdf>; cf. Katyal, *supra* note 19, at 557-58 (asserting that only one brief (on which Professor Katyal worked) in the *Grutter* appeal offered a substantial argument based on educational autonomy).

³⁹⁵ *Bakke*, 438 U.S. at 313 (opinion of Powell, J.).

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

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

The importance of this first reading of *Grutter's* First Amendment, however, does not rest on its ultimate success in the courts. Indeed, that is one of the key points of this Article. Notwithstanding the Court's bold First Amendment rhetoric in *Grutter*, it is quite possible that it will turn out to be a "sport" in First Amendment case law, as *Bakke* arguably was before it.³⁹⁶ Nonetheless, *Grutter* and *Bakke* still demand greater consideration within the world of First Amendment scholarship. If *Grutter's* First Amendment eventually does have greater influence beyond the narrow confines of race-conscious admissions policies, the importance of carefully studying this aspect of *Grutter* will be obvious. Regardless, *Grutter* will raise serious questions for First Amendment scholars even if it *does* turn out to be a sport. For example, what are the First Amendment principles announced in *Grutter*? Do they have greater application beyond the facts of that case? Do they *merit* greater application? And if the Court refuses to apply those principles elsewhere, why? In short, no matter what happens in the courts, *Grutter* deserves serious consideration as a First Amendment case.

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

³⁹⁶ See Byrne, *supra* note 17, at 315; Yudof, *supra* note 30, at 855-56.

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

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

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

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

B. Grutter's First Amendment as Substantive Commitment

The focus on the institutional autonomy reading of *Grutter* has yielded a surprising and wide-ranging set of potential implications for First Amendment doctrine and other aspects of constitutional law. It is based, however, on a particular reading of *Grutter*. So far, I have assumed that *Grutter* adopts a value-neutral conception of academic freedom. Provided that a university is making "academic decisions" with respect to policies that serve its "proper institutional mission,"³⁹⁷ it is entitled to substantial deference. What constitutes a "proper educational mission," on this reading, is substantially up to the university. A university may decide that its educational mission demands a diverse student body, or it may conclude that it has a pedagogical interest in maintaining a gender- or race-exclusive student body. It may decide that its mission demands the imposition of stringent and viewpoint-specific codes of civility in student speech, or that its mission demands wide open debate and precludes the imposition of speech codes.

In each case, the discretion lies with the educational institution. Courts are not qualified to judge the "complex educational judgments"³⁹⁸ that go into the formation of a university mission, and must assume that the university has reached its judgments about its proper educational mission, and the policies necessary to support it, in good faith.³⁹⁹ This reading of *Grutter*, which is substantially based on the Court's own language, thus preserves universities as "spheres of independence and neutrality" into which the government may not intrude.⁴⁰⁰

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

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

³⁹⁷ *Grutter*, 539 U.S. at 329.

³⁹⁸ *Id.* at 328.

³⁹⁹ *See id.* at 329.

⁴⁰⁰ David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 683 (1992).

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

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

A number of early examinations of *Grutter* have focused on this reading of the case. Professor Post, for example, sees in *Grutter* a vision of education “as instrumental for the achievement of extrinsic social goods like professionalism, citizenship, or leadership.”⁴⁰⁹ Universities, according to this view, are not mere warehouses for researchers. They are, instead, both models of democratic dialogue⁴¹⁰ and training grounds for a well-trained and representative body of citizens. Profes-

⁴⁰¹ See Byrne, *supra* note 20, at 117–18 (discussing the extent to which the *Grutter* Court “made an independent judgment that diversity in higher education was important”).

⁴⁰² *Grutter*, 539 U.S. at 330.

⁴⁰³ Cf. Cynthia Estlund, *Taking Grutter to Work*, 7 GREEN BAG 2D 215, 217–18 (2004).

⁴⁰⁴ *Grutter*, 539 U.S. at 330 (quotation and citation omitted). For commentary on this aspect of *Grutter*, see generally Bryan W. Leach, Note, *Race as Mission Critical: The Occupational Need Rationale in Military Affirmative Action and Beyond*, 113 YALE L.J. 1093 (2004).

⁴⁰⁵ *Grutter*, 539 U.S. at 330. For a thoughtful treatment of this aspect of *Grutter*, see generally Thomas H. Lee, *University Dons and Warrior Chieftains: Two Concepts of Diversity*, 72 FORDHAM L. REV. 2301 (2004).

⁴⁰⁶ *Grutter*, 539 U.S. at 330.

⁴⁰⁷ *Id.* at 332.

⁴⁰⁸ *Id.*

⁴⁰⁹ Post, *supra* note 306, at 60.

⁴¹⁰ See *id.* at 61 (identifying universities as fora “for participation in civic life”).

sor Lani Guinier, in a statement that spotlights the two readings of *Grutter* that I have stressed thus far, also argues that *Grutter* makes a positive statement about "the fundamental role of public education in a democracy," by "link[ing] the educational mission of public institutions not only to the autonomy that the First Amendment gives universities to fashion their educational goals, but also to the broad democratic goal of providing upward mobility to a diverse cadre of future leaders."⁴¹¹ *Grutter*, in her view, is the starting point for a public discussion about the "democratic purpose of public education."⁴¹²

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

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

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

⁴¹² *Id.* at 120. Others have focused on *Grutter* as a substantive commitment to democratic values in education and beyond. *See, e.g.,* Michelle Adams, *Shifting Sands: The Jurisprudence of Integration Past, Present, and Future*, 47 HOW. L.J. 795, 824-25 (2004); Bollinger, *supra* note 204, at 1591-92; Greenberg, *supra* note 203, at 1619; Kenneth L. Karst, *Justice O'Connor and the Substance of Equal Citizenship*, 55 SUP. CT. REV. 357, 394-401 (2003); Douglas Laycock, *The Broader Case for Affirmative Action: Desegregation, Academic Excellence, and Future Leadership*, 78 TUL. L. REV. 1767, 1770 (2004).

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

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

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

⁴¹⁶ Greenberg, *supra* note 203, at 1618.

its representativeness and inclusiveness. *Grutter* thus presents a significantly different picture of the nature and purpose of higher education than that offered in *Bakke*.⁴¹⁷

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

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

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

⁴¹⁸ *Grutter*, 539 U.S. at 331 (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

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

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

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

⁴¹⁹ Post, *supra* note 306, at 61.

⁴²⁰ See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948); ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1965); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245.

individualistic vision of speech as self-actualization, but as serving a substantive vision of democracy as self-government.⁴²¹ In Professor Owen Fiss's words, "[t]he purpose of free speech is . . . the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live."⁴²² In Professor Cass Sunstein's terms, this approach represents a turn from free speech as an unregulated marketplace of ideas to a system dedicated to deliberative democracy.⁴²³

Under this theory, a purely context-insensitive, rule-oriented approach to First Amendment issues may properly be amended or abandoned when that approach interferes with the larger goal of democratic self-government. In order that "public debate might be enriched and our capacity for collective self-determination enhanced,"⁴²⁴ the state "may sometimes find it necessary to restrict the speech of some elements in our society in order to enhance the relative voice of others."⁴²⁵

This democratic approach to free speech thus may demand a set of departures from current free speech doctrine. Under this model of free speech and its relation to self-government, the state may properly enact greater restrictions on the spread of pornography, to ensure that "everyone ha[s] an equal chance to speak and to be heard."⁴²⁶ It may allocate subsidies in content-specific ways to "further the sovereignty of the people by provoking and stirring public debate."⁴²⁷ It may restrict hate speech where that speech "helps contribute to the creation of a caste system."⁴²⁸ The state also may intervene in the sphere of election-related speech to "promote democratic processes."⁴²⁹ In short, government may employ a number of regulatory approaches

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

⁴²² OWEN M. FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* 13 (1996).

⁴²³ See SUNSTEIN, *supra* note 228, at 17-23, 50-51 (elaborating on this point).

⁴²⁴ FISS, *supra* note 422, at 19.

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

⁴²⁶ FISS, *supra* note 422, at 87.

⁴²⁷ *Id.* at 107.

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

⁴²⁹ *Id.* at 85; see *id.* at 93-120.

to speech in order to enhance our system of self-government and deliberative democracy.

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

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

⁴³⁰ See generally, e.g., Horwitz, *supra* note 139; William Marshall, *Free Speech and the "Problem" of Democracy*, 89 Nw. U. L. Rev. 191 (1994); Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517 (1997); Martin H. Redish & Gary Lippman, *Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications*, 79 CAL. L. REV. 267 (1991).

⁴³¹ See, e.g., SUNSTEIN, *supra* note 228, at 16 ("[A] reconnection of the First Amendment with democratic aspirations would require an ambitious reinterpretation of the principle of free expression.").

⁴³² See FISS, *supra* note 422, at 5.

deeply troubling.⁴³³ It is thus clear that these theorists argue for a significant reshaping of First Amendment theory and doctrine.⁴³⁴

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

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

C. *Is Grutter's First Amendment Consistent with the Court's First Amendment Jurisprudence?*

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

⁴³³ See SUNSTEIN, *supra* note 228, at 50.

⁴³⁴ See, e.g., *id.* at 252.

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

⁴³⁶ *Id.* at 332.

⁴³⁷ See *infra* notes 487-575 and accompanying text.

erence; the other offers a more substantive, democratically oriented vision of the First Amendment. As I have suggested, if these readings are inconsistent with the broad run of First Amendment opinions issued by the Supreme Court, two possibilities present themselves: either *Grutter* can be treated as a sport for First Amendment purposes, or the Court itself ought to reexamine its First Amendment case law.

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

Focusing first on the majority Justices, the two Justices who seem most consistent in their approach with respect to both *Grutter* and other First Amendment cases are Justices Breyer and Stevens. In both his extrajudicial writing and his writing on the Court, Justice Breyer has emphasized an approach to the First Amendment that "[f]ocus[es] on participatory self-government."⁴³⁸ Like Professors Sunstein and Fiss, Justice Breyer argues for an approach that looks back to "the Constitution's more general objectives,"⁴³⁹ and considers whether a particular speech regulation serves "the ability of some to engage in as much communication as they wish and . . . the public's confidence and consequent ability to communicate."⁴⁴⁰ Justice Breyer is thus suspicious of First Amendment rules that treat all speech as equal, and all speech restrictions as equally deserving of suspicion.⁴⁴¹ He finds that approach inconsistent with the more general objective of ensuring "democratic government,"⁴⁴² which may counsel permitting speech regulations in some cases despite their conflict with general rules of content neutrality. This context-specific, democratically oriented approach is evident in Justice Breyer's writing on such issues as campaign finance regulations and commercial speech.⁴⁴³

⁴³⁸ Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 254 (2002).

⁴³⁹ *Id.* at 256.

⁴⁴⁰ *Id.* at 253 (referring specifically to communication in the electoral process).

⁴⁴¹ See, e.g., *id.* at 253, 255.

⁴⁴² *Id.* at 255.

⁴⁴³ See, e.g., *United States v. United Foods, Inc.*, 533 U.S. 405, 424-25 (2001) (Breyer, J., dissenting); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 399-405 (2000) (Breyer, J., concurring). See generally Jerome A. Barron, *The Electronic Media and the Flight from First Amendment Doctrine: Justice Breyer's New Balancing Approach*, 31 U. MICH. J.L. REFORM 817 (1998).

Similarly, Justice Stevens has voiced his suspicion of general First Amendment rules such as the prohibition on content-based regulation, suggesting that they may "obfuscate[] the specific facts at issue and interests at stake in a given case."⁴⁴⁴ He advocates an approach to First Amendment cases that exhibits "a sensitivity to fact and context that allows for advancement of the principles underlying the protection of free speech."⁴⁴⁵ This approach is evident in his First Amendment jurisprudence,⁴⁴⁶ and, as I have suggested above, it is consistent with his treatment of academic freedom jurisprudence.⁴⁴⁷

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

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

⁴⁴⁴ John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1307 (1993).

⁴⁴⁵ *Id.* at 1305.

⁴⁴⁶ See, e.g., *New York v. Ferber*, 458 U.S. 747, 778 (1982) (Stevens, J., concurring); *Young v. Am. Mini Theatres*, 427 U.S. 50, 62-63 (1976).

⁴⁴⁷ See *Widmar*, 454 U.S. at 278 (Stevens, J., concurring). See generally Frederick Schauer, *Justice Stevens and the Size of Constitutional Decisions*, 27 RUTGERS L.J. 543 (1996).

⁴⁴⁸ See generally 524 U.S. 569 (1998).

⁴⁴⁹ See Schauer, *supra* note 32, at 96-97.

⁴⁵⁰ 529 U.S. at 239 (Souter, J., concurring in the judgment). Consistent with the analysis provided above, Justice David Souter was joined by Justices Stephen Breyer and John Paul Stevens. See *id.*; see also Barron, *supra* note 443, at 855-56 (arguing that Justice Souter's approach to electronic media cases is "medium-specific and pragmatic," and skeptical about "the utility of categorical analysis in resolving the First Amendment issues raised by the new electronic media").

different approach to the First Amendment, whether it resembles the institution-specific or democratic readings of *Grutter* or some other vision of the First Amendment. Instead, most of the Justices who joined *Grutter* have, for the most part, willingly followed traditional categorical First Amendment rules in a substantial number of cases. Even Justice Stevens, who I have suggested does have a fairly consistent case-specific approach to the First Amendment, has at times displayed an unwillingness to depart from traditional First Amendment rules.⁴⁵¹

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

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

⁴⁵² See, e.g., *Barron*, *supra* note 443, at 859–72 (discussing First Amendment approaches of Justices Anthony Kennedy and Clarence Thomas).

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

⁴⁵⁴ See, e.g., *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 727, 812 (1996) (Thomas, J., concurring in the judgment in part and dissenting in part); see also *Barron*, *supra* note 443, at 869–70 (arguing that Justice Thomas's opinion in *Denver Area Educational Telecommunications Consortium, Inc. v. FCC* "denie[s] the validity of any First Amendment theory that is instrumental in its objectives and pluralistic in its coverage or scope").

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

⁴⁵⁶ See *id.* at 362–64.

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

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

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

⁴⁵⁷ McGinnis, *supra* note 27, at 489. See generally Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841 (2001) (discussing the role of associations in mediating between individuals and the State, and the Court's part in protecting them).

⁴⁵⁸ McGinnis, *supra* note 27, at 492.

⁴⁵⁹ See 515 U.S. 557, 580–81 (1995).

⁴⁶⁰ See 530 U.S. 640, 647–61 (2000).

⁴⁶¹ See 530 U.S. 567, 572–82 (2000).

⁴⁶² See, e.g., Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1494 (2001).

⁴⁶³ McGinnis, *supra* note 27, at 533.

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

Thus, if any faction on the Court was following a Tocquevillian vision in *Grutter*, it was the majority and not the dissent. To the extent Professor McGinnis can be read as including *Grutter's* dissenting Justices among those who have championed the jurisprudence he describes, therefore, they stand fairly accused of inconsistency in *Grutter*.⁴⁶⁴

To be sure, there are some reasonable objections to this account. First and foremost, Professor McGinnis recognizes that even a Court that is more attentive to freedom of association might still "be less willing to permit associations to exclude [certain] identifiable groups," such as racial minorities, "on First Amendment grounds."⁴⁶⁵ But Professor McGinnis himself is at least ambivalent about this prospect.⁴⁶⁶ He appears to suggest that some greater scope of freedom might be available to institutions such as universities, including freedom to shape admissions decisions along racial grounds, if the school advanced the argument that its "expression of . . . values" would be harmed by state intervention with respect to its admissions choices.⁴⁶⁷ That is precisely the objection raised by the Law School in *Grutter*.⁴⁶⁸

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

⁴⁶⁵ *Id.* at 536.

⁴⁶⁶ See *id.* at 537 n.263.

⁴⁶⁷ *Id.* at 537 n.264 (discussing *Runyon v. McCrary*, 427 U.S. 160 (1976)).

⁴⁶⁸ I should add that in exploring the tension between the Tocquevillian approach discussed by Professor McGinnis and the dissents in *Grutter*, I am in no way suggesting any inconsistency on Professor McGinnis's part. Similarly, as his comment on the *FAIR* litigation suggests, Richard Garnett is well aware of the connection between his work on expressive associations and the sorts of issues raised by the first reading of *Grutter* offered in this Article. See generally Garnett, *supra* note 296.

It might also be argued that whatever additional protections Professor McGinnis's Tocquevillian Court has accorded to civic associations, that focus has been on *private* institutions rather than public institutions. I do not think this argument can be reconciled fully with Professor McGinnis's broader constitutional vision, however. That vision treats the Court's protection of private civic associations as only one component of a broader vision of autonomous and decentralized institutions both private *and* public, "states, secular and religious associations, and juries" among them.⁴⁶⁹ If the Court's vision instructs us to "focus on associations themselves, and on the content and function of their expression,"⁴⁷⁰ perhaps the associative role of public universities should weigh more heavily in the balance than their tenuous connection to state action.⁴⁷¹

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

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

⁴⁶⁹ McGinnis, *supra* note 27, at 495.

⁴⁷⁰ Garnett, *supra* note 457, at 1844, 1853.

⁴⁷¹ For further discussion of the relationship between *Grutter's* First Amendment and the public-private distinction, see *infra* notes 554-575 and accompanying text.

new vision of the First Amendment—one that looses the self-imposed bonds of a series of generally applicable rules, and instead trusts to institutions themselves to shape their own, more context-sensitive rules. That story of *Grutter's* First Amendment is told in Part III.

III. TAKING FIRST AMENDMENT INSTITUTIONS SERIOUSLY

A. Introduction

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

I have refrained from direct discussion of a third reading of *Grutter's* First Amendment—what we might call an *institutional* First Amendment reading of *Grutter*—until now, although it bears a close kinship with the institutional autonomy reading of *Grutter* and may be gleaned by implication from the discussion that has preceded this Part.⁴⁷² It will become clear that, although this vision of *Grutter* raises the most troubling questions and must be much more fully fleshed

⁴⁷² See, e.g., Schauer, *supra* note 28 (titled his article *Towards an Institutional First Amendment*). The phrase actually originates with Bruce C. Hafen. See generally Bruce C. Hafen, Comment, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685.

out, I also believe it is the most promising reading of *Grutter*, one which portends a sea change in First Amendment jurisprudence.

Before turning to that reading of *Grutter*, it is important to consider the current state of First Amendment jurisprudence. As Professor Schauer has observed, for the most part, the Supreme Court has been "institutional[ly] agnostic[]" in its treatment of First Amendment issues.⁴⁷³ Its general approach has been one of generality and principle rather than specificity, narrowness, and policy on the ground.⁴⁷⁴ The Court has viewed the First Amendment through a lens of "juridical categories,"⁴⁷⁵ in which all speakers and all factual situations, no matter how varied, are compressed into a series of narrow legal questions. For example, what general category of speech is implicated here: incitement, commercial speech, pornography? What kind of legal rule is implicated: content-neutral, viewpoint-specific, or time, place, and manner restriction? Is the speaker public or private? These questions sometimes overlap with questions of factual context, but their contours are hardly the same and the nature of the inquiry undertaken by the courts is entirely different. The nature of the speaker, its role in society, the kinds of social or professional norms that govern a particular kind of speech act even absent the specter of legal proceedings—all these facts have been less important than the conceptual cubbyhole into which the dispute must be placed once it reaches the Court. In Justice Holmes's terms, the Court has thought about words, not things.⁴⁷⁶

This preference for rules over facts, this relative insensitivity to the nature of the institutions before the courts, is evident throughout the congeries of rules and principles that govern the law of the First Amendment. A few examples will suffice to illuminate this point. Consider the role of the press in First Amendment law. As a general rule, albeit with some exceptions,⁴⁷⁷ the Court has rendered the Press

⁴⁷³ Schauer, *supra* note 32, at 120.

⁴⁷⁴ *See id.* at 119–20.

⁴⁷⁵ *Id.* at 119. *See generally* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773 (1998).

⁴⁷⁶ *See* Oliver Wendell Holmes, Jr., *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 460 (1899).

⁴⁷⁷ *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'n of Revenue*, 460 U.S. 575, 577, 592–93 (1983) (striking down a use tax on the cost of paper and ink products used in the production of periodicals). *See generally* Jon Paul Diltz, *The Press Clause and Press Behavior: Revisiting the Implications of Citizenship*, 7 COMM. L. & POL'Y 25, 27 (2002) (listing other instances in which the press appears to have been granted a preferred status under the Constitution); Timothy B. Dyk, *Newsgathering, Press Access, and the First Amendment*, 44 STAN. L. REV. 927 (1992).

Clause of the First Amendment a virtual nullity, refusing to grant special privileges to the press or to treat media institutions differently than it would any other speaker under the First Amendment.⁴⁷⁸ Religious institutions have come in for similarly categorical, rule-oriented treatment. Thus, a narrow majority of the Court has refused to grant special accommodations under the Free Exercise Clause to religious groups when they challenge neutral laws of general applicability,⁴⁷⁹ disdaining any approach that would require judges to "weigh the social importance of all laws against the centrality of all religious beliefs."⁴⁸⁰ As many critics have recognized, the Court's treatment of religion has traveled from a substantive concern with the distinctive role of religious groups and practices to a less protective, but more generally applicable, fact-insensitive focus on formal neutrality.⁴⁸¹

That institution-indifferent approach is perhaps best captured, however, by the Court's focus on content neutrality in free speech cases. That approach employs a simple, broad taxonomy in evaluating free speech claims, subjecting them to different levels of scrutiny depending on whether the speech restrictions at issue are content-neutral, content-based, or viewpoint-based.⁴⁸² As Professor Steven J.

⁴⁷⁸ See, e.g., *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 798–802 (1978) (Burger, C.J., concurring); *Branzburg v. Hayes*, 408 U.S. 665, 691–92 (1972); see also David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 118–19 (1975); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 605 (1979) ("No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.").

⁴⁷⁹ See *Employment Div. v. Smith*, 494 U.S. 872, 878–80, 890 (1990).

⁴⁸⁰ *Id.* at 890; see Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 1009 (1990) (stating that free exercise of religion after *Smith* "now means that churches cannot be taxed or regulated any more heavily than General Motors"); Kathleen M. Sullivan, *The Supreme Court, 1991 Term: Foreword—The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 84–86 (1992) (discussing *Smith* as an exemplar of Justice Scalia's preference for strict rules over looser standards and balancing tests).

⁴⁸¹ See, e.g., Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 186–213 (2002); Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 390 (noting a "movement [on the Court] away from robust interpretations of the two Religion Clauses, under which religion must be treated as special . . . , and toward principles of equal treatment and legislative discretion"); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 498–544 (2004); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 524–36 (1998).

⁴⁸² See, e.g., Clay Calvert, *Free Speech and Content Neutrality: Inconsistent Applications of an Increasingly Malleable Doctrine*, 29 MCGEORGE L. REV. 69, 70 (1997). See generally Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

Heyman has observed, this approach "has become the cornerstone of the Supreme Court's First Amendment jurisprudence."⁴⁸³

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

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

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

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

⁴⁸³ Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650 (2002).

⁴⁸⁴ See Schauer, *supra* note 32, at 119–20.

⁴⁸⁵ For a powerful discussion of these issues, see generally Frederick Schauer, *Harry Kalven and the Perils of Particularism*, 56 U. CHI. L. REV. 397 (1989) (reviewing HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamie Kalven ed., 1988)).

cisionmaking only if the court refashions its jurisprudence so as to foster a lucid comprehension of the constitutional values implicit in *discrete* forms of social order. The Court must reshape its doctrine so as to generate a perspicuous understanding of the necessary material and normative dimensions of these forms of social order and of the relationship of speech to these values and dimensions.⁴⁸⁶

B. *Grutter and First Amendment Institutions*

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

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

⁴⁸⁶ Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1280-81 (1995) (emphasis added).

⁴⁸⁷ Cf. Gail Paulus Sorenson, *The "Public Forum Doctrine" and Its Application in School and College Cases*, 20 J.L. & EDUC. 445, 445-46 (1991) (noting the difficulties courts have had applying public forum doctrine to schools and colleges).

⁴⁸⁸ Post, *supra* note 486, at 1272. It should be evident by now that this Article owes a significant intellectual debt to Professor Post's work, although it differs from that work in its particular emphasis on First Amendment institutions rather than broader organizing principles for social discourse, and in its desire to descend from theory to more immediate operational concerns. For a more complete exposition of his vision of the First Amendment, focused not on First Amendment institutions but on different domains of social order, see generally ROBERT C. POST, *CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT* (1995). For a similar distinction between Professor Post's work and a

Indeed, *Grutter* does not just suggest this approach, but exemplifies it. Consider the gulf between this case and other affirmative action cases that the Court has decided in recent years. Nowhere has the Court been as sympathetic to the practices and aims of the institution whose affirmative action policies were under attack as it is here—not when it dealt with a municipal employer,⁴⁸⁹ nor when it dealt with the federal government itself as an employer.⁴⁹⁰ If the Court had adopted the same approach in *Grutter*, it is quite likely the outcome would have favored the plaintiffs, not the Law School.

The Court says in its death penalty jurisprudence that “death is different,” but one could also argue that to the Court, education is different.⁴⁹¹ Speaking of the Court’s affirmative action cases, Professors Akhil Reed Amar and Neal Kumar Katyal once observed that the Court had said “a lot about contracting and rather little about education.”⁴⁹² That observation is key to understanding this reading of *Grutter*’s First Amendment: it is a First Amendment that is sensitive to the special character of particular institutions and particular social practices. It does so by singling out universities as having a *special* interest in diversity sufficient to give them a compelling interest in race-conscious policies, and by subjecting those policies to what any reasonable observer must conclude is a far more deferential level of scrutiny than would apply to other institutions. As a result, *Grutter* truly suggests that not all institutions are equal under the First Amendment.⁴⁹³

specifically institution-oriented approach to the First Amendment, see Schauer, *supra* note 32, at 21 n.88.

⁴⁸⁹ See *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477–80, 493–94 (1989).

⁴⁹⁰ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204–06, 227 (1995) (addressing policy favoring minority contractors under the Small Business Act). One notable exception is *Metro Broadcasting, Inc. v. FCC*, which upheld preferential treatment for racial minorities in the grant of broadcast licenses. See generally 497 U.S. 547, 600 (1990). To the extent that *Metro Broadcasting* relied on diversity in upholding the housing scheme in that case, and applied a lower level of scrutiny to a federal program, it has been assumed widely to have been curtailed, if not overruled, by *Adarand Constructors, Inc. v. Peña*. See, e.g., Arnold H. Loewy, *Taking Bakke Seriously: Distinguishing Diversity from Affirmative Action in the Law School Admissions Process*, 77 N.C. L. REV. 1479, 1495 n.47 (1999). In any event, because that case itself involved a First Amendment institution—broadcasters—it can be seen, if anything, as supporting *Grutter v. Bollinger*’s institution-sensitive approach to constitutional law.

⁴⁹¹ See, e.g., *Schiro v. Farley*, 510 U.S. 222, 238 (1994).

⁴⁹² Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 UCLA L. REV. 1745, 1746 (1996).

⁴⁹³ For this reason, I doubt *Grutter* carries much significance for the future of affirmative action programs outside the university. See generally Estlund, *supra* note 403; Rebecca Hanner White, *Affirmative Action in the Workplace: The Significance of Grutter?*, 92 Ky. L.J. 263 (2003–2004); Joshua Wilkenfeld, Note, *Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of Grutter v. Bollinger*, 104 COLUM. L. REV. 2291 (2004). The Court of Appeals for

At the same time, and unlike the educational autonomy and democratic readings of *Grutter* offered above, which are *only* concerned with the special role of universities, the institution-sensitive reading of *Grutter* carries potential implications far beyond the ivory tower. For where one institution has gone, others may try to follow. *Grutter* may counsel other institutions—religious institutions, media institutions, libraries, perhaps professionals,⁴⁹⁴ and even other institutions—to seek from the Court the same recognition that they have special roles to play in the social firmament and ought, perhaps, to be treated according to special rules. If one takes *Grutter* seriously as a First Amendment decision, as its language certainly permits, it may provide ammunition for a broader effort to overturn an institutionally agnostic, top-down approach to the First Amendment in favor of one that builds from the ground up. This approach would construct First Amendment doctrine in response to the actual functions and practices of particular social institutions.⁴⁹⁵

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

Thus, in the same week that it issued its opinion in *Grutter*, the Court decided *United States v. American Library Ass'n*,⁴⁹⁶ holding that Congress could validly require public libraries that receive federal funding to install filter software to block the receipt of obscene materials or child pornography by library computer users. Pivotal to that decision was that library users could request that the filters be disabled.⁴⁹⁷ For present purposes, however, the result is less important than the Court's reasoning. The Court began by asking *why* we value libraries, and *how* they operate.⁴⁹⁸ It began with the assumption that a crucial legal ques-

the Seventh Circuit, however, applied *Grutter* in holding that diversity in a large urban police department is a compelling government interest in *Petit v. City of Chicago*. See 352 F.3d 1111, 1114 (7th Cir. 2003).

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

⁴⁹⁵ See Philip Selznick, "Law in Context" Revisited, 30 J.L. & Soc'y 177, 181-82 (2003) (arguing, in context of discussion of academic freedom, that law ought to recognize the "requirements and dynamics" of particular social institutions).

⁴⁹⁶ See generally 539 U.S. 194 (2003).

⁴⁹⁷ See *id.* at 209.

⁴⁹⁸ See *id.* at 203-06.

tion in determining the constitutionality of the law was whether libraries were left free to "fulfill their traditional missions."⁴⁹⁹ Accordingly, it held that libraries must be left with substantial discretion to exercise their professional role of collecting, storing, and distributing information.⁵⁰⁰ With this institution-specific approach in mind, the Court rejected any attempt to shoehorn the library's practices into some juridical category like the "public forum."⁵⁰¹

Similarly, Frederick Schauer and others have observed that the Court has sometimes set aside traditional modes of analysis such as public forum doctrine, when the government institution in question is fulfilling the role of a traditional First Amendment institution and is governed substantially by the norms and practices of that institution. Thus, in *Arkansas Educational Television Commission v. Forbes*,⁵⁰² the Court, in a seeming departure from traditional public forum analysis, based its decision that a federally funded local broadcaster could exclude a candidate from a debate on the fact that the broadcaster was acting as a professional journalist and exercising editorial discretion.⁵⁰³ Furthermore, in *National Endowment for the Arts v. Finley*,⁵⁰⁴ the Court held that principles of content neutrality were inapplicable to the government where it was acting as an arts funding body—an institutional role that requires and presupposes the need to make content distinctions.

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

⁴⁹⁹ *Id.* at 204.

⁵⁰⁰ *See id.*

⁵⁰¹ *See Am. Library Ass'n*, 539 U.S. at 204–07; *id.* at 205 (noting that public forum principles were "out of place in the context of this case"). *See generally* Sorenson, *supra* note 487 (noting similar difficulties in cases involving schools and colleges).

⁵⁰² 523 U.S. 666 (1998).

⁵⁰³ *See id.* at 672–74; *see also* Schauer, *supra* note 32, at 91 ("[I]n the end it is the institutional character of public broadcasting as broadcasting . . . that appears to have determined the outcome of the case.").

⁵⁰⁴ 524 U.S. 569 (1998).

sions.⁵⁰⁵ Faced with this dilemma, the Court allowed doctrine to give way to reality.⁵⁰⁶

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

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

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

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

⁵⁰⁵ *Am. Library Ass'n*, 539 U.S. at 204.

⁵⁰⁶ *Cf. Katyal*, *supra* note 19, at 563 ("In short, *Grutter* recognized a limited principle of comparative academic expertise—a principle that is built on how the Court treats other special institutions in American society.").

⁵⁰⁷ I am comforted by the fact that I am in distinguished company in this. See Schauer, *supra* note 32, at 118, 119–20 (suggesting that both he and the Supreme Court have yet to grapple fully with the implications of an institutionally sensitive approach to the First Amendment); Schauer, *supra* note 28, at 27 ("I have not here attempted to say very much about what an institutional approach to the First Amendment would look like . . ."); see also Post, *supra* note 486, at 1281 (recognizing that his advice that the Court shape its doctrine in ways that are respectful of particular social practices is "rather abstract advice" that "certainly will not assist the Court in settling any particular controversy"). Although this Article cannot offer an equivalent of Professor Post's sophisticated theoretical analysis, I hope it can advance some slightly more concrete suggestions about how to resolve particular controversies.

⁵⁰⁸ See generally, e.g., Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist's Privilege in an Infinite Universe of Publication*, 39 *HOUS. L. REV.* 1371 (2003).

and because (as discussed below) of the institutional norms that already serve to constrain them.⁵⁰⁹

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

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

⁵⁰⁹ For detailed discussion on this point, see Post, *supra* note 488, at 257–65.

⁵¹⁰ *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003) (emphasis added).

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

⁵¹² Cf. Post, *supra* note 486, at 1273 (“The most general objection to any single free speech principle is that speech makes possible a world of complex and diverse social practices precisely because it becomes integrated into and constitutive of these different practices; it therefore assumes the diverse constitutional values of these distinct practices.”).

institutions operate within the norms of those institutions, internalizing the culture of an institution as their own ethos and observing its rules because they wish to do so.⁵¹³ Thus, the most powerful constraints on the behavior of First Amendment institutions are the constraints that come from the institutions themselves. In judging the nature and scope of a First Amendment institution's liberty to act, the Court thus should begin, as it did in *American Library Ass'n*, by applying the norms and values of the institution itself. This is why the Court's deference in *Grutter* stemmed from the fact that the Law School was acting according to a legitimate "academic decision []."⁵¹⁴

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

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

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

⁵¹⁴ *Grutter*, 539 U.S. at 328.

⁵¹⁵ Cf. Schauer, *supra* note 28, at 5–6, 9–10, 13–14.

is the product of a constantly shifting, negotiated relationship between a variety of parties and values: the courts' own understanding of constitutional law, their understanding of the values and norms of institutions in the "real world" outside the courts, the institutions' own understanding of their norms and values, and the institutions' understanding of their role within the broader constitutional structure. In Professor Post's terms, it is a constant negotiation between constitutional law and constitutional culture.

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

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

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

I have already argued that the institution-sensitive approach to the First Amendment I have drawn from *Grutter* is echoed elsewhere in the Court's existing jurisprudence, if dimly and imperfectly. Here, I want to suggest briefly that it also finds echoes in a number of recent academic approaches to constitutional law. I will focus on two recent arguments that have been made for a more flexible, decentralized

approach to constitutional law that relies substantially on the subjects of constitutional law to shape their own norms and practices and yet that continues to ensure an important role for the courts.

The first such argument has been made by a number of scholars, prominently including, but not limited to, Professors Michael C. Dorf and Charles F. Sabel, who have advocated "a new model of institutionalized democratic deliberation that responds to the conditions of modern life."⁵¹⁶ Under this approach, which is only briefly sketched here, courts would accord a variety of local institutions substantial latitude "for experimental elaboration and revision [of their activities] to accommodate varied and changing circumstances."⁵¹⁷ At the same time, courts would monitor these institutions to ensure that they met basic standards of legality and did not infringe individual rights.⁵¹⁸ Perhaps most importantly, experimentalist institutions would provide information about the relative success or failure of their projects. This in turn would inform both other institutions engaged in similar practices and the courts themselves, gradually shaping the courts' own sense of the outer boundaries of permissible experimentation.⁵¹⁹ Thus, the courts would be cast in the role of coordinating authority. They would allow a web of local players to develop ways of addressing a particular policy issue—for example, nuclear safety, environmental regulation, or the treatment of drug criminals⁵²⁰—while establishing a rolling set of benchmarks for "best practices" that flow up from the local experimenters rather than down from a court or regulator.⁵²¹

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

⁵¹⁶ Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283 (1998); see Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 885 n.29 (2003) (citing examples of scholarship exploring these ideas); cf. Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 STAN. L. REV. 2113, 2125 n.50 (2003) (describing this approach as the "Columbia School" of thought). For a recent critical but supportive evaluation of democratic experimentalism, see generally Jamison E. Colburn, "Democratic Experimentalism": A Separation of Powers for Our Time?, 37 SUFFOLK U.L. REV. 287 (2004). See also William E. Scheuerman, *Democratic Experimentalism or Capitalist Synchronization? Critical Reflections on Directly-Deliberative Polyarchy*, 17 CAN. J.L. & JURIS. 101 (2004).

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

⁵¹⁸ See *id.* at 288.

⁵¹⁹ See *id.*

⁵²⁰ See, e.g., *id.* at 371–88; Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 831–36 (2000).

⁵²¹ See Colburn, *supra* note 516, at 289.

tends that here, too, courts can act in a way that "call[s] into existence a system of experimentation" rather than simply "laying down specific rules."⁵²² In these cases, particularly when a debate over constitutional rights and duties poses questions of judicial competence arising either from the moral complexity or the factual complexity of the situation, a court can decide not to decide too much.⁵²³ It instead can lay down a general standard that could be met in a variety of ways, and so "devolv[e] deliberate authority for fully specifying norms to local actors."⁵²⁴

For example, in the field of sexual harassment—a statutory regime, albeit one with broader, quasi-constitutional aspects and implications⁵²⁵—the Supreme Court has refused to lay down categorical rules governing workplace behavior. It instead has recognized the "constellation of surrounding circumstances, expectations, and relationships" in the workplace that render a concrete rule beyond the Court's competence.⁵²⁶ Accordingly, by establishing a safe harbor for employers that take reasonable care to avoid and to remedy harassment,⁵²⁷ the Court has cast lower courts "in the role of monitoring employers' monitoring of their workplaces,"⁵²⁸ while allowing employers to shape a variety of responses to the problem of workplace sexual harassment.⁵²⁹ In turn, we may expect a set of "best practices" to emerge as different policies are shown to be effective or ineffective in addressing the problem. Thus, rather than making itself a central rights-giver in this area, the Court has tasked local actors with the primary responsibility for crafting solutions while maintaining a monitoring and coordinating role.

A similar set of proposals is captured broadly by the overlapping concepts of "reflexive" or "autopoietic" law.⁵³⁰ In short, reflexive law is

⁵²² Dorf, *supra* note 516, at 961; see Dorf & Sabel, *supra* note 516, at 444–69.

⁵²³ Dorf, *supra* note 516, at 886 (noting that experimentalist courts resolve difficult problems by "giv[ing] deliberately incomplete answers"); cf. Horwitz, *supra* note 122, at 120–25 (arguing that courts, particularly in the early stages of a developing and uncertain area of constitutional law, should issue minimalist opinions rather than attempt to cover the doctrinal field too quickly). My argument in that article was based on concerns about relationships between courts, and did not discuss the role of extralegal actors.

⁵²⁴ Dorf, *supra* note 516, at 978.

⁵²⁵ See *id.* at 961.

⁵²⁶ *Oncle v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998).

⁵²⁷ See *Faragher v. City of Boca Raton*, 524 U.S. 775, 805 (1998).

⁵²⁸ Dorf, *supra* note 516, at 963.

⁵²⁹ See Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 480–89 (2001).

⁵³⁰ See generally JEAN L. COHEN, *REGULATING INTIMACY: A NEW LEGAL PARADIGM* (2002); GUNTHER TEUBNER, *LAW AS AN AUTOPOIETIC SYSTEM* (1993); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 LAW & SOC'Y REV. 256 (1983). For a related ap-

"regulation of regulation."⁵³¹ It advocates the abandonment, in at least some cases, of command-and-control regulation in favor of a regulatory model that "set[s] a general standard to govern self-regulation by the affected actors."⁵³² As noted above, the Court's approach to sexual harassment law is an example of a reflexive regulatory strategy.

Similarly and relatedly, autopoietic theories of law begin with the presumption that society consists of a series of subsystems, such as politics, education, and the legal system,⁵³³ each of which operates according to its own internal and self-referential norms, and each of which interacts only imperfectly with other subsystems.⁵³⁴ Given these boundary issues, the best way to regulate is not by direct regulation, but by "specifying procedures and basic organizational norms geared towards fostering self-regulation within distinct spheres of social activity."⁵³⁵ The autopoietic approach requires that local actors observe certain "basic procedural and organizational norms," but beyond that, it gives substantial autonomy to those actors to craft their own substantive programs.⁵³⁶ The goal, ultimately, is to find a way to encourage local actors to internalize basic norms of self-regulation within the norms of their own subsystems.⁵³⁷

The relationship between these approaches and the institution-sensitive approach to the First Amendment that I have argued forms *Grutter's* First Amendment should be clear by now.⁵³⁸ Each approach begins from a presumption that local actors and local institutions should (and, according to autopoietic theory, must) have an important role to play in shaping even fundamental public policies. Each proceeds from the assumption that imposing general rules from above is doomed to result in suboptimal decisions, and that there

proach, see generally PHILIPPE NONET & PHILIP SELZNICK, *LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW* (1978). In describing this complex approach, however briefly, I am all too aware that "its conceptual architecture is forbidding enough to discourage casual visitors." Hugh Baxter, *Autopoiesis and the "Relative Autonomy" of Law*, 19 *CARDOZO L. REV.* 1987, 2083 (1998). I acknowledge the warning, but nevertheless will treat reflexive law and autopoiesis as substantially overlapping approaches, notwithstanding important differences between the two theories that are not of concern in this Article.

⁵³¹ Michael C. Dorf, *The Domain of Reflexive Law*, 103 *COLUM. L. REV.* 384, 391 (2003).

⁵³² *Id.* at 393.

⁵³³ See Baxter, *supra* note 530, at 1993-94.

⁵³⁴ See Schauer, *supra* note 28, at 5.

⁵³⁵ William E. Scheuerman, *Reflexive Law and the Challenges of Globalization*, 9 *J. POL. PHIL.* 81, 84 (2001).

⁵³⁶ *Id.*

⁵³⁷ See *id.*

⁵³⁸ The relationship between democratic experimentalism and reflexive law should be evident by now. See Dorf, *supra* note 531, at 386 (acknowledging the similarity).

should instead be a symbiotic, evolving relationship between the norms of local actors and the norms adopted by central regulatory authorities. Each also assumes that the best way to achieve this goal is to cast the central regulatory authority—here, the courts—in a coordinating role, in which it polices the outer boundaries of acceptable practice while allowing local actors substantially to craft their own policies. In turn, each actor—local and central—will learn from and influence the other.

There are important differences, of course. Crucial to Professor Dorf's experimentalist project, for instance, is the demand that local institutions "justify the deference they demand by producing a record of performance that can withstand comparative assessments."⁵³⁹ By contrast, the institution-sensitive approach to the First Amendment that I have advocated nowhere expressly provides for feedback to the courts or to similar institutions. Its central feature is deference *tout court*, without any formal program for monitoring or benchmarking. Deference is not, in and of itself, experimentation, nor is it necessarily reflexive in nature.

One should not, however, make too much of the distinction. For as I have argued, and as Professor Post has convincingly shown,⁵⁴⁰ the boundaries between constitutional law and constitutional culture as understood outside the courts already are constantly blurred. Although the institution-sensitive reading of *Grutter* described in this Part relies primarily on deference to First Amendment institutions, it is to be expected in the nature of things that those institutions will incorporate basic constitutional norms into their own understanding of themselves as functioning institutions. The courts, in turn, will incorporate their understanding of the shifting nature of the cultural norms and practices of First Amendment institutions into constitutional law as they police the shifting boundaries of constitutionally permissible deference. Indeed, the requirement that courts, in setting and policing those boundaries, pay attention to both basic constitutional norms and basic institutional practices suggests a fundamentally experimentalist, or reflexive, approach. This approach is one in which the courts lay down a general procedural requirement—for example, is this a legitimate *academic* decision,⁵⁴¹ or is this task properly within the role of a library,⁵⁴² or is this an exercise of professional

⁵³⁹ Dorf, *supra* note 516, at 981; see Colburn, *supra* note 516, at 289.

⁵⁴⁰ See generally Post, *supra* note 306.

⁵⁴¹ See *Grutter*, 539 U.S. at 329.

⁵⁴² See *Am. Library Ass'n*, 539 U.S. at 203–04.

journalistic discretion?⁵⁴³—while permitting the institutions substantial latitude to operate within these minimal standards.

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

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

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

This Part has argued for a reading of *Grutter's* First Amendment that focuses on the importance of taking so-called First Amendment institutions seriously. It has suggested that courts should recognize the important role that First Amendment institutions play as loci for, and definers of, public discourse. It has advocated that courts grant these institutions substantial deference to govern themselves, subject to generous constitutional limits and to procedural and substantive requirements drawn from the norms and practices of the institutions

⁵⁴³ See *Forbes*, 523 U.S. at 666.

⁵⁴⁴ Cf. *Dorf*, *supra* note 516, at 883–84 (noting that laws are intentionally vague because of the impossibility of foreseeing every possible contingency). See generally *Post*, *supra* note 486 (arguing that the Supreme Court must pay attention to social realities).

themselves. Finally, it has noted a close kinship between this reading of *Grutter* and similar projects aiming to encourage the courts to take a more generous role in allowing local actors to experiment for themselves in shaping their own practices and in working toward the resolution of pressing social issues.

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

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

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

Second, this approach is not necessarily a charter of rights for institutions—even institutions, such as the press, that manage to find special recognition by name in the First Amendment. Nor is it an opportunity for the Court simply to surrender its own judgment absolutely to the "complex judgments" of particular favored institutions under the

⁵⁴⁵ Byrne, *supra* note 17, at 320.

First Amendment. It is, in short, neither a brief in favor of absolute license for First Amendment institutions, nor an argument in favor of judicial abdication in favor of these institutions. To the contrary, in some instances an institution-sensitive approach to the First Amendment may *limit* the freedom to act of First Amendment institutions. And in some cases, an institutional approach to the First Amendment may impose *greater* duties on the courts that oversee them.

As is evident in *Grutter* itself, an institution-sensitive approach to the First Amendment may favor granting greater rights to those institutions in some cases. For example, under the educational autonomy reading of *Grutter*, which is consistent with the argument in this Part, universities may be permitted greater latitude than other institutions to craft and to enforce campus speech codes. In other cases, the special social obligations of a particular institution may give it *less* latitude to speak than a private individual might possess.⁵⁴⁶ No one demands that the proverbial soap-box speaker limit himself to a particular subject. No university department should hesitate, however, to require a university lecturer to confine himself or herself to the subject at hand and to refrain from taking a chemistry lecture as an occasion to talk about neoliberalism. A court would hesitate long and hard before enforcing a seemingly gratuitous "contract" without clear promises or consideration on either side, but it might be more willing to find a legally enforceable contract where the agreement takes place within the journalist's professional norm of honoring the confidentiality of sources.⁵⁴⁷ In short, if the gift of taking First Amendment institutions seriously is that those institutions have substantial latitude to live by their own norms, the cost of taking them seriously is that they may be held accountable for failing to live up to those norms.

The posture of deference that I have described above thus does not utterly liberate the courts from the obligation to give cases involving First Amendment institutions serious consideration. As the democratic experimentalists have observed, liberty to experiment means little without careful monitoring. If the courts are to defer to First Amendment institutions based substantially on their compliance with their own norms, values, and practices, they will have to educate themselves far more carefully about the shifting content of those norms, values, and practices. In each case, as Frederick Schauer observes, the Court will be required to "inquire much more deeply into

⁵⁴⁶ Schauer, *supra* note 32, at 116 n.149.

⁵⁴⁷ See generally *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

the specific character of the institution, and the function it serves, than it has [so far] been willing to do."⁵⁴⁸

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

There are still further problems, less important for situations like *Grutter* that involve admissions decisions, but with great implications for future academic freedom cases. *Grutter* contains no discussion about the norms of professional responsibility that play such a large role in discussions about the scope of *professional* academic freedom.⁵⁴⁹ It is difficult to defer to an educational institution on the basis that it is acting according to a legitimate academic decision without some understanding of precisely what constitutes a legitimate academic decision. What if the decision to engage in seemingly preferential admissions had been arrived at by a professional university administrator without faculty input? What if it had been imposed on the university administration by the board of governors? What if it was a result of coercion by some outside group, such as the AAUP or the AALS? None of these questions are answered in the case.

Nor does *Grutter* discuss the implications of an institution-specific approach to academic freedom for other constituents in campus life—most notably, professors and students. As the discussion above indicates, that omission leaves room for a variety of potential implications for student speech, admissions policies, and other matters. What

⁵⁴⁸ Schauer, *supra* note 32, at 116.

⁵⁴⁹ See Metzger, *supra* note 81, at 13 (describing the "notion that rights entail responsibilities, that academic freedom should be wedded to conscientious conduct, and all the other classic maxims of professionalism" in the academy).

Grutter means for a university's freedom to shape its policies with respect to religious speech, hate speech, on-campus recruiting, and other issues has much to do not only with the university administration, but also with the other stakeholders involved. If universities are a special creature of the First Amendment, that still begs the questions who gets to be counted as a member of the university community, and what it means to be a member of that community. These disputes between component parts of the university community—tenure disputes, disciplinary appeals, disputes over campus rules and regulations—are precisely the sorts of academic freedom issues that arise most often in the courts. Yet *Grutter* has nothing to say about them. Nor, given the context of the case, does it fully acknowledge that, under *professional* understandings of academic freedom, those rights carry significant responsibilities.⁵⁵⁰ Under an institution-sensitive approach to the First Amendment, a professor, in fact, might have far fewer speech rights than other citizens.⁵⁵¹

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

In any event, whether the Court continues to stick to its generally neutral approach to particular speakers under the First Amendment or begins to pay more careful attention to speech acts by particular institutions, *Grutter's* significance as a First Amendment decision should be clear. If it is true that "American free speech doctrine has never been comfortable distinguishing among institutions,"⁵⁵³ then *Grutter* represents a rare exception. Whether it is in fact a forerunner of similar approaches where other institutions are concerned, or simply the exception that proves the rule, remains to be seen.

One last question must be addressed. Thus far, I have bracketed the distinction between public universities, such as the University of Michigan, and private universities. There is, however, a crucial distinc-

⁵⁵⁰ See generally Metzger, *Profession and Constitution*, *supra* note 46; Metzger, *supra* note 81.

⁵⁵¹ See generally Rabban, *Faculty Autonomy*, *supra* note 46.

⁵⁵² Guinier, *supra* note 411, at 120.

⁵⁵³ Schauer, *supra* note 32, at 84.

tion between them: each lies on a different side of the public/private divide. Indeed, *Grutter* took on its constitutional character precisely because it involved a public university. It is widely recognized that, under current constitutional doctrine, private universities enjoy a far broader scope of freedom than public universities.⁵⁵⁴ What role, if any, should this distinction play in taking First Amendment institutions seriously? How important is it?

For a number of reasons, I want to suggest that the distinction is less important than it may seem initially. First, the legal landscape is far less clear in drawing a firm line between public and private universities than one might assume based on standard state action doctrine. This is so even if one sets aside arguments that private universities are entitled to be viewed as state actors because they fulfill a public function, receive significant public funding, or are intertwined with the affairs of the government.⁵⁵⁵ It remains true even if one ignores the web of quasi-constitutional civil rights laws and other statutory requirements that may place public and private universities under many of the same obligations.⁵⁵⁶ The reason the public-private distinction may be less important in this context stems from state law, not federal state action doctrine.

State law provides two reasons why it may make less sense to treat private universities as utterly distinct from public universities in their obligations to observe norms of free speech. First, a number of courts have held that private universities must honor at least some free speech norms under *state* constitutions or statutes. Thus, in the seminal 1980 case of *State v. Schmid*,⁵⁵⁷ the New Jersey Supreme Court reversed the conviction of a non-student for distributing leaflets without permission on the campus of Princeton University. To support its holding, the court relied on a then-recent U.S. Supreme Court case acknowledging that state constitutions could sweep more broadly in protecting free speech, even in the absence of state action.⁵⁵⁸ Analo-

⁵⁵⁴ See, e.g., Byrne, *supra* note 17, at 299-300; see also Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third "Essential Freedom,"* 45 STAN. L. REV. 1835, 1836-37 (1993); Evan G.S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1381 (1990). See generally HENRY J. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* (1969).

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

⁵⁵⁶ See generally Ellen E. Lange, Note, *Racist Speech on Campus: A Title VII Solution to a First Amendment Problem*, 64 S. CAL. L. REV. 105 (1990).

⁵⁵⁷ 423 A.2d 615, 616, 633 (N.J. 1980).

⁵⁵⁸ See *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 80-81, 85-88 (1980).

gizing to this precedent, the court held that the state's constitutional protection of free speech could reach "unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property."⁵⁵⁹

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

If this discussion suggests that *students* may not be entirely differently situated depending on whether they attend a public or private institution, what of the institutions themselves? If they are not arms of the state, why should they be in the same position as public universities? Here, too, the state constitutional landscape goes some of the way toward narrowing the gap between public and private universities. Most state constitutions grant their public universities some degree of independent constitutional status.⁵⁶³ Michigan, to take an example close to the heart of *Grutter*, states in its constitution that the Board of Regents of the University of Michigan has "general supervision of the institution and the control and direction of all expenditures from the

⁵⁵⁹ See *Schmid*, 423 A.2d at 628. For commentary, see Finkin, *supra* note 143; Comment, *Testing the Limits of Academic Freedom*, 130 U. PA. L. REV. 712, 712-18 (1982).

⁵⁶⁰ See 1 JENNIFER FRIESEN, *STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES* § 9-3, at 9-16 to 9-22 (3d ed. 2000).

⁵⁶¹ See *Commonwealth v. Tate*, 432 A.2d 1382, 1387-91 (Pa. 1981) (applying state free speech provision to Muhlenberg College, a private institution).

⁵⁶² See, e.g., CAL. EDUC. CODE § 94367 (West 2002 & Supp. 2005); Arthur L. Coleman & Jonathan R. Alger, *Beyond Speech Codes: Harmonizing Rights of Free Speech and Freedom from Discrimination on University Campuses*, 23 J.C. & U.L. 91, 93 n.6 (1996). Whether such statutes are themselves constitutional, however, is an open question. See Byrne, *supra* note 20, at 174 n.171.

⁵⁶³ See, e.g., John A. Beach, *The Management and Governance of Academic Institutions*, 12 J.C. & U.L. 301, 310 n.34 (1985); Joseph Beckham, *Reasonable Independence for Public Education: Legal Implications of Constitutionally Autonomous Status*, 7 J.L. & EDUC. 177, 179-82 (1978); Kathy L. Wyer, Comment & Note, *A Most Dangerous Experiment? University Autonomy, Academic Freedom, and the Concealed-Weapons Controversy at the University of Utah*, 2003 UTAH L. REV. 983, 1001 & nn.88-90.

institution's funds."⁵⁶⁴ This provision has been interpreted as granting the university a general right against state interference in academic affairs.⁵⁶⁵ Thus, public universities are already in an odd position with respect to state action doctrine—part of the state for some constitutional purposes, but separate from it for others.⁵⁶⁶ As Professor Byrne notes, "[a] state university is a unique state entity in that it enjoys federal constitutional rights against the state itself."⁵⁶⁷

These unusual features of state law suggest that the public-private distinction is in some ways less important than outside observers might assume. I want to suggest, however, two additional reasons, linked less to existing law than to the potential of *Grutter's* First Amendment, why the public-private distinction does not present a significant factor in taking First Amendment institutions seriously, at least with respect to universities. First, concerns about the public-private distinction in the university context normally concern the opposite problem. They involve questions of whether stakeholders *within* the private university community, such as professors or students, enjoy fewer rights than do their counterparts at public universities.⁵⁶⁸ Here, however, I have suggested that *Grutter's* reading of the First Amendment guarantees academic institutions *as a whole* a substantial right of autonomy from governmental interference. Thus, *Grutter's* First Amendment does not require us to transport First Amendment norms to the private sector, a phenomenon whose problems were so richly

⁵⁶⁴ MICH. CONST. art. VIII, § 5. For discussion of the effect this fact might have had on the *Grutter* litigation, see Evan Caminker, *A Glimpse Behind and Beyond Grutter*, 48 ST. LOUIS U. L.J. 889, 892–93 (2004).

⁵⁶⁵ See Byrne, *supra* note 17, at 327.

⁵⁶⁶ In some senses, public universities thus resemble quasi-autonomous nongovernmental institutions, or quangos. See, e.g., Lili Levi, *Professionalism, Oversight, and Institution-Balancing: The Supreme Court's "Second Best" Plan for Political Debate on Television*, 18 YALE J. ON REG. 315, 363–79 (2001); Craig Alford Masback, *Independence vs. Accountability: Correcting the Structural Defects in the National Endowment for the Arts*, 10 YALE L. & POL'Y REV. 177, 183–92 (1992); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1257–64 (1999). See generally SANDRA VAN THIEL, QUANGOS: TRENDS, CAUSES AND CONSEQUENCES (2001). The implications of this similarity are discussed in *infra* notes 570–573 and accompanying text.

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

⁵⁶⁸ See, e.g., Olivas, *supra* note 554, at 1836–37.

discussed by Julian Eule,⁵⁶⁹ but to incorporate private sector norms into the First Amendment. What implications this trend might have for student and faculty rights are, as I noted above, unclear at this point. For now, what is clear is that taking First Amendment institutions seriously demands giving public universities *more* freedom from government interference, and so brings the legal status of private and public universities closer together.

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

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

In short, when we take First Amendment institutions seriously, it is less important to ask whether a particular institution is public or private. Instead, we should be asking whether a particular institution, be it public or private, is "the university," or "the newspaper," or some other category of speaker.⁵⁷² Regardless of their public or private

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

⁵⁷⁰ See Schauer, *supra* note 32, at 116.

⁵⁷¹ See *Forbes*, 523 U.S. at 672–75.

⁵⁷² See Philip Selznick, "Law in Context" Revisited, 30 J.L. Soc'y 177, 181–82 (2003) (arguing, in context of discussion of academic freedom, that law ought to recognize the "requirements and dynamics" of particular social institutions).

status, these institutions operate "within a specialized professional culture" whose features are more salient to understanding their role and function than the source of their funds.⁵⁷³

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

CONCLUSION

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

This Article has offered three potential readings of *Grutter's* First Amendment implications. First, the case may be read simply as counseling a broad degree of deference to academic decisions made by educational institutions. This reading says little about the implications

⁵⁷³ Randall P. Bezanson, *The Quality of First Amendment Speech*, 20 HASTINGS COMM. & ENT. L.J. 275, 377 (1998); see Bezanson & Buss, *supra* note 311, at 1457-62; Cole, *supra* note 400, at 717-47; Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 164-76 (1996); Tushnet, *supra* note 566, at 1257-64.

⁵⁷⁴ See Post, *supra* note 486, at 1273. Professor Post writes that

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

Id.

⁵⁷⁵ See generally Finkin, *supra* note 143.

of the case beyond that narrow set of circumstances. Even within this confined field, however, I have suggested that an institutional autonomy approach to academic freedom could question or upset a number of settled First Amendment cases, and point toward surprising results in a number of cases in the future. Second, *Grutter* might be read as advancing a particular *substantive* vision of education as a democratic good, and perhaps by extension a particular substantive vision of the First Amendment as a whole. This reading is fraught with even greater problems. It sits uneasily with the Court's approach elsewhere in First Amendment jurisprudence, and it fails to acknowledge the difficulty in enshrining in the First Amendment any particular vision of education or academic freedom when those values are deeply contested outside the courts, in the very communities at issue.

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

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

serves consideration because the limits and implications of that approach are still unclear.

I close with a simple plea. *Grutter* will obviously have its day under the microscope of the Fourteenth Amendment scholars. It would be a great shame, however, if First Amendment scholars, casebook editors, treatise writers, and other gatekeepers of the First Amendment canon give *Grutter* the same treatment they have accorded *Bakke* and relegate it to the footnotes, or ignore it altogether. *Grutter* has not yet earned its place in the First Amendment canon, but it is surely knocking at the door.