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Erica Goldberg

Kelly Sarabyn

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MEASURING A “DEGREE OF DEFERENCE”: INSTITUTIONAL ACADEMIC FREEDOM IN A POST-GRUTTER WORLD

Erica Goldberg* and Kelly Sarabyn**

INTRODUCTION

Academic freedom, as a constitutional right, has long suffered from a lack of consensus over its scope and application. Although academic freedom is generally conceptualized as insulating certain aspects of the academy from government intrusion, the courts are as divided as scholars on the issue of who may invoke the right, and in what circumstances.

Some scholars and courts argue that professors and students have constitutional rights to academic freedom, but universities do not. They reason that constitutional academic freedom is a “special concern of the First Amendment,”¹ and the First Amendment normally functions to protect individuals against state interference, not to protect state actors from interference by other state actors. They conclude, therefore, that public universities, which are established by the state,² cannot seek refuge in the First Amendment.³


1. Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978) (stating that “Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”).

2. For the purpose of this article, “public universities” is defined as universities established by the state, at least partially supported by state taxes, and required to abide by the federal Constitution. See, e.g., Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 822 (1995) (noting that “[t]he University of Virginia, an instrumentality of the Commonwealth for which it is
Others espouse the opposite view: academic institutions, but not individual faculty members or students, possess a constitutional academic freedom right.4 Still others believe that a constitutional right to academic freedom does not exist at all. They recognize that the ideal of academic freedom is championed by the Supreme Court, which has noted that “[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”5 They believe proclamations such as these, however,

4. See, e.g., Borden v. Sch. Dist., 523 F.3d 153, 172 (3d Cir. 2008) (stating the right of academic freedom, if valid, belongs entirely to the school, not the individual teacher); Brown v. Armenti, 247 F.3d 69, 74-75 (3d Cir. 2001); Urofsky v. Gilmore, 216 F.3d 401, 414-15 (4th Cir. 2000). See also Paul Horwitz, Universities as First Amendment Institutions: Some Easy Answers and Hard Questions, 54 UCLA L. REV. 1497 (2007) [hereinafter Horwitz, Universities as First Amendment Institutions]. Horwitz advocates an “institutional approach” to the First Amendment that would afford a university almost complete autonomy to operate in accordance with its self-defined mission. Id. at 1500-01. Horwitz explains that this autonomy is not entirely coterminous with academic freedom, but he supports his approach with his interpretation of the Supreme Court’s application of constitutional academic freedom. Id.

5. See Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (holding that state legislature’s attempts to force a professor it deemed “subversive” to testify about the contents of his lectures and the organizations to which he belonged “was an invasion of petitioner’s liberties in the areas of academic freedom and political expression”). See also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) (recognizing the importance of “autonomous decisionmaking by the academy”); Keyishian v. Bd. of Regents, 385 U.S. 588, 603 (1967) (stating “[t]he 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.”) (internal quotation marks and alterations omitted); Sweezy, 354 U.S. at 234, 263 (Frankfurter, J., concurring) (recognizing “four essential freedoms of a university ‘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[.]’”)
have never independently affected the outcome of a decision and are ultimately only rhetorical dicta. According to this view, academic freedom is only a professional right, not a legal right, except insofar as it is codified in employment and student contracts.

The wide divergence in opinion on the constitutional right of academic freedom has occurred in no small part because the Supreme Court has, for half a century, deployed the right in an opaque and vague manner, repeatedly declaring its importance while failing to define it clearly or definitively. Then came Grutter v. Bollinger.

See Urofsky, 216 F.3d at 411 ("It is true, of course, that homage has been paid to the ideal of academic freedom in a number of Supreme Court opinions, often with reference to the First Amendment. Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom.") (citations omitted). See also J. Peter Byrne, The Threat to Constitutional Academic Freedom, 31 J. C. & U. L. 79, 118 n.269 (2004) ("[A]cademic freedom cases often employ stirring rhetoric without deciding much.") [hereinafter Byrne, Threat]. Byrne argues in favor of constitutional academic freedom and notes that "the Grutter decision differs from all prior academic freedom decisions in using modest rhetoric to enlarge the substance of academic freedom rather than using fiery rhetoric to make a narrow decision." Id. at 118.

Academic freedom as a "professional" ideal is well established, codified into principles, and has been chiefly monitored by the American Association of University Professors (AAUP). See Matthew W. Finkin and Robert C. Post, FOR THE COMMON GOOD: PRINCIPLES OF AMERICAN ACADEMIC FREEDOM (Yale University Press 2009). The AAUP has adjudicated individual cases of alleged violations of professional academic freedom since its founding in 1915. Though the AAUP has no legal authority over universities, its censure of administrations serves as a somewhat effective public reprimand for institutions who seek to disregard academic freedom. The AAUP's "case law" provides a thorough picture of the outlines of academic freedom as a professional right. The legal right, though clearly related to the professional right, need not track its contours. See generally Rebecca Gose Lynch, Comment, Pawns of the State or Priests of Democracy? Analyzing Professors' Academic Freedom Rights Within the State's Managerial Realm, 91 CAL. L. REV. 1061 (2003) (discussing the distinctions between the professional and constitutional conceptions of academic freedom).


The Supreme Court's invocation of academic freedom in *Grutter* unambiguously declared that the courts must give a “degree of deference to a university's academic decisions, within constitutionally prescribed limits." This declaration bolstered the institutional view of academic freedom. However, the ambiguity of this language, perhaps stemming from the Court's particular concern with preserving the University of Michigan Law School's affirmative action program, resurrected many of the same questions about academic freedom under a different framework. Now scholars and courts must contend with the question of whether this right can be invoked by the university against state action, or whether it can be invoked only as part of the balancing test when a public university asserts an interest in overriding another party's constitutional rights, as was the case in *Grutter*. Scholars and courts must further determine the boundaries of the "constitutionally prescribed limits" circumscribing the right, and navigate the interactions of institutional academic freedom with the academic freedom rights of students and professors.

Although important and thoughtful articles have been written on the subject of institutional academic freedom since *Grutter*, scholars often overlook both the differences

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10. *Id.* at 328.


*It is one thing to defer to a state university's judgment in deciding who may attend that university . . . in determining whether the university has run the gauntlet of defending presumptively unconstitutional racial classifications. It is quite another to say that the First Amendment in general and academic freedom in particular prohibit a State from eliminating racial preferences.* *Id.*

According to one scholar, *Grutter* did not "propose that the Law School had a First Amendment right to autonomy (or academic freedom) that off-set in any way Ms. Grutter's equal protection claim; the Court simply concluded—without engaging in any reported 'balancing'—that the various state or governmental interests implicated in the School's admissions program were more important than that equal protection right." *See* Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1, 55 (2007).

between public and private universities, and the complicated constitutional position of the public university, which can violate students' and professors' rights, yet can also assert its own rights against other state actors. In addition, the conflict between the institutional academic freedom rights of the university and the individual academic freedom rights of its faculty remains. Finally, there has been no post-Grutter examination of how the lower courts have applied institutional academic freedom.

The lower courts are currently bereft of a proper framework to understand institutional academic freedom. If courts are to honor Grutter's words and treat universities with some "degree of deference," however, they must determine when a university decision deserves deference and how to apply that deference. They must avoid overstating that deference, like Professor Horwitz, who argues that a university, as a "First Amendment institution," should be


13. Professor Judith Areen proposes a potentially workable approach to academic freedom, arguing that the right "is central to the functioning and governance of colleges and universities." Judith Areen, Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance, 97 GEO. L.J. 945, 947 (2009). She creates constitutional doctrine based on a conception of the public university as "educator," in addition to its sovereign and employer roles. See id. at 947-48 (exploring the "governance dimension" to institutional academic freedom, and examining situations where both faculty and administrators make governing decisions). However, Areen limits her approach to the context of professors' speech rights. Her proposals are intended as a way to avoid creating a sui generis exception to the public-employee speech doctrine of Garcetti v. Ceballos, 547 U.S. 10 (2006), which gives the government wide latitude in regulating employees' speech. Id. at 946-47 ("This Article responds to the invitation in Garcetti to identify constitutional interests that support academic freedom and that are not fully accounted for by public-employee speech jurisprudence."). As a result, Areen addresses only the academic-freedom rights at state universities, and does not address the many different postures in which institutional academic freedom can be invoked.

14. See Schauer, supra note 12, at 919 ("[T]here is no avoiding the conflict between a view of academic freedom that views individual academics as its primary and direct beneficiaries, and a contrasting view that locates the right in academic institutions, even if doing so limits the individual rights of the employees of those institutions."). See also Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226 n.12 (1985) ("Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.") (citations omitted).

15. Grutter, 539 U.S. at 328.
given considerable latitude to promulgate policies that would otherwise violate the Constitution, so long as the universities act in accordance with their "academic mission." Horwitz's caveat that universities adhere to their own mission does not constrain universities in any meaningful way because, according to Horwitz, a university may define its own academic mission and allow that mission to evolve over time.

Horwitz, like many scholars who have recently addressed academic freedom, bases his argument for expansive institutional autonomy on Grutter. However, Grutter, which upheld the University of Michigan Law School's race-conscious admissions policy against an equal protection challenge, did not permit the law school to determine its own educational mission. Instead, it held that the law school's goal of "student body diversity" was a compelling interest under the Fourteenth Amendment because of the Court's own judgment that student body diversity is part of a law school's proper educational mission. It then deferred—to a degree—to the law school's chosen method of achieving student body diversity (in this case, a race-sensitive admissions process).

In this article, we begin to delineate the contours of, and practical considerations involved in applying, the constitutional concept of "academic freedom" to universities post-Grutter. We believe that courts should apply academic freedom only to legitimately academic, ideologically neutral decisions of a university, and should afford different amounts

16. Horwitz, Universities as First Amendment Institutions, supra note 4, at 1519.
17. Id. at 1547. Horwitz contends that "rather than imposing a static conception of academic freedom and the mission of the university when defining the scope of constitutional educational autonomy for universities," courts "should defer substantially to universities' own sense of what their academic mission requires, and their own sense of what academic freedom entails." Id. at 1547–48.
18. See also J. Peter Byrne, What Next for Academic Freedom?: Constitutional Academic Freedom After Grutter: Getting Real About the "Four Freedoms" of a University, 77 U. COLO. L. REV. 929 (2006) (arguing that Grutter represents "a high-water mark for the recognition and influence of constitutional academic freedom" and applying Grutter's holding to several fact patterns) [hereinafter Byrne, What Next for Academic Freedom?].
19. See Grutter, 539 U.S. at 329 ("Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission.").
of deference based on how much academic expertise the decision required and whose rights the decision places at stake. We begin our article in Part I by illuminating the ambiguities in *Grutter* and analyzing the courts’ approaches to institutional academic freedom since *Grutter*. In Part II, we argue that courts must establish threshold requirements before applying constitutional academic freedom, which should be implicated only when a university’s actions serve a “legitimate academic purpose,” and we define which purposes are legitimately academic. In Part III, we explain why universities may not exercise their institutional autonomy in ways that trample upon the rights of students and professors. Finally, in Part IV, we construct a test for courts to use that applies different amounts of deference to a university’s implementation of its legitimate academic purpose depending on who is making the academic decision and in what context academic freedom is being invoked.

It is important to note that this article concerns academic freedom as a constitutional right. Universities may adhere to different understandings of professional academic freedom, and act ideologically as long as they do not violate their obligations under state, federal, or constitutional law. It is only when universities invoke the concept of constitutional academic freedom to receive deference or special protection from the courts that their decisions must be ideologically neutral and academic in nature.

In addition, private universities, who are not subject to the constitutional obligations of public universities, have more leeway to experiment with different understandings of the purpose and role of the university. They may, as Horwitz wishes, “let a thousand flowers bloom” in discovering their own academic goals, what institutional ideals they wish to promote, and how to best fulfill those goals. However, this experimentation must operate outside the scope of constitutional academic freedom; neither private nor public colleges should be afforded *Grutter*’s “degree of deference.”

20. See discussion infra Part I.
21. See discussion infra Part II.
22. See discussion infra Part III.
23. See discussion infra Part IV.
unless they are acting with a "legitimate academic purpose."

I. GRUTTER AND ITS APPLICATION BY THE LOWER COURTS

A. Grutter’s Institutional Deference

Because so many articles have thoroughly detailed the Supreme Court’s invocation of academic freedom prior to Grutter, we will not trace its history here. We begin our analysis with Grutter’s application of institutional academic freedom and then address the aftermath of that decision.

In Grutter, a prospective student who was denied admission by the University of Michigan Law School brought a Fourteenth Amendment equal protection challenge to the school’s use of race in its admissions decisions. In its analysis, the Court applied the general equal protection doctrine, which requires that all "governmental action based on race . . . be subjected to detailed judicial inquiry to ensure that the personal right to equal protection of the laws has not been infringed." The Court analyzed the Law School’s admissions policy under a strict-scrutiny framework that allows the use of race only when it is justified by a “compelling government interest.”

In upholding the Law School’s admissions policy, the Grutter court explicitly referenced institutional “academic freedom.” The Court noted that “universities occupy a special niche in our constitutional tradition,” and cited Regents of the University of California v. Bakke for the idea that there is a “constitutional dimension, grounded in the First Amendment, of educational autonomy.” Quoting and expanding upon Justice Powell’s opinion in Bakke, the

25. See, e.g., Areen, supra note 13, at 967–85; Hiers, supra note 11, at 6–56; Van Alstyne, supra note 8; J. Peter Byrne, Academic Freedom: A “Special Concern of the First Amendment,” 99 YALE L.J. 251, 312–27 (1989) [hereinafter Byrne, Academic Freedom]; see also infra Part II.B for an analysis of some of the pre-Grutter academic freedom decisions. For a historical overview of the differences between professional academic freedom and constitutional academic freedom, see Walter Metzger, Profession and Constitution: Two Definitions of Academic Freedom in America, 66 TEX. L. REV. 1265 (1987–1988).


27. Id. at 326 (quoting Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995)).

28. Id. at 327.


Grutter opinion continued:

"The freedom of a university to make its own judgments as to education includes the selection of its student body." From this premise, Justice Powell reasoned that by claiming "the right to select those students who will contribute the most to the 'robust exchange of ideas','" a university "seek[s] to achieve a goal that is of paramount importance in the fulfillment of its mission." Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that "good faith" on the part of a university is "presumed" absent "a showing to the contrary."31

Grutter therefore legitimized the university's right to select students who would best promote a robust exchange of ideas because dissemination of ideas is a proper part of the university's institutional mission.32 Robust exchanges of ideas provide educational benefits because they are, according to the Court, "enlightening and interesting" and capable of dispelling stereotypes.33

The Grutter Court expounded upon its initial analysis in a confusing fashion, however, writing:

Today, we hold that the Law School has a compelling interest in attaining a diverse student body.

The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their amici. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.34

31. Id. (citations omitted) (emphases added).
32. According to the Court, "classroom discussion is livelier, more spirited, and simply more enlightening and interesting when the students have the greatest possible variety of backgrounds." Id. at 330.
33. Id.
34. Id. at 328.
This language presents internal ambiguities that, unless clarified, will stymie lower courts or allow judges to apply Grutter in an unprincipled manner. For instance, if the Court has chosen to “defer” to the Law School’s educational judgment that diversity is essential to its institutional mission, then why does that not render the scrutiny “less strict”? And if the Court is deferring to a university’s understanding of how to fulfill its proper educational goals, why must the assessment that diversity yields educational benefits be “substantiated” by amici? Finally, if “a degree of deference” is given to a university’s admissions policy, how does that accord with requiring that university decisions conform to “constitutionally prescribed limits”? The Court never clearly explains how much deference the Law School is given, and to what portion of the constitutional analysis the deference attaches.

The best interpretation of this passage is that the Court first determined that the Law School’s educational goals, including promoting lively discussion and greater comprehension of students with various backgrounds, were legitimate academic goals and were in keeping with the proper mission of the university. The Court then deferred somewhat to the Law School’s method of “assembling a class that is both exceptionally academically qualified and broadly diverse,” including designing an admissions policy that considers prospective students’ race as one factor among many, in order to fulfill these educational goals. The Court appreciated that “[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.” The Court held that the Law School’s race-conscious admissions policy was based on less objectionable decisions influenced by race, and in so doing deferred to the university’s “good faith” belief that its admissions policy promotes the Law School’s legitimate academic mission.

35. Id. at 329.
37. Id. at 329.
38. Without commenting on the merits of the Fourteenth Amendment equal
In dissent, Justice Kennedy objected to this analysis. He argued that the Court should defer to an institution's own understanding of its educational mission, and then scrupulously ensure that the university's method of fulfilling that mission is truly effective. This contrasts directly with the *Grutter* majority, which seemed to be deciding for itself a university's proper educational mission, and then deferring to the Law School's view that student body diversity accomplishes that mission and yields the educational benefits ratified by the Court. According to Kennedy:

Justice Powell's approval of the use of race in university admissions [in *Bakke*] reflected a tradition, grounded in the First Amendment, of acknowledging a university's conception of its educational mission. Our precedents provide a basis for the Court's acceptance of a university's considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence.

It is unfortunate, however, that the Court takes the first part of Justice Powell's rule but abandons the second.

Kennedy's conception of academic freedom misconstrues protection claim, we believe that *Grutter* s application of its own academic-freedom standard may have given the University of Michigan Law School too much deference. The Court, in deferring to the school's stated goal of achieving student body diversity through enrolling a "critical mass" of students of certain racial and ethnic minorities, may have overlooked critical and significant evidence that the law school's "critical mass" rationale was a pretext for achieving "racial balancing." See id. at 381 (Rehnquist, C.J., dissenting). As Chief Justice Rehnquist's dissent notes, "[i]f the Law School is admitting between 91 and 108 African-Americans in order to achieve 'critical mass,' thereby preventing African-American students from feeling 'isolated or like spokespersons for their race,' one would think that a number of the same order of magnitude would be necessary to accomplish the same purpose for Hispanics and Native Americans." *Id.* Although *Grutter* may not have followed its own dictates of presuming good faith on the part of the university "absent 'a showing to the contrary'," *id.* at 329 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 319 (1978)), lower courts should take *Grutter* 's language as instructive, even if it was not scrupulously followed in *Grutter*.

40. *Id.* at 339. The Court did, however, inquire somewhat into whether the law school had given "serious, good faith consideration of workable race-neutral alternatives" when deferring to the law school's race-conscious admissions process designed to achieve "student body diversity." *Id.*
41. According to one scholar, "Justice Kennedy cited no cases that might constitute such a tradition, for there were no such cases." See Hiers, *supra* note 11, at 52.
42. *Grutter*, 539 U.S. at 387–88 (citations omitted).
Justice Powell’s opinion in *Bakke*. Powell defined the limits of which educational missions are entitled deference by holding that a university’s academic freedom right includes the ability to select a student body that creates “an atmosphere of speculation, experiment, and creation.”43 According to Justice Powell, it is “widely believed”44 that this atmosphere is produced through a diverse student body—not just racially diverse, but “truly heterogeneous”45 in terms of ideas and background. Powell’s concurring opinion, which is “endorsed by” the *Grutter* majority,46 invalidated the affirmative action plan at the University of California’s medical school because the “diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.”47

Justice Powell prohibited schools from putting too much emphasis on race in achieving a diverse student body based on his understanding of a truly academic atmosphere.48 He found that the school’s race-conscious admission process was not genuinely designed to achieve the type of student body diversity that would produce the legitimate academic benefit of robust intellectual exchange.49

**B. The Solomon Amendment Makes Its Way Through the Courts**

The confusion presented by both the *Grutter* majority and Kennedy’s dissent has created a judiciary that is tentative in defining and applying the right to institutional academic freedom. After *Grutter*, the Supreme Court dodged an opportunity to further clarify the scope of institutional academic freedom in a case involving the Solomon Amendment.50 The Solomon Amendment is a federal law mandating that universities either allow military recruiters

44. Id.
45. Id. at 323.
46. Grutter, 539 U.S. at 325.
47. Bakke, 438 U.S. at 315.
48. Id. at 311–15.
49. Id.
onto their campuses or forgo millions of dollars in federal funding. In the Solomon Amendment case, unlike in *Grutter*, law schools invoked academic freedom as a constitutional right that protected them from government interference with their academic decisions. The schools argued that the Solomon Amendment should be invalidated because it interfered with their constitutional right to make their academic decisions free from the control of (other) government bodies.

Litigation over the Solomon Amendment began when a coalition of law schools and faculty, called Forum for Academic and Institutional Rights, brought suit claiming that the Solomon Amendment violated their First Amendment rights. The law schools, wishing to abide by their own policies denying recruitment opportunities to employers who discriminate on the basis of sexual orientation, argued that the Solomon Amendment infringed on their rights against compelled speech and to expressive association due to the military's practice of excluding gays. The Third Circuit agreed and granted a preliminary injunction against application of the Solomon Amendment. In a footnote, the Third Circuit noted that "[t]he Supreme Court's academic freedom jurisprudence thus underscores the importance" of deferring to a university's views on what would impair its own expression.

The Supreme Court overturned the Third Circuit and held that that the law schools' claim "exaggerat[ed] the reach of our First Amendment precedents." However, the Court never mentioned the Third Circuit's footnote or the impact of academic freedom on the constitutionality of the Solomon Amendment. The Supreme Court thus missed a critical opportunity to remark upon the Third Circuit's interpretation of academic freedom and how academic freedom would affect the university's claim.

After the Supreme Court ignored the issue, another court

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52. Brief for the Respondents at 20–21, FAIR, 547 U.S. 47 (No. 04-1152).
53. Id.
54. FAIR, 390 F.3d 219, 224 (3d Cir. 2004).
55. Id. at 225 n.3.
56. Id. at 224.
57. Id. at 224 n.13.
of appeals had to contend with the Third Circuit’s unaddressed footnote. Following the Supreme Court’s decision in *Rumsfeld v. FAIR*, the Second Circuit addressed a challenge to the Solomon Amendment that had been stayed pending the Supreme Court’s ruling on the Third Circuit’s case. This stayed lawsuit was brought by a voting majority of the Yale Law School faculty. In upholding the Solomon Amendment, the Second Circuit noted that although the Supreme Court did not explicitly address academic freedom in *Rumsfeld v. FAIR*, it implicitly considered and rejected the argument that academic freedom renders the Solomon Amendment unconstitutional.

The Second Circuit also held, on the merits, that academic freedom was not violated because the Solomon Amendment did not directly interfere with the content of teaching, the ability of faculty to express themselves, or the selection and evaluation of students. According to the court, “while requiring universities to grant military recruiters . . . equal access to their campuses and students may incidentally detract from the academic mission of inculcating respect for equal rights, this requirement undermines educational autonomy in a much less direct and more speculative way” than in the instances where the Supreme Court has found a school to have a legitimate academic freedom claim. The court of appeals thus did not deny the ability of universities to invoke academic freedom as a constitutional right that could supersede federal law; it simply held that the right was not violated by the Solomon Amendment.

C. The Different Faces of Academic Freedom in the Lower Courts

Since *Grutter*, courts have deployed a variety of approaches in their understanding of institutional academic freedom as a constitutional right against state interference. In *Coalition to Defend Affirmative Action v. Granholm*, for example, plaintiffs challenged an amendment to the Constitution of the State of Michigan, enacted as a response

60. Id.
61. Id. at 189–90.
62. Id. at 191–92.
63. Id. at 191.
to *Grutter*, that prohibited racial preferences in admission decisions at public universities.\(^6^4\) The plaintiffs claimed that universities have an academic freedom right, based on *Grutter*, "to select their students and . . . in the course of doing so, give some consideration to such factors . . . as race."\(^6^5\) The Sixth Circuit held otherwise:

> [I]t is one thing to defer to a state university's judgment ... in determining whether the university has run the gauntlet of defending presumptively unconstitutional racial classifications. It is quite another to say that the First Amendment in general and academic freedom in particular prohibit a State from eliminating racial preferences . . . .

The Universities mistake interests grounded in the First Amendment—including their interests in selecting student bodies—with First Amendment rights.\(^6^6\)

At first blush, the result in *Granholm* seems strange; academic freedom prevailed in *Grutter* against the dictates of the Fourteenth Amendment, but could not override a Michigan law proscribing the race-conscious admissions policies that *Grutter* deemed constitutional.\(^6^7\) The Sixth Circuit, however, distinguished the type of institutional academic freedom that prevailed in *Grutter*—the deference afforded a state university in the implementation of a policy that the university purports to further a compelling governmental interest—from the institutional academic freedom asserted in the instant case—the ability to use academic freedom as a right against the state in order to invalidate a state law.\(^6^8\)

The Sixth Circuit justified this distinction in several ways, noting that:

*Grutter* ends by explaining that affirmative action

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\(^{64}\) Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237 (6th Cir. 2006).

\(^{65}\) *Id.* at 242.

\(^{66}\) *Id.* at 247 (emphasis added).

\(^{67}\) According to Professor Byrne, who considered a hypothetical version of this case prior to *Granholm*, "it would introduce a novel notion of what is a constitutional right to hold that one has special, constitutional weight against other constitutionally protected interests while still being vulnerable to state legislation." Byrne, *What Next for Academic Freedom?*, supra note 18, at 937–38.

\(^{68}\) *Granholm*, 473 F.3d at 247.
programs may not exist in perpetuity . . . . The First Amendment, by contrast, has no termination point, whether in 25, 50 or 250 years, making it improbable that the same Court that decided Grutter would hold that state universities have a First Amendment right to maintain racial preferences.\(^{69}\)

The difference between academic freedom as a constitutionally compelling state interest and as a constitutional right is paramount in Granholm, but Grutter did not explicitly articulate this distinction.\(^{70}\)

The First Circuit, in contrast to the Sixth Circuit in Granholm, recognized institutional academic freedom as a constitutional right that is capable of overriding state law in a case involving high schools.\(^{71}\) This court overturned Puerto Rican educational regulations governing private elementary and high schools on academic freedom grounds.\(^{72}\) Noting that “the right to academic freedom in secondary education is necessarily more circumscribed than that of a university,” the court held that the “regulation of textbooks implicates academic freedom sufficiently to require the state to demonstrate that the regulation withstands constitutional scrutiny.”\(^{73}\)

The court then overturned a regulation requiring parental consent of textbooks and a regulation mandating that schools allow students to purchase older editions of textbooks unless the newer version contains “significant changes.”\(^{74}\) According to the court, these regulations implicated academic freedom because they interfered with “what shall be taught and how it shall be taught.”\(^{75}\) The court upheld only a portion of the regulations requiring disclosure of textbook prices and special deals with booksellers, but invalidated all other challenged provisions.\(^{76}\)

Universities have also invoked the constitutional

\(^{69}\) Id. at 248.

\(^{70}\) See infra Part IV.C for further discussion on the reasoning and outcome of Granholm.

\(^{71}\) See Asociación de Educación Privada de P.R., Inc. v. García-Padilla, 490 F.3d 1, 11 (1st Cir. 2007) (holding that “private schools have a First Amendment right to academic freedom.”).

\(^{72}\) Id. at 11, 21.

\(^{73}\) Id. at 11.

\(^{74}\) Id. at 11–18.

\(^{75}\) Id. at 19 (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957)).

\(^{76}\) Id. at 11–21.
academic freedom right as insulating them against other legal obligations, including burden of proof requirements. In *Walker v. Board of Regents*, for example, an assistant chancellor for student affairs at the University of Wisconsin alleged that the university failed to renew her contract because of her race and gender. The university argued that "courts must give 'enhanced deference' to employers in the university context and that this deference 'militates against a finding'" at the summary judgment stage that the university's stated reasons for failing to renew Walker's contract were a mere pretext for unlawful discrimination.

To substantiate its claim for "enhanced deference," the university quoted the Supreme Court's opinion in *Hishon v. King & Spalding* for the proposition that "respect for academic freedom requires some deference to the judgment of schools and universities as to the qualifications of professors, particularly those considered for tenured positions." The district court, however, rejected the university's argument that academic freedom militates in favor of affording some deference to the university's stated nondiscriminatory motive for its employment decision. Declining the opportunity to extend *Grutter* beyond its factual scenario, the district court held that "[a]t most, the Court has suggested that academic freedom could be a relevant consideration in evaluating affirmative action plans." Ultimately, the court refused to give universities more deference than other employers when assessing motives for employment decisions in discrimination cases.

The varying contexts in which academic freedom is invoked, and the varying approaches by the lower courts, demand a coherent and comprehensive framework for analyzing academic freedom claims. In the next section, we

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78. *Id.* at 858.
79. *Id.* at 858-59 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 80 n.4 (1984) (Powell, J., concurring)). In *Hishon*, the Court considered an employment discrimination case in the private employment context that did not "present such an issue" of academic freedom. *Hishon*, 467 U.S. at 80 n.4.
81. *Id.* at 858.
82. *Id.* at 859.
begin to outline that framework.

II. THE LEGITIMATE ACADEMIC PURPOSE

In order to justify granting universities special deference based on academic freedom, courts must ensure that the university is acting with a purpose that is genuinely academic. Otherwise, the argument for granting universities greater rights than other, more political, institutions quickly loses cogency.

Of course, academic institutions may subscribe to varying philosophies on the role and purpose of the university, and define their missions accordingly. But academic freedom as a constitutional right should apply only when the institutions proffer ideologically neutral goals that are explicitly and legitimately academic, and are intended to further the truth-seeking and knowledge-transmitting functions of the university. The courts must police this right using principled, clear rules that define what constitutes a legitimate academic purpose.

83. Byrne, What Next for Academic Freedom?, supra note 18, at 939. Any special protection of [university] decision making must be rooted in the values of the First Amendment . . . . Protecting institutional autonomy is the means and preserving the scholarship and teaching is the end. Seeking to protect aspects of autonomy removed from this will fail and threaten to bring the entire right into disrepute as a simple ‘interest,’ like users of subsidized irrigation.

Id.


85. Indeed, a religious institution such as Bob Jones University may decide that part of its mission is to inculcate Christian values. Bob Jones University is free to do so, as long it does not intend to circumvent any state laws or invoke academic freedom to advance this mission. Similarly, a private, liberal arts college may champion certain political ideologies, but it may not claim a right to academic freedom to circumvent state or federal laws for this aspect of its mission. This is because one of the main justifications for academic freedom is that, in ways related to other First Amendment values, academic freedom seeks to increase the knowledge in society by ensuring that the academy does not stifle speech for personal, political or ideological reasons, as opposed to academic, truth-seeking reasons—and that the academy does not stifle the spread of knowledge to the populace, or try to stifle innovation within academic discourse. See infra Part II.C.
A. Courts Must Police the Legitimate Academic Purpose

This view of the courts’ role, as a check on illegitimate invocations of academic freedom, rejects the method advocated by scholars like Horwitz, who argues that “the institutional approach to universities requires that the debate over institutional mission be held by individual universities, and that neither the courts nor legislatures be given jurisdiction to interfere with that debate.”86 In his view, deference to the institution should extend to the question of what constitutes an academic—versus political—decision. As a result, he criticizes the Supreme Court’s decision in Rumsfeld v. FAIR,87 writing:

Under an approach that took Grutter deference seriously, the Court would have been obliged to defer substantially to the FAIR plaintiffs’ assertion that their desire to exclude military recruiters from campus, or to grant them something less than absolutely equal access, was compelled by their own sense of their academic mission, and that compliance with the [law in question] would do serious violence to that academic mission.88

Horwitz believes that universities should be given “presumptive autonomy to act” and that a university’s “internal norms” should govern its decisions instead of the Constitution.89 In the speech area, for instance, Horwitz believes that courts should not ask whether the university is following generally applicable First Amendment principles, but instead whether it is generally following its own “norms and practices,” and “whether those norms and practices serve the First Amendment values that are advanced by the role of that institution within the broader society.”90 In this way,

86. Horwitz, Universities as First Amendment Institutions, supra note 4, at 1552.
87. See supra Part I.B.
89. Horwitz, Universities as First Amendment Institutions, supra note 4, at 1510–11. Horwitz advances both a weak and a strong form of institutional autonomy, and would provide different amounts of deference to these different forms. His article makes clear, however, that he believes a university’s self-defining rules should supersede “the externally imposed, top-down model of judicial enforcement of standard First Amendment rules.” Id. at 1511.
90. Id. See also Paul Horwitz, Grutter’s First Amendment, 46 B.C. L. REV. 461, 589 (2005) (suggesting that “the Court ought to attend to the unique social practices of [universities], allowing the scope of its deference to be guided over
Horwitz claims that universities (including public universities otherwise subject to the First Amendment) should be able to make their own decisions about censoring speech on campus, depending on their institutional ideas about which speech is and is not valuable. And instead of drawing these norms from the First Amendment, these decisions can be "guided over time by the changing norms and values" of each institution.

Horwitz’s approach is fundamentally flawed because, among other missteps, it ignores the reason that institutions are entitled to academic freedom under the First Amendment. Academic freedom is designed to promote a robust exchange of ideas and foster an environment where speech is restricted only because of its academic quality, not because it is politically undesirable.

Further, Horwitz’s proposed deference to schools to determine their mission creates an unworkable tautology. Namely, Horwitz conceives of an academic decision as anything decided by a university, but this does not require universities to conform to any type of academic standards. To avoid a conception of academic freedom and institutional deference that cannot be supported by the rationales for academic freedom, institutions receiving deference must not be able to dictate the terms of that deference.

Like all other constitutional rights, courts must police the constitutional right to academic freedom based on a longstanding tradition that cherishes the "expansive time by the changing norms and values of those institutions." [hereinafter Horwitz, Grutter’s First Amendment].

91. Horwitz, Universities as First Amendment Institutions, supra note 4, at 1519.

92. Id. at 1523 (quoting Horwitz, Grutter’s First Amendment, supra note 90, at 589).


94. Horwitz, Universities as First Amendment Institutions, supra note 4, at 1542. Horwitz defines academic speech “at its best” as “characterized by its commitment to truth . . . its honesty and carefulness, its richness of meaning, its doctrinal freedom, and its invitation to criticism,” but in no way requires academic speech to contain these characteristics in order to receive judicial deference. See id. at 1514 (internal quotation marks omitted).
freedoms of speech and thought associated with the university environment." Giving courts the ability to define this right separately from an institution's own conception of the academic mission does not mean that courts will be able to unduly interfere with academic decisionmaking. Instead, courts will determine, as a threshold issue, which situations involving universities require more judicial deference and which situations require treating private universities like other private organizations, and public universities like other state actors. Courts can thus preserve spheres of university activity that permit more or less scrutiny.

B. Courts Have Already Begun Confining Institutional Academic Freedom to Legitimately Academic Decisions

Although they are hesitant to articulate rules or tests to analyze academic freedom, courts have already begun shaping which areas of university operation trigger academic freedom considerations. In Sweezy v. New Hampshire, Justice Frankfurter's concurrence quoted a statement by scholars at the University of Cape Town, South Africa, categorizing the "four essential freedoms of a university—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." Almost three decades later, in Regents of the University of Michigan v. Ewing, the Court further elevated the notion of the "four essential freedoms" in a case where a student argued that a medical school arbitrarily expelled him without permitting him to retake an exam. Even assuming that the student had a substantive right to continued enrollment at his university, the Court held that a university’s freedom to decide who may study at the university was implicated, and that "[t]his narrow avenue for judicial review precludes any conclusion that the decision to dismiss Ewing from the ... program was such a substantial departure from accepted academic norms as to demonstrate

97. Id. at 263 (Frankfurter, J., concurring) (emphasis added) (quoting The Open Universities in South Africa 10–12, which Frankfurter described as "[a] statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand") (internal quotation marks omitted).
that the faculty did not exercise professional judgment."99

Based on the notion of "four freedoms," one scholar has contended that academic freedom "primarily protects the autonomy of university governance on core matters relating to scholarship and teaching, including especially the values and practices that make up the non-legal system of academic freedom, but that it does not protect most university activities, which are fully subject to government regulation."100

Courts have also begun identifying situations where laws that affect university functioning are too attenuated from teaching and scholarship to qualify for academic freedom. In University of Pennsylvania v. Equal Opportunity Employment Commission,101 for example, the Court rejected the university's expansive understanding of academic freedom, holding that academic freedom does not permit a university to refuse to disclose files relating to the tenure process required for a government investigation of potential discriminatory denial of tenure to a faculty member.102 Although noting that it does not have to "define the precise contours of any academic-freedom right," the Court held that the required production of employment records is too attenuated from the asserted academic freedom right of deterring discourse at the university.103

The Court further remarked that disclosing tenure records in court will not impede a university's ability to

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99. *Id.* at 227.
100. Byrne, *What Next for Academic Freedom?*, supra note 18, at 934. As Byrne notes, "the Court has rejected university arguments for deference when it has failed to see the direct connection with academic concerns, as in its decision to subject NCAA football television contracts to antitrust analysis." *Id.* at 941 (citing NCAA v. Bd. of Regents, 468 U.S. 85, 98–99 (1984)).
102. *Id.* at 197–98.
103. *Id.* at 199–202. *See also* Burt v. Gates, 502 F.3d 183, 191 (2d Cir. 2007).

The Solomon Amendment places no restriction on the content of teaching, the membership of teachers in organizations, the selection of students, or evaluation and retention of students. While requiring universities to grant military recruiters that discriminate in hiring equal access to their campuses and students may incidentally detract from the academic mission of inculcating respect for equal rights, this requirement undermines educational autonomy in a much less direct and more speculative way than do the policies addressed in *Sweezy, Keyishian, Grutter, and Ewing.*

*Id.*
determine who may teach. According to the Court, "[n]othing we say today should be understood as a retreat from this principle of respect for legitimate academic decisionmaking." A "legitimate" academic decision would not result from racial intolerance because a decision based on animus is unrelated to the quality of teaching or scholarship. The Court's statement in University of Pennsylvania foreshadows the Grutter Court's recognition of the difference between proper and improper educational missions and its holding that "[o]ur conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission . . . ."

C. Deference Should be Afforded only for Non-Ideological Academic Decisions

Determining when a university is acting to fulfill a proper educational mission is a complex, but not Herculean, undertaking. Academic freedom rights derive from the First Amendment's concern with the social benefit of allowing scholars to pursue knowledge based on the dictates of a particular discipline. This knowledge should grow based on the input and critique of scholars and be insulated from governmentally-imposed rules or political pressure. There

104. Univ. of Pa., 493 U.S. at 199 (emphasis in original).
106. See Horwitz, Universities as First Amendment Institutions, supra note 4, at 1538 ("In modern terms, we assume that the academic freedom of a faculty member depends on his or her ability to satisfy the standards of his or her discipline."). See also Am. Ass'n of Univ. Professors, 1940 Statement of Principles On Academic Freedom And Tenure With 1970 Interpretive Comments 3 (2006) ("Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition."); Byrne, Academic Freedom, supra note 25, at 286 ("American academics have always insisted that speakers conform broadly to the evolving standards of the discipline.").
107. Byrne, Academic Freedom, supra note 25, at 298 ("Despite their analytical shortcomings, Sweezy and Keyishian contributed substantially to the virtual extinction of overt efforts by non-academic government officials to prescribe political orthodoxy in university teaching and research.") (emphasis in
is little justification for affording academic protection to decisions that are not academic in nature, but rather ideological. An academic decision seeks to enable professors to develop new ideas and expand knowledge, and to promote the optimal environment for exposing students to new ideas and motivating them to rigorously pursue different disciplines. By contrast, an ideological decision is motivated by the goal of altering students' or professors' values, often as a way of effectuating political or social change outside of the learning arena. An academic decision does not attempt to alter the resulting viewpoints of students to conform to specific beliefs and values, but concerns the process by which students are educated and exposed to new ideas.

When a private university's ideological positions affect university policy, it should receive constitutional protection as a private association, but it does not deserve academic protection for its ideological expression or policies. Public universities also cannot cloak themselves in academic freedom when promoting ideological goals. A public

original). Some scholars even believe that academic freedom, as either a professional or a constitutional right, should insulate professors from political pressures placed on them by trustees or administrators. See Alan K. Chen, Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine, 77 U. COLO. L. REV. 955, 972 (2006) ("While institutional academic freedom is crucial to the world of ideas, it is not clear why courts ought to trust academic administrators, many of whom are subject to the same political pressures (public and private) as other public officials, particularly where something as vital as speech is concerned.").

108. The Supreme Court's landmark academic freedom cases of Sweezy and Keyishian reject the rationale that the university's purpose is to instill democratic values in its students. See Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967); Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957). According to Horwitz, they rely "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." Horwitz, Grutter's First Amendment, supra note 90, at 487. See also Byrne, What Next for Academic Freedom?, supra note 18, at 951.

Inculcation of human values or modeling of professional values, while legitimate, do not stand at the center of higher education; investigation, discussion, critique, and judgment do . . . . But academic freedom exists to protect a liberal education, which teaches students to think carefully and fruitfully for themselves, something antithetical to inculcation.

Id.

109. For distinctions between the educational and the ideological in another context, the funding of organizations with student fees, see Galda v. Rutgers, 772 F.2d 1060 (3d Cir. 1985).
D. Distinguishing the Academic from the Ideological

Because the academic venture concerns the pursuit of knowledge and truth guided by the dictates of reason, institutional academic freedom should provide deference to the university's ideas about the process by which students learn, as opposed to allowing the university to promote a particular ideological stance. Universities as institutions should be permitted a sphere of freedom to determine how best to accomplish truly academic goals, such as selecting the most qualified professors according to their academic judgments, advancing students' ability to think and reason, and exposing students to new ideas. In Grutter, the Supreme Court partially deferred to the Law School's view that racial and ethnic diversity provides educational benefits based on the school's goal of promoting a robust and diverse exchange of ideas. This mission is arguably not ideological. It does not attempt to impose views upon students but seeks to create an environment where students encounter a variety of viewpoints. In an environment where students are exposed to a diversity of ideas, they are better equipped to develop their own views.

Although we believe that Grutter may have incorrectly overlooked the University of Michigan Law School's actual purpose in enacting its affirmative action program, Grutter should be interpreted according to the principles the Court claimed it was applying. Namely, the Court claimed it was deferring to an admissions program designed to provide the ideologically-neutral educational benefit of having an environment richer in ideas and viewpoints.

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110. See Healy v. James, 408 U.S. 169 (1972). In Healy, the Court held that a university may not discriminate based on viewpoint when determining whether to recognize student organizations because “[t]he mere disagreement of the President with the group’s philosophy affords no reason to deny it recognition.” Id. at 187.
112. See supra note 38.
If, as Horwitz proposes, a university is empowered to supersede state and federal laws subject to its own “changing norms and values,” academic freedom will become a means for a university to act in ways contrary to traditional notions of the role of universities, as long as the university can justify its behavior by citing its own internal norms. Although Horwitz believes that a “sense of the scope and limits of proper behavior have long since been internalized by universities themselves,” there are numerous well-documented examples of universities engaging in surprising tactics to overstep their primary role as facilitator of the “marketplace of ideas” and suppressing rights of students and faculty in the process. Universities have incentives, both honorable and ignoble, to create an environment that betrays the reasons they have been granted academic freedoms.

114. Horwitz, Universities as First Amendment Institutions, supra note 4, at 1523.
115. Id. at 1542.
freedom rights, often when following their sincerely held political ideals. Courts must guard the henhouse to ensure that universities, unless they are acting in accordance with a "proper educational mission," respect state and federal laws, and that public universities uphold their constitutional obligations.

When universities seek academic freedom to control their admissions process, for example, they should not receive extra deference to exclude Democratic students for the purpose of better preparing Republican students for political debate. Though such an admissions policy may seem extreme, the law schools' position in *Rumsfeld v. FAIR* was equally ideological: their freedom of expressive association claim argued that the military's presence on campus infringed on their ability to send the message that gays were entitled to be treated equally in all careers.118 This message may be honorable and important, but it is an ideological, not academic, viewpoint. It sought to effectuate social change in a way unrelated to the dissemination of knowledge or the promotion of the academic enterprise, just as if the law schools had, instead, sought academic freedom to express the message that the military should discriminate against gays. Although the law schools' expressive association claim failed because the Court found that the military recruiters' brief presence on campus did not infringe on the schools' ability to express their message, the unaddressed academic freedom claim should have failed for a different reason: because that message is clearly the expression of an ideological position.119

Private universities that are ideologically oriented—such as thoroughly religious colleges like Liberty and Bob Jones University120—should receive the least amount of deference under any conception of academic freedom because they choose to forgo the pursuit of knowledge in favor of predetermined ideological views. These universities exist in large part to instill allegiance to a predetermined ideological

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118. See supra Part I.B (discussing *FAIR*), 547 U.S. 47 (2006)).
119. Horwitz acknowledges this, but claims the only question the Court should have asked is whether the schools sincerely saw the expression as part of their academic mission. Horwitz, *Three Faces*, supra note 88, at 1133–35.
truth, and are to that degree more akin to churches and other private religious associations that seek to further a shared ideological mission. This distinction possibly explains why the Supreme Court did not see academic freedom as supporting Bob Jones University's claim against the Internal Revenue Service's ruling that in order to obtain tax-exempt status, Bob Jones needed to stop denying admission to students who were either part of or advocated for interracial marriages.\textsuperscript{121}

Some scholars and courts have argued that a legitimate academic purpose of universities should be expanded beyond the pursuit of knowledge and the development of critical thinking to include the inculcation of fundamental democratic values.\textsuperscript{122} There is little Court precedent for such a position, as spreading democratic values is a function of many civic and state institutions, and it does not require freedom from state interference to occur, nor does it result in the production of new truths.\textsuperscript{123} The judiciary and the political branches are equally, if not more equipped, than the university to spread democratic values.

Furthermore, the spread of "democratic values" can in fact impede the search for knowledge. The spread of democratic values means inculcating a particular ideology,

\begin{itemize}
\item \textsuperscript{121} Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (holding that a private university that maintained racially discriminatory policies did not qualify for a tax exemption as a charitable organization because its policies were "so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred" by the university).
\item \textsuperscript{122} In an amicus curiae brief by the AAUP, for example, the association claimed that academic freedom "protects faculty policies that set forth criteria for advancing students into postgraduate employment and seek to instill educational values that students will carry with them into that employment." Brief for American Association of University Professors as Amicus Curiae Supporting Respondents, FAIR, (No. 04–1152), available at http://www.aaup.org/NR/rdonlyres/85233D04-8816-4CDE-B3C7-6028CDBF2D69/0/SolomonAmendmentAmicusBrief.pdf. See also Byrne, Academic Freedom, supra note 25, at 279–83 (describing the "democratic value" of higher education, which exists in tension with the role of the university to serve truth-seeking functions and embraces the view that "students must receive a coherent education in the traditions of civilized thought, writing, and art.").
\item \textsuperscript{123} Indeed, the university is routinely distinguished from the high school, which was intended to act in loco parentis and teach students proper morality and behavior. See Kelly Sarabyn, The Twenty-Sixth Amendment: Resolving the Federal Circuit Slit Over College Students' First Amendment Rights, 14 TEX. J. C.L. & C.R. 27, 30–31, 35–40 (2008).
\end{itemize}
and if spreading an ideology is recognized as a core function of universities, academic work that is perceived to be inherently or implicitly in conflict with that ideology could be suppressed. This can retard the growth of new truths, as the Court has long recognized that the development of knowledge is reliant on dialogue unfettered by ideological restrictions. As a result, there is slim justification for protecting such a function under the right to academic freedom.

There may be instances when it is difficult to distinguish an academic decision from an ideological one. For instance, a public university may refuse to tenure a professor because it disagrees with her ideological views, or because of her race or gender (both non-academic reasons), but claim that the tenure decision is based on her work being academically unsound according to the standards of her department (a legitimate academic reason). In some subjects—like physics, mathematics, organic chemistry—there is much less potential for confusion over whether a professor was fired for academic reasons or for ideological reasons. In subjects that have an inherent ideological component, such as politics or philosophy, it is often much more difficult to discern.

In such cases, courts should look to the process by which a university's decision was made. If a faculty committee is

124. See DeJohn v. Temple Univ., 537 F.3d 301, 318 n.18. (3d Cir. 2008) (invalidating university's sexual harassment policy where “Plaintiff, a graduate student pursuing a master’s degree in Military and American History, argue[d] that he felt inhibited in expressing his opinions in class concerning women in . . . the military”); Doe v. Univ. of Mich., 721 F. Supp. 852, 859–60 (E.D. Mich. 1989) (overturning university's Policy on Discrimination and Discriminatory Harassment where “there existed a realistic and credible threat that Doe could be sanctioned were he to discuss [controversial] biopsychological theories” involving differences between the races or genders.) See also Note: Education and the Court: The Supreme Court's Educational Ideology, 40 VAND. L. REV. 939, 953–54 (1987) (“The inculcative mission of primary and secondary public education—to instill in children society’s values—directly conflicts with higher education’s notion of academic freedom as the true marketplace of ideas where students are exposed to diverse influences.”).

125. Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) (“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.”) (internal quotation marks and alterations omitted); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (“To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”).
making an institutional decision about tenure based on its academic expertise, academic freedom would impart more discretion to that decision because it involves a core academic function—the faculty's assessment of a professor's academic work. Assessment of academic quality should not be made by the government, but rather by the standards of a particular academic field. Having faculty make this judgment minimizes the likelihood that the decision will be an ideological one masquerading as an academic judgment, although it does not, of course, eliminate it.\textsuperscript{126}

This type of discretion does not mean the court should refrain from questioning all faculty-based academic decisions; rather it affords such decisions a level of deference so that they can have the breathing room needed in order to remain free from the yokes of government-imposed orthodoxy. And if, in contrast, the decision to deny a professor tenure is made by administrators who are not as well versed in the dictates of a particular discipline, less deference should be given to the school's decision as it is more likely that such a decision will be politically motivated.

In \textit{Grutter}, the University of Michigan Law School should have received this mid-level deference because the admissions decisions were made by administrators and faculty acting outside of their academic expertise.\textsuperscript{127} Indeed, they might have been motivated by the political goal of achieving racial balance instead of by a desire to foster a better learning environment. The Court should have responded more thoroughly to Justice Rehnquist's dissent and examined the data substantiating the university's claim to determine whether there was an indication that the university was being disingenuous in stating an academic purpose.\textsuperscript{128} But

\textsuperscript{126} A particularly difficult situation arises when disciplines and departments become inherently ideological. Some departments have incorporated ideological goals into their standards for what constitutes academically qualified work. For instance, a women's studies program at the University of South Carolina required students to "acknowledge that racism, classism, sexism, heterosexism and other institutionalized forms of oppression exist." See Ellen Sorokin, \textit{Women's studies mandates seen as threat to free speech}, \textit{Wash. Times}, May 16, 2002, available at http://www.thefire.org/public/pdfs/08718ee2be8208ba8a6e2d65c7ee6764.pdf. One solution to this problem is to have the faculty at large make that judgment, and have courts defer to that broader academic consensus.

\textsuperscript{127} See infra Part IV.B.

the Court should still have afforded some deference to the university's view that racial and ethnic diversity will foster a robust educational environment. In Part IV, we will describe in greater detail how a university can garner more or less institutional deference. Before that, we turn to a discussion of the interaction between institutional academic freedom and other First Amendment interests.

III. INSTITUTIONAL AUTONOMY CANNOT TRAMPLE STUDENTS' AND PROFESSORS' FIRST AMENDMENT ACADEMIC FREEDOM RIGHTS

Before affording deference to a university's decisions based on academic freedom, courts must also consider the way a university's decision interacts with the First Amendment academic freedom rights of students and faculty. In this section, we posit that to the extent that universities invoke institutional academic freedom for legitimate academic purposes, they cannot infringe upon the academic freedom rights of students and faculty. Thus, contrary to the wishes of some scholars, universities should not invoke academic freedom as a way to suppress undesirable viewpoints. Further, institutional academic freedom cannot be used as a way to diminish the academic freedom rights of students and professors.

A. Institutional Academic Freedom Versus Free Expression

Because academic freedom, as a First Amendment value, is bound up in the idea that "the nation's future depends upon leaders trained through wide exposure to the ideas and mores of students as diverse as this Nation," public universities cannot usually invoke academic freedom as a way to circumvent other First Amendment rights. Contrary to

dissenting).


130. Public universities, as state actors, must respect the constitutional academic freedom rights and other First Amendment rights of their faculty and students. Although public institutions share the same academic freedom rights against outside interference as private universities, they must abide by the First Amendment. See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 822 (1995) (noting that "[t]he University of Virginia, an instrumentality of the Commonwealth for which it is named [is] bound by the First and Fourteenth Amendments").
Horwitz’s view, a public university should not receive deference to suppress speech it deems undesirable or against its conception of its mission. Horwitz’s approach would contravene the very values that give rise to institutional academic freedom in the first place.

Courts have consistently held that students and professors maintain their First Amendment rights on college campuses, and that public colleges must be engines of robust discourse and debate. As Horwitz notes, courts have universally overturned speech codes that restrict students’ expression everywhere on campus.

Although institutional academic freedom cannot usually be used in a way that would infringe on the free speech rights students and professors would have in other environments, it is important to note that there are situations in which a university may make assessments about student work or a faculty member’s professionalism without violating the First Amendment. Part of the mission of a university, as a First Amendment institution, is to allow those with expertise in an academic field to judge the academic quality of students’ or professors’ work. Institutions may thus judge the academic quality of speech by students and faculty without violating their free speech rights. Professors may control their

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131. Horwitz, Universities as First Amendment Institutions, supra note 4, at 1519.

Finally, a stronger degree of recognition of the institutional autonomy of the university might well suggest that courts should reevaluate their blanket rejection of campus speech codes grounded in the universities’ own considered judgment of the kinds of speech that do and do not contribute to the academic mission, whether on public campuses or, under state law, even private ones.

Id.

132. See, e.g., Rosenberger, 515 U.S. at 836 (“For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation’s intellectual life, its college and university campuses.”); Healy v. James, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large . . . . [T]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”) (internal citation omitted).

133. See supra note 108.

134. See Byrne, Threat, supra note 6, at 93 (explaining the intersection of free speech and academic freedom by arguing that “[c]olleges and universities do not need to continue to employ professors whose writings clearly exhibit a
classrooms and grade students on the quality of their work, so long as they do not discriminate on the basis of ideological viewpoint. Such discrimination is not justified by academic freedom.

Institutions, accordingly, may fire or discipline professors for producing poor quality work. But when students are punished by the administration (as opposed to given a lower grade by a professor) for controversial expression, or a professor is fired for criticizing a university or for other extracurricular speech, it is much less likely institutions will be able to successfully argue that the restrictions were motivated by academic, as opposed to ideological or personal, concerns.

In line with the Court's general failure to clarify the constitutional right of academic freedom, the state of the law on professors' First Amendment rights is currently uncertain. As we describe in the next section, the free speech rights of public employees have been dramatically curtailed by the Supreme Court's recent decision in *Garcetti v. Ceballos*,¹³⁵ which held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."¹³⁶ The *Garcetti* Court specifically noted, however, that professors at public institutions may have individual academic freedom rights that exempt their speech from *Garcetti*'s holding.¹³⁷ We must therefore examine how institutional academic freedom interacts with the academic freedom rights of professors and students.

**B. Institutional Academic Freedom Versus Individual Academic Freedom**

Institutional academic freedom should not be used to squash the academic freedom rights of students or professors. The purpose of institutional academic freedom in preserving a robust exchange of ideas would be undermined if universities could invoke academic freedom to shelter themselves when

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¹³⁶. *Id.* at 421.
¹³⁷. *See id.* at 425.
stifling controversial or provocative views. Even Professor Byrne, who generally believes that institutions and not professors possess academic freedom rights, concedes that a situation where "college administrators intentionally sought to silence a professor through extraordinary administrative means... falls within that small category of cases where [he] acknowledge[s] the propriety of judicial protection of individual academic freedom." Byrne is referring to a case where the City College of New York violated the First Amendment rights of a philosophy professor, who published controversial views about the disparity in intelligence between blacks and whites. In response to student complaints, the college created alternate sections of his class, denounced his views in a press release, and established a committee to determine whether sanctions were warranted. As Byrne argues, the professor's scholarship should have been judged by his colleagues on the basis of its academic quality, not its purported ideological viewpoint.

Academic freedom rights should protect professors above and beyond the free speech rights of individual employees, even when counterbalanced against institutional academic freedom. The Court's recent decision in *Garcetti*, allowing the government to strictly control its employees' on-duty speech, left unresolved the scope of the academic freedom right of professors against the university. In *Garcetti*, the Court ruled that public employees, because they speak for the government, can be punished for the content of what they say while working in their official capacity, or "pursuant to their official duties." *Garcetti*, however, involved a deputy district attorney criticizing his county's district attorney's office, far removed from the university setting. In light of concerns voiced by dissenting justices, the Court

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138. Byrne, Threat, supra note 6, at 93.
141. Byrne, Threat, supra note 6, at 93–94.
143. Id. at 413–15.
144. Id. at 438 ("I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to... official duties.'") (Souter, J. dissenting). Joining Justice Souter's dissent were Justices Stevens and Ginsberg. Justices Stevens and Breyer also wrote separate
specifically noted that *Garcetti*'s holding may not apply to professors at public institutions because of their academic freedom rights.\(^{146}\)

As the Court has yet to rule on whether and how academic freedom insulates professors from *Garcetti*'s holding, federal courts have taken different approaches. Some have held that *Garcetti* is directly applicable.\(^{146}\) Others have not ruled on the question, but have previously held that constitutional academic freedom rights belong only to the institution.\(^{147}\) In these courts, professors have the same speech rights as all other public employees, whose rights are now dramatically limited by *Garcetti*.\(^{145}\) Universities would thus be able to fire professors for controversial or ideologically objectionable speech, despite its academic merits, in the same fashion that a deputy sheriff could be fired for criticizing police tactics. In contrast, some courts have not applied *Garcetti*'s holding to professors.\(^{149}\)

\(^{145}\) See id. at 425.

There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.\(^{146}\)

Id.

\(^{146}\) The Seventh Circuit has taken this approach in the high school context, although professors have greater academic freedom rights than high school teachers, as the high school is not the primary locus of academic freedom interests. See Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477, 480 (7th Cir. 2007) (“Mayer's current-events lesson was part of her assigned tasks in the classroom; *Garcetti* applies directly.”).

\(^{147}\) See Brown v. Armenti, 247 F.3d 69, 74–75 (3d Cir. 2001) (holding that “the professor is acting as the university's proxy” when he speaks in the classroom) (citations omitted).

\(^{148}\) See Borden v. Sch. Dist. of Twp. Of E. Brunswick, 523 F.3d 153, 171–72, 172 n.14 (3d Cir. 2008) (leaving undecided whether *Garcetti* applies to public school teachers, but holding that teachers have no academic freedom right to in-class speech regarding what is taught and how it is taught).

\(^{149}\) In the high school context, for example, some courts continue to assess teachers' speech under Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, 391 U.S. 563 (1968), which protects high school teachers' speech on matters of public concern. Oddly, although the Fourth Circuit does not recognize a professor's right to academic freedom, it has declined to apply *Garcetti* to the speech of teachers at public schools. See Lee v. York County Sch. Div., 484 F.3d 687, 695, n.11 (4th Cir. 2007) (continuing to apply *Pickering* test to teacher's speech because the Supreme Court in *Garcetti* “explicitly did not decide whether
The most sensible way to protect the academic freedom rights of faculty at public institutions is to treat them as akin to independent contractors on the issue of speech—their speech is funded, but not directed or scripted, by the government. As a result, Garcetti's holding, which bears upon public employees, would not infringe on professors' rights to speak freely and controversially in their area of expertise within the bounds of academic quality, which can be considered a condition on the funding. As long as the professor speaks in an academically qualified way on her subject, a public university cannot restrict her ability to express controversial or ideologically unpopular views.

In the next section, we explore instances when a university should receive institutional deference, and articulate a framework for determining how much deference should be granted.

IV. APPLICATIONS OF INSTITUTIONAL ACADEMIC FREEDOM AND DEGREES OF DEFERENCE

Thus far, this article has occupied itself with the threshold questions a court must determine before it can consider granting constitutional deference to a university decision. Once a court holds that a university's decision is truly made "on academic grounds," it then must determine the magnitude of Grutter's "degree of deference." This section begins to address that question by outlining several practical factors that would entitle universities to more or less deference depending on the circumstances.

Grutter states that, once a decision is determined to be academic, "good faith [on the part of the university] is

[its] analysis would apply in the same manner to a case involving speech related to teaching"). In Lee, the Fourth Circuit declined to apply Garcetti to a teacher's speech despite the fact that the Fourth Circuit had previously held in Urofsky that institutions, and not professors, possess academic freedom rights. See Urofsky v. Gilmore, 216 F.3d 401, 414–15 (4th Cir. 2000).

150. This may also apply to speech made about the functioning of the university, i.e. intramural speech, if a professor's academic expertise renders him more qualified to opine on how university decisions impact the learning environment. And, as Garcetti applies only to speech made pursuant to a public employee's official duties, a professor's speech made outside of the university context is accorded the same First Amendment rights as all citizens.

presumed absent a showing to the contrary." 152 Although this language is highly deferential, it is important to examine what is required for this showing to the contrary. *Grutter* itself did not simply presume good faith, but instead relied on the evidence submitted by the law school and its *amici* in determining that the university's preference for racial diversity in the student body did indeed further educational goals. 153 On the other hand, *Grutter* seemingly ignored the clear showing to the contrary that the Law School's admissions process was in actuality more akin to the racial balancing proscribed by *Bakke* than it was to a genuine search for the true diversity conducive to robust dialogue. 154 We believe that *Grutter*'s convoluted application of institutional academic freedom was less rigorous due to the Court's specific concern with preserving affirmative action programs at universities.

Although *Grutter*'s inconsistencies and ambiguities make for confusing precedent, the Court's clear message that institutional decisions receive a degree of deference cannot be dismissed. In our view, the magnitude of deference given on the basis of institutional academic freedom should depend upon the type of decision a university is making, whether the university is invoking academic freedom as a constitutional right that shields it from state interference or as part of a compelling state interest that might outweigh individuals' constitutional rights, and which body of the university is making that decision. If a university is operating within a core academic area, within the bounds of the four freedoms—

152. *Id.* at 329 (quoting Regents of Univ. of Cal. v. *Bakke*, 438 U.S. 265, 318–19 (1978)). *Grutter* generally states this presumption of good faith as part of its holding that the law's school goal in student body diversity serves a compelling interest because obtaining diversity is "at the heart of the Law School's proper institutional mission." *Id.* However, *Bakke*'s presumption of good faith applied only to negate the assumption, absent a showing to the contrary, that "a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system." *Bakke*, 438 U.S. at 318.

153. *Grutter*, 539 U.S. at 328–31 ("The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*."). The Court was especially persuaded by the amicus brief of the United States Military, which asserted that a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security." *Id.* at 331.

154. *Id.* at 383–84 tbl.1 (Rehnquist, C.J. dissenting).
who may teach, what shall be taught, how the curriculum shall be taught, and who may be admitted to study—more deference should attach.\textsuperscript{155} Beyond that, different levels of deference should apply depending on who is making the decision, in what capacity the decisionmaker is acting, and against whose rights the institutional academic freedom is being balanced.

A. Faculty as Expert Decisionmaker

As touched on above, the high-water mark of \textit{Grutter}'s institutional deference should be granted when university actions are dictated by faculty committees acting as decisionmakers based on their academic expertise. Even if these decisions require final ratification from administrators, if the faculty serves as primary decisionmaker, such decisions are more likely to be made on academic grounds.\textsuperscript{156} Faculty members' decisions based on their knowledge and experience fall within the heart of academic freedom's requirement that truth emerge based on discourse within a discipline instead of being governmentally imposed, or subject to political pressure.\textsuperscript{157} Historical understandings of academic freedom


\textsuperscript{156} This accords with Professor Areen's conception of government-as-educator. \textit{See Areen, supra} note 13, at 995 ("Under the government-as-educator doctrine, if a university shows that its disciplinary decision was supported by the faculty (or by an authorized committee of the faculty), a court should presume that the decision was made on academic grounds and defer to it."). Professor Areen argues that:

[Courts should defer to an academic decision made by the faculty as a body (or a standing committee of the faculty) unless the plaintiff is able to show that the decision was 'such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise its professional judgment.


\textsuperscript{157} \textit{See Sweezy}, 354 U.S. at 250.

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... 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.

\textit{Id.}
also prized the department or committee of faculty as being safest for protecting academic decisions and being least susceptible to corruption.  

Examples of actions by faculty serving in a decisionmaking capacity include hiring, firing, and tenure determinations made by committees comprised of faculty members, or dismissals of students for poor academic performance after assessment by faculty. These academic decisions, even when parties challenge them for violating the Constitution at a public university or for violating federal or state law at any university, should receive the least amount of judicial scrutiny. This is not to say that faculty committees are entitled to violate constitutional or other legal rights in making tenure decisions. However, if a challenge is brought by an aggrieved faculty member against a faculty committee's decision, the court should require less of a demonstration by the faculty that they acted in "good faith"—i.e., that they denied tenure based on academic quality instead of on an unlawful, or academically irrelevant, basis. Absent a clear demonstration that the professor's legal rights were violated, decisions of this nature should be largely insulated from judicial scrutiny.

Courts already employ a form of this faculty-as-expert deference in other contexts, although not within the institutional academic freedom framework advanced by this article, and not labeled as such. When adjudicating due process claims, for example, courts require universities to provide fewer procedural safeguards before suspending a student for poor academic performance than for conduct-based disciplinary charges. Courts have held that the due process clause of the Fourteenth Amendment requires a public university, before suspending or expelling an enrolled student for disciplinary reasons, to provide adequate process, including fair notice and a hearing to contest the charges.


159. See generally Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978) (no due process hearing required for purely academic dismissal of student).

160. See Gorman v. Univ. of R.I., 837 F.2d 7, 13 (1st Cir. 1988) (explaining the process required for a university disciplinary hearing); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961) (establishing due process
This is so courts can determine whether a school is properly assessing the disciplinary charges before depriving students of their property interest in continued enrollment.161

However, universities are not required to provide these same procedural safeguards when dismissing students solely on the basis of poor academic performance.162 The due process requirements are significantly relaxed in this arena due to the notion that assessments of academic performance should be judged by those with expertise in the field, and judicial scrutiny would impair that decisionmaking. Due process challenges based on dismissals for poor academic performance are therefore almost entirely foreclosed.

As the Supreme Court noted in Board of Curators of University of Missouri v. Horowitz, "[l]ike the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."163 The import of Horowitz is that schools are not required to provide as comprehensive or as well-documented procedures to ensure the propriety of academic dismissals as for disciplinary dismissals. Although not distinguished on the basis of academic freedom,164 less judicial scrutiny is given to the procedures followed when assessing a student's academic merit than those followed for determinations that a student has committed a disciplinary offense such as theft or vandalism.

In addition, the Supreme Court has cautioned against judicial scrutiny of the substance of academic decisions. As the Court held in Regents of University of Michigan v. Ewing, "[w]hen judges are asked to review the substance of a


162. See Horowitz, 435 U.S. at 90–91 (holding that the judicial process is not well-suited to evaluating propriety of decision to expel a medical student for failure to meet academic standards).

163. Id. at 90.

164. The Horowitz court did indicate an aversion to "further enlarg[ing] the judicial presence in the academic community." Id.
genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment."\textsuperscript{165} Allowing academic decisions to be made by academic experts, not the government, is the foundational reason for academic freedom. Courts should therefore ensure the widest latitude is given to faculty-driven decisions assessing academic quality, like the hiring and firing of professors and the grade evaluation of students.

Unless an individual complainant clearly demonstrates that a faculty assessment was not based on truly academic grounds, decisions about academic quality made by faculty should be presumptively valid. For example, in employment discrimination cases, Title VII proof requirements should be altered to give some deference to the university's evidence that the decision was not based on race, gender, or other proscribed (and academically irrelevant) characteristics.\textsuperscript{166} And professors launching First Amendment challenges to the denial of tenure, if based on faculty assessments and not administrative action, would have to overcome the strong presumption that the faculty committee denied tenure based on academic quality,\textsuperscript{167} not based on ideological viewpoint.\textsuperscript{168} In order to ensure that these academic decisions are made by experts, summary judgment standards must be altered to avoid burdensome litigation and minimize judicial intervention.\textsuperscript{169}

**B. Actions by Administrators or Faculty as Administrator**

Institutional actions based on decisions made by

\textsuperscript{165} Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (denying student's claim that he had a constitutional right to retake an exam) (emphasis added).

\textsuperscript{166} This position exists in some tension with Univ. of Pa. v. EEOC. See supra notes 101–02 and accompanying text. However, subpoenaing records alone does not intrude upon the faculty's tenure selection as directly as allowing a Title VII lawsuit to proceed.

\textsuperscript{167} If administrative action was taken against a professor before consulting faculty expertise, however, the faculty-as-expert deference would not apply.

\textsuperscript{168} However, because academic freedom stems from First Amendment concerns, universities should be given less deference when professors or students bring First Amendment challenges than when other challenges are brought. See infra Part IV.B.

\textsuperscript{169} This view is not contrary to the result in Walker v. Bd. of Regents of Univ. of Wis. Sys., 300 F. Supp. 2d 836, 842–43 (W.D. Wis. 2004), because, in that case, the administration made an employment decision about another administrator, the assistant chancellor for student affairs. See supra Part I.C.
administrators or faculty acting outside their disciplinary expertise, in an administrative capacity, deserve less deference. These actions lack the academic expertise upon which academic freedom was founded. However, a substantial number of the decisions related to the essential freedoms of a university to determine “who may teach, what may be taught, how it shall be taught, and who may be admitted to study” are made by faculty acting in an administrative capacity or administrators. *Grutter* itself involved a prospective student challenging a university’s decision to deny her application, based on an admissions policy designed by faculty serving as administrators.\footnote{170} Such decisions are important to the structure and function of the university, but are more tangential to the pursuit of knowledge than decisions made on scholarly expertise. They are also more likely to be made based on managerial, bureaucratic, or ideological considerations than for academic reasons, as administrators are concerned with budgets, soliciting donations, managing personal conflicts and the public image of the institution.

To safeguard the university’s autonomy when making “complex educational judgments,”\footnote{171} however, administrative decisions that involve some amount of academic expertise should be entitled to greater deference than if academic freedom were not involved. This is especially true when faculty—the ones who possess that expertise—are involved in the process.

Within the category of administrative decisions, judges should assess the type of challenges brought by individual faculty members or students in order to determine how much deference to apply. For instance, because silencing professors or students on the basis of their ideas contravenes the rationale animating academic freedom, less institutional deference should be afforded when professors or students launch First Amendment challenges against administrators.\footnote{172} Judges should not greatly relax their scrutiny if a professor alleges that she was punished by administrators on the basis of an ideological viewpoint.

\begin{footnotes}
\footnote{170}{Grutter v. Bollinger, 539 U.S. 306, 312 (2003).}
\footnote{171}{Id. at 328.}
\footnote{172}{See supra Part III.}
\end{footnotes}
expressed in class or in her scholarship.173

Cases of this type often arise when a professor’s speech is found by administrators to violate university policy. For instance, in the case of Silva v. University of New Hampshire, a tenured professor was suspended without pay for one year for statements he made during lectures, including analogizing the focus required for good writing to a sexual relationship.174 The university found that his speech violated its sexual harassment policy.175 In Silva, the district court correctly held that applying the sexual harassment policy to Silva’s classroom speech violated his First Amendment rights “because it employ[ed] an impermissibly subjective standard that fail[ed] to take into account the nation’s interest in academic freedom.”176 Here, the court is referring to the individual professor’s academic freedom, which operates as a shield against the deference given to universities invoking institutional academic freedom, especially when making administrative decisions about which speech is appropriate or sexist instead of which speech is of high academic quality.

Further, even less deference should be afforded to administrative decisions regarding extracurricular speech, or those decisions made about students’ speech or behavior outside of class, or about professors who are not acting pursuant to their official duties. These administrative judgments are not only further attenuated from assessments about academic quality, but they are also farther removed from the management of core university activities. Universities, therefore, should not be given deference based on institutional academic freedom when they enact speech codes,177 which govern student, and sometimes faculty, expression outside of class. The administration should also receive less deference than professors acting in the faculty-as-

173. Even those who narrowly define professors’ academic freedom rights believe that these rights cover the ability to express controversial views, if academically supported. See Emergency Coalition to Defend Educ. Travel v. U.S. Dep’t of Treasury, 545 F.3d 4, 12 (D.C. Cir. 2008) (“Assuming that the right to academic freedom exists and that it can be asserted by an individual professor . . . the right can be invoked only to prevent a governmental effort to regulate the content of a professor’s academic speech.”) (emphasis in original).
175. Id. at 303.
176. Id. at 314.
177. Contra Horwitz, Universities as First Amendment Institutions, supra note 4, at 1519.
expert category when it penalizes a student for her speech because such a demerit is less likely to be academically-based.

Even though administrators or faculty serving as administrators should not receive the same deference as faculty members acting within their area of academic expertise, they should receive the most deference an administrator can receive when making core administrative decisions that implicate academic matters. For example, in *Walker v. Board of Regents*, a university failed to renew the contract of the assistant chancellor for student affairs.\(^{178}\) Her Title VII lawsuit alleged that the university’s decision was based on her race and gender.\(^{179}\) The district court refused to afford any deference to the university’s stated reasons for refusing to renew Walker’s contract.\(^{180}\) As in *Grutter*, some amount of “good faith” deference should have been presumed because college administrators were making an administrative decision regarding Walker’s capacity to assume the administrative role of vice chancellor of student affairs. These types of decisions require some expertise on running a university, and courts should defer to the university’s prerogative to govern itself academically by affording the university a greater presumption of good faith. An application of deference in this context would involve shifting more of the burden to Walker to overcome summary judgment.

**C. Institutional Academic Freedom as a Constitutional Right that can Supersede State and Federal Law**

Academic freedom invoked as a constitutional right capable of facially invalidating state or federal law, and not just a thumb on the scale in a constitutional analysis evaluating a purported infringement of other parties’ constitutional rights, diverts from *Grutter* significantly. As a result, this application of institutional academic freedom stands on shakier judicial ground. Still, there is some support for it in the doctrine. This is particularly true when state or federal law encroaches on core academic assessments,

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179. *Id.* at 842–43.
180. *Id.* at 858.
or the proper foundational mission of the university.

In *Keyishian v. Board of Regents*, for example, the Supreme Court invalidated New York laws requiring faculty to sign certificates stating that they were not members of the Communist Party and barring them from membership in particular organizations.\(^{181}\) Although the laws were deemed unconstitutional due to vagueness, overbreadth, and for violating associational rights, the Court cited *Sweezy v. New Hampshire*'s statements regarding the "essentiality of freedom in the community of American universities."\(^{182}\) In invalidating the New York law, the Court remarked that "[t]he 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."\(^{183}\) *Keyishian* exemplifies the type of case where institutional academic freedom should trump state law because the state is directly controlling who may teach based on adherence to an ideological orthodoxy.

The First Circuit's decision in *Asociación de Educación Privada de P.R. v. Garcia-Padilla* may also fall within this framework.\(^{184}\) Puerto Rican regulations sought to control, by some measure, the textbooks used by private high schools.\(^{185}\) Although the court of appeals distinguished high schools as having fewer academic freedom rights than universities, the regulations interfered with curricula, lesson plans, and the school's ability to "convey its own message."\(^{186}\) This is a direct intrusion on a basic academic function of the university, and should be subject to scrutiny based on the constitutional right to institutional academic freedom.

Similarly, a challenge to a state law that restricted university employees from accessing sexually explicit material on state-owned computers, if brought by an institution on the basis of academic freedom, should

\(^{182}\) *Id.* at 603.
\(^{183}\) *Id.* (internal quotation marks omitted).
\(^{184}\) *Asociación de Educación Privada de P.R., Inc. v. Garcia-Padilla*, 490 F.3d 1 (1st Cir. 2007). See supra Part I.C.
\(^{185}\) *Asociación de Educación Privada de P.R.*, 490 F.3d at 11–13, 18–19.
\(^{186}\) *Id.* at 12–13, 20.
prevail. This law directly impacts the information a faculty member may access while performing her professorial duties, and thus implicates the core academic functions of learning, transmitting information, and arriving at the truth through a multitude of tongues.

It is more difficult to determine whether institutional academic freedom should govern in situations like the one presented in the Sixth Circuit case of Coalition to Defend Affirmative Action v. Granholm. In Granholm, a Michigan state ballot initiative proscribed affirmative action in college admissions decisions. Plaintiffs claimed that the initiative interfered with the university's ability to select its students, and thus intruded upon the university's freedom to decide who may be admitted to study. However, states should be entitled to enact regulations affecting admissions that do not directly implicate academic concerns or impede the fulfillment of the school's legitimate academic mission. Residency requirements for public universities, for instance, fulfill the legitimate state interest of providing state residents with access to state-funded universities. Although these requirements may affect the composition of the student body by lowering the price of tuition for state residents, these rules are far more attenuated from interfering with the purpose of academic freedom than the loyalty oaths in Keyishian or even the textbook regulations in Asociacion de Educacion Privada.

The Michigan constitutional amendment banning race-conscious admissions was designed to eradicate unequal treatment on the basis of race in admissions decisions. However, the Grutter court held that these preferences help enhance "student body diversity," which is "essential" to the school's mission. Although opaquely stated, it appears that Grutter never held that racial preferences are necessary to achieving student body diversity, or essential to the Law School's proper educational mission, but only that the race-conscious admissions program was narrowly tailored to achieve student body diversity, broadly defined, which was

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188. 473 F.3d 237 (6th Cir. 2009).
189. Id. at 239.
190. See supra Part I.C.
considered essential to the Law School's mission.\textsuperscript{192} If, alternatively, the Court had held that racial diversity was \textit{necessary} to achieving a university's proper mission, then Michigan's law would be closer to the law prohibited in \textit{Keyishian}, as the Michigan law would severely undermine a university's ability to fulfill its proper educational mission. We therefore agree with the outcome in \textit{Granholm}, but not without reservation.

Without further guidance from the Supreme Court, institutional academic freedom as a constitutional right capable of facially invalidating state or federal law stands on less well-established ground, and courts should perhaps tread lightly in deciding to overturn state laws on this basis. Nevertheless, when state or federal laws interfere with the core freedoms necessary to the development of academic expertise and the dissemination of knowledge, courts should protect the institution's autonomy and its ability to make academic decisions without state or federal interference.

\textbf{CONCLUSION}

This article has endeavored to begin a task that courts have resisted for decades: delineating some of the contours of academic freedom. Although this task demands great time and attention from scholars and the judiciary, we have provided some useful factors for courts to consider when complying with \textit{Grutter}'s mandate to allow universities a "degree of deference" when making decisions "on academic grounds."

Since \textit{Grutter}, lower courts have struggled to apply institutional academic freedom in a principled and coherent way. Courts show different degrees of willingness to indulge this ill-defined right, and courts are confounded by which framework to apply when addressing this special concern of the First Amendment. We have proposed both threshold questions to answer before the right can be applied, and a framework for placing the right in its proper context. Courts must first determine whether an issue is truly "academic," in

\textsuperscript{192} The strict scrutiny test for equal protection violations asks whether government action is narrowly tailored to serve a compelling government interest, \textit{see id.} at 326, but does not require that the government action be the only means to achieving that interest.
the sense of being non-ideological and harmonious with the proper, historical institutional mission of promoting truth through a robust exchange of ideas. As part of this initial inquiry, courts should examine how institutional academic freedom coexists with the academic freedom rights and certain other First Amendment rights of students and faculty. Then, once the right is established, courts should examine who is invoking the right, in what capacity, and against whom the right is being marshaled.

There is much work to be done before the questions precipitated by the Grutter majority opinion can be authoritatively resolved. Until Grutter, there was still room to argue that academic freedom had never independently affected the outcome of a decision. Now, that argument is all but foreclosed, and courts must determine the extent to which Grutter meant what it said. Academic freedom occupies a special place in our constitutional tradition and in order for it to be preserved, it must be clarified. We hope this article has contributed to the ongoing dialogue on how to do so.

193. One scholar, who calls institutional academic freedom a "jurisprudential mirage," maintains that Grutter never "held that academic institutions are entitled to either academic freedom or autonomy under the First Amendment." See Hiers, supra note 11, at 52–56.