

# CONSTITUTIONAL ACADEMIC FREEDOM AFTER *GRUTTER*: GETTING REAL ABOUT THE “FOUR FREEDOMS” OF A UNIVERSITY

J. PETER BYRNE\*

## INTRODUCTION

The Supreme Court's decision in *Grutter v. Bollinger*<sup>1</sup> represents a high-water mark for the recognition and influence of constitutional academic freedom. The Court there relied, gingerly perhaps, on constitutional academic freedom, understood as some autonomy for university decision making on matters of core academic concern, to provide a compelling interest adequate to uphold flexible racial preferences in university admissions. Now that the dust has settled from direct import of the decision for affirmative action in admissions,<sup>2</sup> it is important to consider what role constitutional academic freedom, as a working constitutional doctrine, should or may play within current disputes about higher education.

In this essay, I hope to clarify the scope and strength of the right affirmed in *Grutter* and to suggest how it might apply to a few current and notorious disputes. Preliminarily, I provide some context for *Grutter* by reviewing the long development of constitutional academic freedom and the role it played in the Court's decision. The core of the paper examines three aspects of constitutional academic freedom by looking both at what *Grutter* tells us about each and how each addresses current controversies about the nature and scope of academic freedom. First, I argue that *Grutter* clarifies that constitutional academic freedom is a right and apply it to state referenda prohibiting universities from considering race in ad-

---

\* Professor of Law, Georgetown University Law Center. I would like to thank Neal Katyal, Robert Post, David Rabban, and Mike Seidman, for helpful comments, many of them critical, as well as the participants in the Rothgerber Conference at the University of Colorado School of Law.

1. 539 U.S. 306 (2003).

2. See Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 662–63 (2005) (collecting scholarly reactions to *Grutter*). Professor Horwitz observes that most commentators have neglected discussion of the academic freedom aspects of the case and proceeded under the assumption that *Grutter* “belong[s] to the Fourteenth Amendment, subgenus affirmative action.” *Id.* at 463.

missions. Second, I consider the centrality to constitutional academic freedom of faculty control over the evaluation of scholarship and curriculum, arguing that statutes enacting the so-called "Academic Bill of Rights" would be invalid. Third, I claim that the sphere of autonomy protected by the right must be limited to core academic areas and that broader claims to autonomy based on academic freedom, such as those advanced in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*<sup>3</sup> for employer recruitment policies, both lack merit and may imperil the basic right.

## I. CONSTITUTIONAL ACADEMIC FREEDOM BEFORE *GRUTTER*

Constitutional academic freedom exists to protect scholarship and teaching in higher education from untoward political interference, primarily by granting universities autonomy over certain core scholarly and educational policies.<sup>4</sup> While a First Amendment right, it embodies the academic values and systems of professional speech within higher education rather than the rights of expression elaborated by the Court for citizens generally against the broad sweep of government power. Thus, it protects indigenous academic speech values, to which the justifications for its applications should be traced, rather than the more familiar civic values of free speech relied on generally by courts in applying the First Amendment and elaborated by First Amendment scholars.<sup>5</sup> While the justifications for a special constitutional protection of academic speech are complex, university scholarship and teaching uniquely advance the search for truth and model a fruitful discourse based on freedom, rigor, and accountability.<sup>6</sup> This is not to say that academic free speech and civic free speech do not overlap. Plainly they do, both in individual cases and in the reasons employed to justify restraints on political power. However, nothing has confused understanding of constitutional academic freedom as much as misguided attempts to derive its content from general First Amendment principles.

---

3. 126 S. Ct. 1297 (2006).

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

5. Analogously, Robert Post argues that academic freedom protects the professor only in her professional role, and for functional reasons related to the production of knowledge, rather than as an individual citizen. Robert Post, *The Structure of Academic Freedom*, in ACADEMIC FREEDOM AFTER SEPTEMBER 11, 61, 72–73 (Barbara Doumani ed., 2006). I view this as complementary to the views expressed here.

6. See J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 138–89 (2004).

Academic freedom developed before modern First Amendment jurisprudence.<sup>7</sup> It was created neither by courts nor by legislatures. As a system of practices and values, academic freedom developed under the aegis of the American Association of University Professors during the early years of the twentieth century. Designed to insulate scholars from the political and religious prejudices of powerful lay trustees, it accommodated competing needs for intellectual freedom and disciplinary accountability through peer review and tenure, which both sanctioned careful evaluation by peers and sharply limited it by others. The core ethical concept was that a scholar could research, teach, and publish without retaliation for the political tendencies of her work. Peers should evaluate work only for its professional quality and, after tenure, professors could be dismissed only for cause such as moral turpitude demonstrated in a hearing. These were the conditions thought necessary for scholarship in the modern sense to be possible. While subject to numerous qualifications and failings in practice, the system of academic freedom had by mid-century settled basic issues of authority over scholarship and teaching in research universities, and this ethic has since spread to nearly all institutions of higher education, including most religiously affiliated schools.<sup>8</sup> This was the first national restraint on employers penalizing employees for their speech.<sup>9</sup> Law played a minor role in its functioning. Professors might be able to enforce academic or tenure rights as a matter of contract, but the chief deterrent against violation was scandal and professional censure.<sup>10</sup>

These informal arrangements shook when political actors grew more interested in expanding higher education after World War II. The Supreme Court fashioned constitutional academic freedom primarily to protect academic and intellectual work, seen as having prime First

---

7. See RICHARD HOFSTADTER & WALTER METZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (1955) (giving the classic account of the origins of academic freedom). The most important document is the Am. Ass'n of Univ. Professors, *1915 Declaration of Principles on Academic Freedom and Tenure*, reprinted in AM. ASS'N OF UNIV. PROFESSORS, *POLICY DOCUMENTS AND REPORTS* (9th ed. 2001) [hereinafter AAUP 1915 Statement]. See also Byrne, *supra* note 4, at 269–79.

8. Nearly all subscribe to the Am. Ass'n of Univ. Professors, *1940 Statement of Principles on Academic Freedom and Tenure*, in AM. ASS'N OF UNIV. PROFESSORS, *POLICY DOCUMENTS AND REPORTS* (9th ed. 2001). See generally Walter P. Metzger, *The 1940 Statement of Principles on Academic Freedom and Tenure*, 53 *LAW & CONTEMP. PROBS.* 3 (1990).

9. The Supreme Court eventually fashioned qualified protection for speech by public employees. See, e.g., *Waters v. Churchill*, 511 U.S. 661 (1994); *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

10. AAUP maintains a “censure list” of institutions found to have seriously violated academic freedom. This reflects the long-held view that institutions that deny their members academic freedom are not truly universities and should “not be permitted to sail under false colors.” AAUP 1915 Statement, *supra* note 7.

Amendment importance, from untoward outside political interference.<sup>11</sup> The first Supreme Court case to discuss academic freedom, *Sweezy v. New Hampshire*,<sup>12</sup> reflected the pressures placed on universities during the McCarthy period. The Court prohibited the state attorney general's questioning of a lecturer at a state university about the political content of his presentation. Although the decision rejected the questioning on narrow and odd grounds, the Court expressed vigorously the values it saw at stake:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>13</sup>

In a concurring opinion, which set the peculiar pattern in which constitutional academic freedom has been given its most comprehensive and probing expression in concurring opinions,<sup>14</sup> Justice Frankfurter urged an explicitly institutional right that amounted to "the exclusion of governmental intervention in the intellectual life of a university."<sup>15</sup> Frankfurter drew neither on the internal system of academic freedom nor on any collateral legal doctrines.<sup>16</sup> He based his arguments on non-legal educational pronouncements, most importantly a statement of South African scholars invoking the "'four essential freedoms' of a university—to determine itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>17</sup> The

---

11. See, e.g., Byrne, *supra* note 4, at 255; Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom*, 66 TEX. L. REV. 1265 (1988); David M. Rabban, *A Functional Analysis of Individual and Institutional Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990).

12. 354 U.S. 234 (1957).

13. *Id.* at 250.

14. See *infra* note 70.

15. *Sweezy*, 354 U.S. at 262.

16. The most helpful legal antecedents are state constitutional provisions granting governance autonomy to state universities and the common law doctrine of academic abstention. See Byrne, *supra* note 4, at 323–31.

17. *Sweezy*, 354 U.S. at 263.

Court viewed the university as creating the conditions under which free and valuable scholarship and teaching could exist.

Subsequently, the Court gave indirect support to a First Amendment right of academic freedom. While opinions praised it in general terms, decisions seem to rest on other grounds and its reach and effect remained ambiguous.<sup>18</sup> The relationship between an individual right and an institutional right remained cloudy. And this confusion deepened when courts came to recognize free-standing First Amendment rights of free speech for students and faculty against state universities and for public employees generally against their employers.<sup>19</sup> Courts perceived that simultaneous individual and institutional rights could be inconsistent and even in conflict.<sup>20</sup> The problem that constitutional academic freedom poses to the civil free speech rights of faculty is that it creates a presumption against judicial involvement in deciding the contours of individual free speech against the university because courts are precluded from displacing the system of speech operating within academia.<sup>21</sup>

The Court resolved some of these ambiguities in *Grutter*. It relied on constitutional academic freedom to decide a major constitutional question that had long been a subject of public and scholarly debate—the constitutionality of racial preferences in higher education admissions. The Court held that the University of Michigan Law School’s consideration of race among other factors served a compelling interest in achieving, and was narrowly tailored to achieve, diversity in the student body.<sup>22</sup> The decision provides a new baseline for considering the strength and scope of constitutional academic freedom. Some commentators, nonetheless, continue to express doubt that *Grutter* actually embraced academic freedom, at least as I have defined it.<sup>23</sup>

Below, I address several problems of academic governance that lately have been conspicuous and contentious. By considering whether they violate constitutional academic freedom, I hope both to illuminate that mysterious right after *Grutter*, and to offer perspectives on the spe-

---

18. See, e.g., *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

19. See J. Peter Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399 (1991).

20. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985); *Piarowski v. Ill. Cmty. Coll. Dist.* 515, 759 F.2d 625, 629 (7th Cir. 1985).

21. See Byrne, *supra* note 6. *Feldman v. Ho* is an interesting example of a court struggling to accommodate the free speech of a professor with the speech-evaluating role of the university. 171 F.3d 494 (7th Cir. 1999) (Easterbrook, J.).

22. *Grutter v. Bollinger*, 539 U.S. 306, 333–34 (2003).

23. See, e.g., Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did Grutter v. Bollinger Perpetuate the Confusion*, 30 J.C. & U.L. 531 (2004); John LaNear, *Academic Freedom in Public Higher Education: For the Faculty or Institution?* (2005) (unpublished Ph.D. dissertation, University of Wisconsin–Madison).

cific problems analyzed. In general, I claim that *Grutter* clarified that academic freedom is a real constitutional right and that it 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.

## II. APPLICATIONS OF CONSTITUTIONAL ACADEMIC FREEDOM

### A. *State Bans on Affirmative Action*

California adopted, in 1996, a state constitutional amendment banning the use of race in educational decision making, including student admissions.<sup>24</sup> Activists in Michigan appear to have succeeded in placing a similar measure on the ballot for November 2006, and polls suggest widespread support.<sup>25</sup> These measures seek to impose through the political process exactly those restraints on university self-governance the Supreme Court rejected in *Grutter*. These efforts may violate constitutional academic freedom. Consideration of arguments on this point will illuminate the strengths and weaknesses of *Grutter* as a precedent. In brief, because *Grutter* confirmed that academic freedom is a constitutional right that encompasses some affirmative action in admissions, these referenda must be unconstitutional.

In *Grutter*, the question was whether race conscious admissions criteria at the state law school violated the Equal Protection Clause. The plaintiffs had a strong case because the Court's precedents since 1989 had established that race could be used in government decision making only to serve a compelling state interest in a narrowly tailored fashion, and the only such interest that had been identified was to remedy specific past discrimination.<sup>26</sup> The state law school was considered to be the government for purposes of the state action doctrine; the Constitution directly regulated its behavior. If the Court had treated university decision

---

24. CAL. CONST. art. I, § 31(a) (approved Nov. 5, 1996) (codifying Proposition 209).

25. Michigan Civil Rights Initiative, <http://www.michigancivilrights.org> (last visited July 25, 2006) (containing the ballot language); see Peter Schmidt, *Battle Over Race-Conscious Admissions Continues in Michigan*, CHRON. HIGHER EDUC., Jan. 6, 2006, at A34.

26. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). The *Grutter* Court itself felt a need to "dispel the notion that the Law School's argument has been foreclosed, either expressly or implicitly, by our affirmative-action cases decided since *Bakke*." 539 U.S. at 328. It admitted that "some language in those opinions might be read to suggest that remedying past discrimination is the only permissible justification for race-based governmental action." *Id.*

making about racial preferences as standing on the same normative foundation as that of any other governmental entity, such as a city council or fire department, the plaintiffs' case would likely prevail.<sup>27</sup>

The Court held that the admissions program served a compelling state interest and was narrowly tailored to serve that interest.<sup>28</sup> The holding that it served a compelling state interest depended on the ruling that university decisions on academic grounds about student admissions were protected by constitutional academic freedom.<sup>29</sup> The holding that it was narrowly tailored depended on the finding that the extent of the use of race reasonably related to the law school's educational goals of enlivening the classroom by admitting a class that was diverse in many respects, including ethnicity. The weight given to the university's interest, adequate to overcome entrenched equal protection precedent against the use of race in decision making, must be understood as a holding that such core institutional choices are protected by the First Amendment.<sup>30</sup>

It is true that certain rhetorical ambiguities in *Grutter* raise doubts about the depth of the Court's commitment to this principle. The ringing endorsements of the constitutional status of Frankfurter's four freedoms in *Grutter* come in quotes from Justice Powell's *Bakke* decision.<sup>31</sup> Justice O'Connor writes in the midst of her analysis: "In announcing the principle of student body diversity as a compelling state interest, Justice Powell invoked our cases recognizing a constitutional dimension, grounded in the First Amendment, of educational autonomy."<sup>32</sup> Justice O'Connor's own language is more circumspect, not going further than affirming in her own words the wisdom of deference to university administrators in educational matters and that, due to "the expansive freedoms of speech and thought associated with the university environment,

---

27. See, e.g., *Hopwood v. Texas*, 78 F.3d 932 (5th Cir. 1996).

28. *Grutter*, 539 U.S. at 343.

29. *Id.* at 330.

30. Although the Supreme Court had not specifically rejected a diversity rationale for affirmative action before *Grutter*, the tenor of its holdings since *Bakke* made the likelihood of it embracing diversity remote. In *Metro Broad. Corp v. FCC*, the Court employed an intermediate standard of review to uphold a federal affirmative action program in awarding broadcasting licenses on the ground of promoting diversity of viewpoints. 497 U.S. 547 (1990). The Court subsequently rejected any use of the intermediate standard for racial classifications, overruling *Metro Broadcasting*. *Adarand Constructors*, 515 U.S. at 227. Justice O'Connor dissented in *Metro Broadcasting*, writing: "Modern equal protection has recognized only one [compelling state] interest: remedying the effects of racial discrimination. The interest in increasing the diversity of broadcast viewpoints is clearly not a compelling interest. It is simply too amorphous, too insubstantial, and too unrelated to any legitimate basis for employing racial classifications." 497 U.S. at 612.

31. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

32. *Grutter*, 539 U.S. at 330 (citing *Bakke*, 438 U.S. at 312).

universities occupy a special niche in our constitutional tradition.”<sup>33</sup> She also took care to cite the views of non-academics to provide independent grounds to think that some affirmative action in admissions was socially desirable.<sup>34</sup> These “tea leaves” at least raise some doubt about the solidity of the right and how the Supreme Court would deal with other questions about university autonomy. However, the ruling on admissions certainly seems firm. Quoting with approval language from prior opinions signals assent to the principals enunciated in the quotes.<sup>35</sup> After *Grutter* no lower court can reasonably question that constitutional academic freedom is a right protected by the First Amendment, and lower courts since *Grutter* consistently have so read it.<sup>36</sup>

*Grutter* cannot mean that diversity itself generally is a compelling state interest that justifies affirmative action. That proposition would swallow all the holdings rejecting it for contractors or school teachers.<sup>37</sup>

---

33. *Id.*

34. Thus, Justice O'Connor found that the law school's view that racial diversity would enhance the quality of education to be “not theoretical but real” based on representations of business executives and military leaders in *amici* briefs. *Id.*

35. See Neal Kumer Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 563 (2003) (“The discussion of academic freedom in *Grutter*, in short, was not some afterthought, shorn of history or precedential support. Rather the concept was built on a recognition of the First Amendment concerns of government intrusion into higher education, coupled with a healthy skepticism about the ability of generalist federal courts to make decisions for a university with respect to learning.”).

36. See, e.g., *Flint v. Dennison*, 361 F. Supp. 2d 1215, 1221 (D. Mont. 2005) (upholding university cap on student government campaign expenditures); *Nieman v. Yale Univ.*, 851 A.2d 1165, 1172 (Conn. 2005) (grounding deference to university's evaluation of candidate for tenure in First Amendment).

The importance of constitutional academic freedom to the *Grutter* decision may be seen in current litigation about student racial diversity in primary and secondary schools, which are not protected by constitutional academic freedom. The Court recently granted certiorari to review two lower court decisions upholding the limited use of race to enhance diversity in public high school student assignments. *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005) (en banc), *cert. granted*, 126 S. Ct. 2351 (2006); *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006). These cases are important and difficult precisely because academic freedom does not enhance constitutionally the school districts' interests in diversity. For example, Judge Bea's dissent in *Parents Involved* detailed the absence of any constitutional tradition of deference to high schools as compared with the academic freedom of universities and explained the reasons for a different approach. 426 F.3d at 1207–08. Nonetheless, programs enhancing racial diversity may serve compelling state interests other than those enshrined in academic freedom. But the lower court opinions in these cases highlight how crucial constitutional academic freedom was to *Grutter*.

37. Ethnic diversity among students at any educational level would seem to have educational value. However, at least a plurality of the Court has rejected the goal of providing “role models” for high school students as a rationale for protecting minority teachers from layoffs. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986). The “role model” approach for teachers seems analogous to a diversity argument for students. It does seem right that the Court should adopt some lesser standard of review for reasonable, good faith efforts by school

It seems that in the Court's view, diversity needs to be connected with some other value that it furthers to have constitutional traction. In *Grutter*, diversity contributed to a compelling state interest because university officials reasonably concluded that it would advance educational goals, and judicial deference to this judgment served a constitutional value. Of course, there may be other contexts within which diversity may be found compelling without any boost from academic freedom, but those judgments must be justified on quite different grounds.<sup>38</sup>

From my reading of *Grutter*, strong arguments arise that any state law that bars the use of race in state university admissions violates constitutional academic freedom. Academic freedom is protected by the federal Constitution and includes the authority to use race to some extent. Therefore, any state law—whether passed by initiative or legislature, whether having statutory or constitutional status under state law—that purports to deprive universities of authority to consider race in admissions at all violates the federal Constitution.<sup>39</sup> The only point at which opponents could attack this syllogism as a matter of legal reasoning is on the premise that academic freedom is a constitutional right. Although the Court has invoked academic freedom in striking down at least one state statute and in enjoining executive action,<sup>40</sup> it more often has employed it as a counter to constitutional arguments posed by challengers to university actions, as providing weight to university interests.<sup>41</sup> *Grutter* itself is the prime example. However, 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

---

boards that seek to preserve elusive racial diversity in public schools. See *Parents Involved*, 426 F.3d at 1193, 1196 (Kozinski, J., concurring); *Comfort v. Lynn Sch. Comm.*, 418 F.3d 1, 27 (1st Cir. 2005) (Boudin, C.J., concurring).

38. See, e.g., *supra* notes 36–37 (discussing high school cases).

39. What would be the analysis of a state statute requiring a state university to admit a racially diverse student body? If the correct reading of *Grutter* were that diversity generally was a compelling state interest, then such a statute, if narrowly tailored, might well be constitutional. Under my approach, the question would turn on whether a university would be found to have “academic grounds” upon which to choose a less diverse student body than the statute would require. One could imagine a set of facts in which an engineering school, for example, legitimately could defend on academic grounds taking the best-qualified students based only on math and science grades even though their student body was grossly disproportionately Asian.

40. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 593–96, 604 (1967) (striking down a loyalty oath created by state statute); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (overturning a contempt conviction of a professor who refused to answer questions by state attorney general about the content of the professor's lectures and the professor's knowledge of a particular political party).

41. *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 227–28 (1985) (rejecting a student's substantive due process challenge to grading).

vulnerable to state legislation. The formerly recognized constitutional interest of an individual to be free from rejection on account of her race would seem as weighty in constitutional analysis as the political interests of state voters. Again, even if the Supreme Court might eventually draw such uncouth and gossamer distinctions, it is doubtful that any lower court would.

What is surprising about this analysis is that a state should be powerless to control the admissions policy of its state university, funded substantially by state tax revenues. Perhaps it seems even more peculiar that the voters could not regulate admissions policy through initiative, arguably the most "democratic" political mechanism open to the people. And courts might accommodate these expectations as prudential matters. But, this is the chief point in favor of constitutional academic freedom as an institutional right: that the government is excluded from "the intellectual life of a university."<sup>42</sup> The special values of free scholarship and teaching flourish when protected from control by a democratic state or electorate because they involve scholarly, educational, and scientific judgments that most of us cannot competently make most of the time. The core decisions captured in the four freedoms represent the essential citadel of academic governance, and constitutional academic freedom places large barriers against political dictation of these decisions.

From one perspective, at least, this claim may seem appalling. The state creates and funds its state universities and governs them in myriad ways to which no one would raise a constitutional objection. This point of course is true and highlights the surprising feature of constitutional academic freedom—that it provides federal constitutional freedoms to a state instrumentality against the state itself.<sup>43</sup> Nearly every academic freedom case in the Supreme Court has involved a state university. But this may merely be an artifact of the unique history of higher education in the United States, with state and private institutions growing together, competing with one another, and sharing most mores and practices. Of course, it emphasizes the necessity of construing the area of institutional autonomy against the larger field of undoubted governmental control. State constitutional decisions protecting the autonomy of state universities from legislative control provide a useful model of such adjudication.<sup>44</sup> Many of these questions are difficult, but inclusion within the protected sphere of using race as a factor in admissions is the question

---

42. *Sweezy*, 354 U.S. at 261 (Frankfurter, J., concurring).

43. *See Byrne*, *supra* note 4, at 300.

44. *Id.* at 327–30.

incontrovertibly settled by *Grutter*. State initiatives seeking to reverse that decision must be unconstitutional.

### *B. Academic Bill of Rights*

This section, as well as the next, examines the scope of constitutional academic freedom. What kind of legal enactments does it protect against? This section first considers proposed state statutes that would require schools to hire faculty of diverse views and require faculty to present a range of views in class on controversial subjects. I argue that such statutes would violate constitutional academic freedom because they would displace academic control of core educational decisions with lay political control. The next section considers an argument advanced in a recent case: that legislative mandates requiring schools to permit the military to recruit students on campus violate academic freedom. I argue that academic freedom does not extend to peripheral student services like job placement, which are remote from core concerns about scholarship and teaching. Each contemporary concern addressed is important in its own right, and considered together they show the powerful but limited reach of constitutional academic freedom.

What is the scope of constitutional academic freedom? One faces real difficulty in distinguishing the government's legitimate interest in regulating the higher education establishment that it supports financially and upon which depend important public interests from the area appropriately subject to academic autonomy. The constitutional text offers no help because constitutional academic freedom is an indirect judicial elaboration from those protections necessary to maintain the freedom and quality of scholarship and teaching. Any articulation of the standard must be applied in light of the liberal values and traditions of American higher education. Any special protection of decision making must be rooted in the values of the First Amendment; the Constitution protects some university decision making only in order to protect a communal system of intellectual exchange sheltered by it. 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.<sup>45</sup>

---

45. In a thoughtful recent article, Professor Paul Horwitz argues that constitutional academic freedom may be conceived not primarily as protecting scholarship and teaching, but as shielding the university understood as a "small-scale model of and gateway for a democracy." Horwitz, *supra* note 2, at 556. Some language in *Grutter* surely supports this reading. Some of Horwitz's argument pursues broader theoretical debates about the First Amendment gener-

The four freedoms provide a standard for decision that has been surprisingly successful. Frankfurter did not present them in *Sweezy* as providing a rule of decision as much as inspiring slogans, referring to the statement of the South African professors as the "latest" and "most poignant" expression of the "dependence of a free society on free universities."<sup>46</sup> He did not use any of the freedoms to delineate the appropriate realm of state regulation from that of protected freedom; instead, he used the blunt instrument of "the exclusion of governmental intervention in the intellectual life of a university," which was sufficient to condemn the government intimidation present in the case.<sup>47</sup> Moreover, they do not help much in resolving internal conflicts within the institution, for example, indicating whether the case would have come out the same if a dean or trustee had asked Paul Sweezy the same questions about his lecture.

The South African statement of the four freedoms crucially required that any protected decision be made "on academic grounds." Universities are large, complex organizations moved by a variety of motives, including hunger for resources and raw competitive advantage. The need to connect a decision to academic concerns directs attention to the goals of scholarship and teaching directly advanced by the authority. Justice Powell's opinion in *Bakke* draws this distinction helpfully. In that case, he found that the medical school's interest in social justice did not fall within its academic realm but was better left to the political branches. Its interest in promoting a diversity of voices within the classroom could fall within that scope and should be protected.<sup>48</sup> Moreover, he tailored the scope of the protected authority to that of the academic interest, holding that diversity could be a factor among other academic criteria for admission, but that there could not be a quota for any race, an approach that

---

ally, which I cannot pursue. Still, academic freedom makes no sense as a constitutional right if severed from the knowledge value of scholarship and teaching. In earlier work, I argued that many functions of a university unrelated to teaching and scholarship might be labeled "democratic," justifying regulation by democratically elected officials. Byrne, *supra* note 4, at 332-33.

46. *Sweezy*, 354 U.S. at 262.

47. *Id.* In his critique of institutional academic freedom, Professor Richard Hiers makes much of the limitations of the South African statement as a legal authority for academic freedom. Hiers, *supra* note 23, at 533-35. I agree that Frankfurter's use of the statement is anomalous. Byrne, *supra* note 4, at 292. But far more important to Frankfurter and to the Court in 1957 was the havoc wrought by McCarthy-era pressures on faculties. The Court seemed concerned only about external, political threats to academic freedom. Once again, the life of the law proved to be experience, not logic.

48. *Compare Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 306-09 (1978) (Powell, J., concurring) (explaining the lack of competence and authority of a university to make findings concerning past societal discrimination) with *id.* at 311-14 (discussing a university's competence and constitutionally-sanctioned authority to determine that racial diversity will enhance education).

might have been permissible if the decision had been grounded in social justice at large. Similarly, 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.<sup>49</sup> The relation of autonomy to academic work, captured in a claim to protect amateurism, simply seemed too remote. The galloping commercialization of college football understandably removed that extracurricular activity from the purview of teaching and scholarship.

Courts also have repeatedly held in Title VII cases that universities have no academic interest in discriminating against women and minority faculty in hiring and promotion, even though such cases involve determinations of “who may teach.”<sup>50</sup> Universities have not made this argument as such; it is interesting that they articulate an academic case for inclusion but not exclusion. Prejudice is not an academic value, of course. A university’s claim in such cases is that the judicial inquiry threatens peer review by exposing deliberations and subjecting ostensible academic decision to the test of whether it is pretextual. These are not easy process issues, but courts have insisted on the propriety of condemning race and sex discrimination and applying familiar procedures to uncover it. However, courts also have exercised restraint in displacing what appear to be bona fide academic judgments about competence. While commentators may reasonably differ about whether the courts have struck the right balance between protecting individuals against discrimination and protecting academic decision making, there cannot be much doubt that they have sought to distinguish decision making on academic grounds from invalid or subjective prejudice.

The Academic Bill of Rights (ABR) has been promoted by a campaign spearheaded by activist David Horowitz, under the auspices of an organization known as Students for Academic Freedom.<sup>51</sup> It addresses an alleged problem of political bias and indoctrination by predominantly “liberal” or “leftist” faculty.<sup>52</sup> The proposed solution is for legislatures to direct boards of state universities to implement policies or procedures that safeguard academic freedom as the legislation defines it. Although bills have been introduced in eighteen states and in the U.S. House of

---

49. *NCAA v. Bd. of Regents*, 468 U.S. 85, 98–99 (1984).

50. *Walker v. Bd. of Regents of the Univ. of Wis. Sys.*, 300 F. Supp. 2d 836, 851 (W.D. Wis. 2004); *see Univ. of Pa. v. EEOC*, 493 U.S. 182, 195–197 (1990).

51. Academic Bill of Rights, <http://www.studentsforacademicfreedom.org/abor.html> (last visited July 19, 2006).

52. *See* DAVID HOROWITZ, *THE PROFESSORS: THE 101 MOST DANGEROUS ACADEMICS IN AMERICA* (2006) (detailing the position of the “insurgents”).

Representatives, no state has enacted any of the bills. In Colorado, the presidents of the state's public universities agreed to a Memorandum of Understanding to, *inter alia*, "review its students [sic] rights and campus grievance procedures to ensure that political diversity is explicitly recognized and protected."<sup>53</sup>

The ABR has been denounced by numerous faculty groups<sup>54</sup> and the American Association of University Professors<sup>55</sup> as a violation of the principles of academic freedom. There are three chief elements that elicit faculty ire. First, the ABR places a duty on faculty to present a diversity of views on controversial subjects covered in class.<sup>56</sup> Second, it directs schools to hire faculty members to foster "a plurality of methodologies and perspectives."<sup>57</sup> Third, institutions are directed to establish procedures for implementing these and other principles.<sup>58</sup> The overall complaints are that these requirements impose political rather than academic criteria for class content and faculty hiring, that they will make faculty answerable to some non-expert body for decisions about class coverage and hiring, and that the overall effect of these will chill teaching and scholarship.<sup>59</sup>

To date, arguments about the propriety of the ABR have remained on the level of political and academic principles. Reaction to the ABR will turn to some extent on whether one perceives a widespread or systematic problem of leftist bias in university teaching.<sup>60</sup> A preponderance

53. Memorandum of Understanding (Mar. 18, 2004), <http://www.studentsforacademicfreedom.org>.

54. See, e.g., Jennifer Howard, *MLA Offers Preview of Report on Tenure and Votes to Oppose 'Academic Bill of Rights'*, CHRON. HIGHER EDUC., Jan. 13, 2006, at A18.

55. Attacks on Academic Freedom and Independence of Colleges and Universities, 2005 Annual Meeting Resolution, <http://www.aaup.org/statements/Resolutions/AFattacks.htm> (posted June 15, 2005).

56. Academic Bill of Rights, *supra* note 51.

57. *Id.*

58. *Id.*

59. The historian of McCarthyism in higher education writes:

Despite its heavy reliance on the traditional rhetoric of academic freedom, the "academic bill of rights" seriously undermines that freedom. By injecting extraneous political considerations into personnel and curricular decisions, the measure not only interferes with those areas of educational policy that are the traditional responsibility of the faculty, it also disregards the professional standards that guarantee the quality of American higher education.

Academe maintains those standards by policing itself through peer review. . . .

. . . Professors must make the main decisions about hiring, tenure, promotion, and curriculum . . . .

Ellen Schrecker, *Worse Than McCarthy*, CHRON. HIGHER EDUC., Feb. 10, 2006, at B20.

60. It must be said that Horowitz and his associates have not made much of a showing.

of faculty to the left is not the same thing as teaching from any perspective that crosses a professional line into indoctrination. Most faculty—of all political stripes—present various viewpoints and encourage students to do so; departures from these norms come more frequently from intellectual enthusiasm or arrogance than from political passion. While debate about the ABR has been largely wholesome, actual legislative enactment would harm more than help free teaching and scholarship.

Would enactment of the ABR violate constitutional academic freedom? One might plausibly argue that the ABR could be implemented in a manner that would enhance rather than impair academic freedom. Faculty may not ethically reject candidates based on the political tendencies of their work. More generally, professors treating ideas with which they disagree respectfully and even presenting them in their best light in class or scholarship further the values of academic freedom. A school might implement a statute judiciously, affording substantial deference to faculty within each department to define the range of reasonable scholarly dispute within its field and craft mechanisms of oversight that defer substantially to scholarly expertise in hiring and setting curriculum. Thus, one might continue in a strictly legal argument, the legislation should not be found to violate constitutional academic freedom on its face. Courts should wait to scrutinize specific applications for excessive political intrusion.

This argument, however, should fail: enactment of the ABR would immediately violate constitutional academic freedom on its face. First, legislators would be providing rules for the conduct of core university

---

In a recent hearing before Pennsylvania legislators, he had to back off of accusations of classroom bias against two professors for lack of evidence. The scholarship in Horowitz's recent book, *supra* note 52, has been subjected to withering criticism. For example, Neil Gross, a sociology professor at Harvard, points out that sampling biases in Horowitz's book make his claim that the individual professors he attacks are "representative" so implausible as to "fail[] to distinguish partisanship from serious social scientific research." Neil Gross, *Right, Left, and Wrong: David Horowitz's Latest Attack on America's Left-Leaning College Professors Doesn't Add Up*, BOSTON GLOBE, Feb. 26, 2006, at D10.

Horowitz lists two of my colleagues at Georgetown University Law Center, David Cole and Mari Matsuda, among the dangerous. The accounts of them are nothing but contemptible character assassinations, fraught with errors. One error concerning Professor Matsuda touches me directly. She is accused of being responsible for the "Speech and Expression Policy" at Georgetown University. HOROWITZ, *supra* note 52, at 278. In fact, Professor Matsuda had nothing to do with the creation of that policy. I was a principle author of the policy, along with a Jesuit theologian and Georgetown's current president. See *Speech and Expression Policy*, <http://www.georgetown.edu/student-affairs/policies.html#speechandexpressionpolicy> (last visited July 19, 2006). The main purpose of the policy was to establish formally, for the first time, a right of free expression for all members of the Georgetown community, as a commitment to what Georgetown thinks is entailed in being a Catholic and Jesuit university. It does exclude from protection some hate speech, although the book weirdly misquotes the policy. HOROWITZ, *supra* note 52, at 278.

functions encompassed within the four freedoms and determining on academic grounds who may teach and what may be taught. Such rules would not prohibit denying appointments on non-academic grounds, such as race or sex discrimination, but would encourage appointments based on the political tendencies of the ideas propounded by the candidate. This entangles political power with academic judgment in a way that threatens systematic corruption. It matters greatly that the ABR represents a political effort to change the content of teaching and scholarship within existing fields through political action. In the language of *Sweezy*, it constitutes a "governmental intrusion into the intellectual life of a university."<sup>61</sup>

Second, courts also should invalidate the ABR as vague and overbroad. These doctrines have special salience in the First Amendment context because vague and overbroad statutes will inhibit exercise of important freedoms.<sup>62</sup> In the context of the ABR, it is evident, for example, that a statutory right for a student to be "presented diverse approaches and dissenting sources and viewpoints within the instructional setting"<sup>63</sup> could be applied to protected speech or conduct and that doubt about its reach could inhibit both teachers and administrators in protected curricular choices. The Supreme Court already has struck down on vagueness grounds a New York statutory and regulatory scheme to prevent the employment of disloyal faculty and staff by, *inter alia*, requiring removal for "seditious" acts or utterances, citing the importance of not inhibiting academic freedom, despite the possibility of constitutional application.<sup>64</sup> In analogous decisions, courts unanimously struck down university speech codes directed at racial insults or sexual harassment for being overbroad and vague.<sup>65</sup> The student speech codes of the 1990s and the ABR are alike in their mixed goals of enhancing education in certain directions and shifting balances of power on campus; they differ crucially in that the former were freely adopted by schools to address harms they saw, while the ABR would be imposed by legislation.<sup>66</sup> Courts that

---

61. 354 U.S. 234, 261 (1957) (Frankfurter, J., concurring).

62. *E.g.*, *Grayned v. Rockford*, 408 U.S. 104, 108-09 (1972); *Gooding v. Wilson*, 405 U.S. 518, 527-28 (1972).

63. College Access and Opportunity Act of 2005, H.R. 609, 109th Cong. § 103 (1)(a)(2)(C) (as introduced in House, Feb. 8, 2005).

64. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 597-99 (1967) ("The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts.").

65. *See, e.g.*, *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 972 (9th Cir. 1996); *UMW Post, Inc. v. Bd. of Regents of the Univ. of Wis.*, 774 F. Supp. 1163, 1173 (E.D. Wis. 1991).

66. No one denied that the litigated speech codes could be applied in a constitutional manner. Another interesting difference is that while the speech codes arguably impinged on

found the speech codes vague and overbroad certainly should find the ABR to be so too. Moreover, courts have shown little patience with political measures that exert indirect influence over teaching and scholarship,<sup>67</sup> something accomplished and probably intended to be accomplished by mere passage of the ABR legislation.

A key flaw in the arguments for the ABR is that faculties have no obligation to be viewpoint neutral in any constitutional sense regarding substantive disputes within their disciplines. While scholars need to deal honestly with all views, they do not need to treat any view as valuable or include it within the body of work to which they refer in addressing the issues they think important for their own work. In fields liable to controversy, scholarly critics will judge any scholar's work, in part, by the author's choice of and commentary on existing work. Injecting political controls or pressures into this process must distort both production and critique.<sup>68</sup>

This is at the core of the difference between academic freedom and free speech generally. While government actors need to be neutral in the various substantive disputes, university faculties need not and, perhaps, should not be. The Court has struggled with this distinction in addressing university rules for extracurricular student speech, generally requiring some form of content neutrality in allocating benefits to student groups.<sup>69</sup> Concurring opinions in those cases cautioned the majorities not to slight the primary role of the university in making judgments about which speech activities are more valuable to educational goals.<sup>70</sup> While the Court as a whole has tended to treat extracurricular speech as a matter of civic free speech, it never has suggested that curricular speech needed to conform to civic norms. Within the curriculum, the need for making judgments of quality and suitability precludes judges from constraining academic choices to effectuate any version of civic neutrality.

---

individual free speech rights, the ABR would invade rights that are primarily institutional or at least professional.

67. See, e.g., *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 678–80, 682 (6th Cir. 2001); *Levin v. Harleston*, 966 F.2d 85, 89–90 (2d Cir. 1992).

68. This is not to say that individual scholars do not descend to political prejudice, jealousy, or spite in indicating what other work they think valuable, whether in writing, teaching, or evaluating in an appointments or tenure process. But these are widely recognized as failings. My argument is that a legislative fix for such failings endangers the principle by which we know that they are failings and the process that usually corrects for them.

69. *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 229–32 (2000); *Widmar v. Vincent*, 454 U.S. 263, 273–78 (1981).

70. *Southworth*, 529 U.S. at 238–39 (Souter, J., concurring) (“[W]e have spoken in terms of a wide protection for the academic freedom and autonomy that bars legislatures (and courts) from imposing conditions on the spectrum of subjects taught and viewpoints expressed in college teaching . . . .”); see also *Widmar*, 454 U.S. at 278–79 (Stevens, J., concurring).

Consideration of the ABR emphasizes that academic freedom protects the autonomy of decision making on academic values by the appropriate academics. The displacement of academic speech norms by civic or political speech norms would undermine the disciplinary and educational purposes of higher education. This point can be generalized to other important but currently dormant debates.

Universities should have authority under constitutional academic freedom to penalize student speech without intellectual value that seriously interferes with other students' abilities to obtain an education.<sup>71</sup> Similarly invalid should be a California statute that gives students at private universities the same free speech rights that students at public institutions have against their schools.<sup>72</sup> Finally to be condemned is the New Jersey state constitutional doctrine under which someone who was not a member of the academic community in any way—in fact he was a Larouche activist—was found to have the right to leaflet on a private university campus.<sup>73</sup>

In each of these cases, legislative or judicial norms of civic liberty displaced academic rules designed, not always faultlessly, to protect study and reasoned discourse. Of course, they involved only contested areas of extracurricular life where academic and civic norms co-exist. But they exemplify the threat, made manifest in the Academic Bill of Rights, to wield partial notions of civic rights to sweep away regulatory mechanisms, such as peer review, designed to keep universities directed toward education and scholarship. A virtue of constitutional academic freedom is that it provides a constitutional discourse in which this conflict of important values can be explicated and resolved so as to protect traditional academic values.

### C. *Claims of Academic Freedom in Rumsfeld v. FAIR*<sup>74</sup>

This section looks to clarify the boundaries of constitutional academic freedom by disagreeing with a recent claim of application of that

---

71. See Byrne, *supra* note 19. I maintain this view notwithstanding the unanimous lower court decisions finding them unconstitutional, usually on grounds of overbreadth and vagueness. See Byrne, *supra* note 6, at 100–07. But see *Southworth*, 529 U.S. at 238–39 (Souter, J., concurring) (suggesting that the four freedoms might shield university student speech codes).

72. CAL. EDUC. CODE § 94367 (West 2002). A California court relied on this provision in striking down Stanford's student speech code. *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995), available at <http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm> (last visited July 19, 2006).

73. *State v. Schmid*, 423 A.2d 615 (N.J. 1980), appeal dismissed *sub nom.*, *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

74. 126 S. Ct. 1297 (2006) [hereinafter *FAIR*].

right. To be acceptable within constitutional law, and in conflict with democratic decision making, academic freedom must be neither protean nor imperial. It must be restricted to providing institutional autonomy for decisions on academic grounds concerning core intellectual interests in teaching and scholarship. Thus, it may be valuable to consider in some detail why academic freedom should not be held to protect institutional rules for student placement services.

Most areas of state regulation and control of universities do not conflict with academic freedom. For most purposes, universities can be regulated like any non-profit corporation. Moreover, state universities are arms of state government and subject to pervasive governance tied to funding, labor standards, and property management. Some state constitutions create state university systems as a separate branch of government, providing structural and principled protections for educational decision making. These provisions anticipate to some extent the federal constitutional right, although the state provisions predate the federal right by as much as one hundred years.<sup>75</sup> In an earlier paper, I argued that government could regulate those aspects of university business that “promote democratic values” such as access, sports, staff employment, and applied research, but could not interfere with scholarship, liberal education, and the system of individual academic freedom that fosters them.<sup>76</sup> Another more doctrinal way of putting this might be that constitutional academic freedom protects the four freedoms of a university, but most government regulation does not substantially burden these core rights. These core rights are deeply anti-majoritarian because they rest on the judgment that academic speech, in which not every citizen may participate, has a particular, beneficial relationship to the search for truth that justifies a distinct form of First Amendment protection.<sup>77</sup> The special value of teaching and scholarship can be protected constitutionally only if drawn narrowly not to impinge on the appropriate prerogatives of popular law making.<sup>78</sup>

The Solomon Amendment requires universities to allow the military access to campus to recruit students, even though the military violates a

---

75. See Byrne, *supra* note 4, at 327 n.303 (listing state constitutional provisions). Lewis Menand described academic freedom as a “deal” between professors and American society whereby academics would commit themselves to the “disinterested pursuit of truth” in exchange for political non-interference in university affairs. LEWIS MENAND, *THE METAPHYSICAL CLUB* 417 (2001).

76. Byrne, *supra* note 4, at 332–39.

77. Byrne, *supra* note 6, at 138–40.

78. One court has explicitly rejected any individual right of academic freedom because it would give greater speech rights to professors than to other citizens. *Urofsky v. Gilmore*, 216 F.3d 401, 411 n.13 (4th Cir. 2000) (en banc).

school's policy prohibiting employer discrimination on the basis of sexual orientation, or face loss of federal funds.<sup>79</sup> The Third Circuit held that the Solomon Amendment violates the First Amendment, relying on *Boy Scouts of America v. Dale*, and the Supreme Court unanimously reversed.<sup>80</sup> The appeals court relied on the associational speech rights amplified in *Dale*, which might create a general form of institutional speech autonomy different from academic freedom.<sup>81</sup> The Supreme Court unanimously reversed, holding that "FAIR has attempted to stretch" the holding of *Dale*, and "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything."<sup>82</sup>

Various entities argued that the Solomon Amendment violates academic freedom, claiming that law schools express their values and convey them to students by adopting policies governing employers recruiting on campus. The Supreme Court kindly ignored these arguments. I address them here, however, because they represent a misguided effort to "stretch" institutional academic freedom beyond the breaking point. Invoking academic freedom here is unpersuasive.

First, universities do not teach primarily through inculcation or modeling appropriate conduct but through study and discussion. Admittedly, professors should model an appropriate regard for truth and respect diversity of thoughtful viewpoints, and their commitment to doing so both enables liberal education to occur and supports academic freedom for the classroom. However, this is quite remote from students learning through observing institutional adherence to even important norms adopted by national educational organizations. Young people "learn" from observing hypocrisy and faithfulness by all sorts of institutions and individuals, but this is not the kind of structured, analytic teaching distinctive to higher education that justifies academic freedom protections.

There are special problems for professional schools because they seek to prepare students to engage in a self-directed manner in the world through exercising distinctive skills. Professional schools appropriately have commitments to certain ethical norms and to conveying them to their students. The law schools in *FAIR* emphasized the law's ethical commitment to equality of opportunity without regard to sexual orienta-

---

79. 10 U.S.C.A. § 983 (1998 & Supp. 2006). The statute only requires schools to provide military recruiters access equal to that provided other recruiters, but the Court construed the language to mean access equal to recruiters that do not discriminate. *FAIR*, 126 S. Ct. at 1305-06.

80. *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

81. 530 U.S. 640 (2000). The best part of this holding is the ironic twist turning *Dale's* protection of homophobia against the homophobic purpose of the Solomon Amendment.

82. *FAIR*, 126 S. Ct. at 1307, 1313.

tion. These normative commitments can be compatible with academic freedom, even when at times they constrain the range of debate, because the ethical commitments provide a framework for the educational enterprise itself. Academic freedom shields the teaching of these norms in the curriculum (so long as teachers and students have reasonable opportunities to criticize them) but cannot protect the norms themselves from displacement by other civic norms.<sup>83</sup>

Second, the underlying dispute in *FAIR* is about control over the terms for on-campus employment recruiting, not for scholarship and teaching. The Solomon Amendment places no constraints on any of the four freedoms.<sup>84</sup> The Supreme Court seems to view the extra-curriculum as an area where universities may pursue educational goals, but must do so in accord with civic norms.<sup>85</sup> But the military recruiters do not come to campus to debate the role of gays in the military, only to enlist employees. Thus, recruiters are not even engaged in the type of political speech common in extracurricular settings (and certainly do not disrupt the political speech occurring on campus) but only in something akin to commercial speech.<sup>86</sup> Recruiting rules are one of many important areas of university concern that do not fall within the rationale of constitutional academic freedom.

Finally, while the Association of American Law Schools and many law professors understandably oppose the Solomon Amendment, a uni-

---

83. See J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315, 329–31 (1993).

84. *FAIR*, 126 S. Ct. at 1307 (“The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds.”).

85. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217 (2000) (upholding mandatory student fees to fund extracurricular speech because of educational purpose, so long as fund awards are viewpoint neutral).

86. Commercial speech is generally thought to be entitled to less protection than other speech. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980). The issue in *FAIR* is not whether a state university can regulate commercial speech on its campus. Cf. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469 (1989) (university’s substantial interest in preserving educational atmosphere on campus justifies some restrictions on commercial solicitations). However, the peripheral relation of employment recruitment to education is highlighted by considering the nature of the speech that Congress sought to protect from university ban.

It may be argued that compelled military recruiting on campus resembles the New Jersey rule permitting citizens to enter campuses to leaflet, which I argued should be found unconstitutional. See *supra* note 73 and accompanying text. In both cases, universities are restricted from controlling outsiders from speaking on campus, although in neither case are teaching and scholarship directly impaired. But the New Jersey rule has a far larger potential to disrupt the educational mission because it generally authorizes many outside speakers to distract students and teachers in the public areas of campuses.

versity's opposition to the Solomon Amendment cannot claim any more privileged foundation than that of any other social institution. This is not an area where faculty have any special expertise to which society should defer. Moreover, the attempt to claim academic freedom protection for excluding the military risks bringing the entire right into disrepute as mere special pleading.<sup>87</sup>

To amplify my concerns, I take issue specifically with the brief *amicus curiae* filed in the Supreme Court by the AAUP, the foremost institutional authority on academic freedom.<sup>88</sup> This brief, signed by some of the nation's best scholars of constitutional academic freedom and free speech, appears to me to present a potentially disastrous argument because it acknowledges no principled limit to the autonomy that a university can claim. The AAUP argument takes off from the safe ground that some academic governance decisions are protected by the Constitution. The brief then claims:

---

87. Judge Wilkins was quite wrong to criticize claims of constitutional academic freedom for giving greater rights to professors than to other citizens. *Urofsky v. Gilmore*, 216 F.3d 401, 411 n.13 (4th Cir. 2000) (en banc). Constitutional academic freedom exists to protect a uniquely valuable process of seeking truth and educating students that redounds to the benefit of society at large. Byrne, *supra* note 6, at 138. But the Fourth Circuit's suspicion of special privilege demonstrates the need to confine claims of institutional autonomy to the core academic activities related to teaching and scholarship captured in the four freedoms.

88. Brief for American Association of University Professors as Amicus Curiae Supporting Respondents, *FAIR*, 126 S. Ct. 1297 (No. 04-1152), available at <http://www.aaup.org/Legal/cases/SolomonAmendmentAmicusBrief.pdf> [hereinafter AAUP Brief]. Friends at the AAUP could plausibly view this critique as requiring real chutzpah, given that I concluded a recent article by urging AAUP and other higher education associations to file more amicus briefs defending institutional academic freedom. Byrne, *supra* note 6, at 141. But the content of such briefs, of course, remains a matter of urgent discussion.

Other briefs touched only gently on academic freedom as support for a civic First Amendment right. See, e.g., Brief of Association of American Law Schools as Amicus Curiae Supporting Respondents, *FAIR*, 126 S. Ct. 1297 (No. 04-1152).

A remarkably perverse brief *amicus curiae* was filed for the Center for Individual Rights and several individuals, arguing that the Solomon Amendment "enhances" academic freedom by requiring law schools to permit the military recruiters to convey their messages to students on campus. The premise of the argument was that academic freedom was a right primarily of students to receive diverse messages. The brief essentially ignored the history of academic freedom, Supreme Court precedents concerning institutional autonomy, and the "exclusion of government intervention in the intellectual life of a university." Instead, the brief treated precedents restricting state university control over student extracurricular speech as warranting the government to dictate that outsiders should be able to speak to students on campus. Such an approach would, of course, destroy academic freedom, both in the professional and constitutional sense, but seems calculated to lay the groundwork for government intervention on campus through devices like the Academic Bill of Rights. Brief for Center for Individual Rights as Amicus Curiae Supporting Petitioners, *FAIR*, 126 S. Ct. 1297 (No. 04-1152), available at <http://www.cir-usa.org/releases/77.html>.

It follows that academic freedom also 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. Preparing students for future employment is, after all, the ultimate function of the university in our society.<sup>89</sup>

The AAUP argument extends to peripheral institutional activities beyond the essentially intellectual foundations of constitutional academic freedom. Regulating the human rights policies of potential employers does not affect the standards or processes of research, scholarship, or liberal education.

The AAUP brief goes so far as to belie the cherished goals of advancing truth, or forming free intellects, by claiming wrongly that “instilling” correct values in future employees is the core of the university’s mission. 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. Of course, character development has been a traditional goal of colleges, as so many hours of community service affirm, and schools are free to incorporate religious and ethical values. But academic freedom exists to protect a liberal education, which teaches students to think carefully and fruitfully for themselves, something antithetical to inculcation.<sup>90</sup> Schools whose “ultimate function” is to prepare students for employment do not merit any institutional autonomy under the First Amendment. Doctrinally, the argument ignores the four freedoms, which do not extend to a university deciding for itself on academic grounds the employment policies of those who interview on campus. Admission of a diverse student body rests on academic grounds because it shapes the nature of classroom discussion; excluding homophobic employers does not.<sup>91</sup>

The brief seeks to anchor its claims about the scope of academic freedom by tying screening of potential employers to constitutionally

---

89. AAUP Brief, *supra* note 87, at 12.

90. On the nature of a liberal education, *see, e.g.*, MARTHA C. NUSSBAUM, CULTIVATING HUMANITY 294–99 (1997). On the relation between academic freedom and liberal education, *see* Byrne, *supra* note 4, at 335–36.

91. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 313 (1978) (Powell, J., concurring and dissenting) (finding a constitutional protection for university use of race in admissions decisions because “universities must be accorded the right to select those students who will contribute the most to the ‘robust exchange of ideas’”). Government rules excluding gays from military service, at most, will have only an attenuated effect on the exchange of ideas in law schools by discouraging a few gays from pursuing a legal education at all. It more likely has the opposite effect by perpetuating through statutes anachronistic legal taboos that call out for reform.

protected faculty autonomy over grading.<sup>92</sup> The AAUP argues that just as a faculty may determine as a matter of educational policy to award grades based on students' merit, so it may determine that merit shall be the touchstone of a school's career development program. A faculty is entitled to make the academic judgment that assisting recruitment by an employer that refuses to hire openly gay students is akin to failing a student in class merely for being gay.<sup>93</sup>

The attractive core of this argument is that academic values do not recognize sexual orientation as a fair or relevant criterion for denying anyone an appointment or admission. But the argument applies these values to a context where they have no direct or substantial effect on teaching or scholarship—student employment services. In effect, this argument claims imperialistic autonomy for any university operations to which an academic norm can be analogized, even in a non-academic context. Doctrinally, this runs counter to *NCAA v. Board of Regents*, where the Court made it clear that it would examine antitrust issues within college football with the same intensity as those it would within professional football, notwithstanding university arguments about the educational values of amateurism.<sup>94</sup> Several recent lower court cases aptly distinguish between protected decisions and those fully subject to regulation.<sup>95</sup>

More importantly, these limits must be recognized because universities carry on a plethora of socially useful activities that go far beyond scholarship and liberal education, from running radio stations to testing new drugs to advising farmers on what trees to plant. The government has legitimate interests in regulating most of these programs, which could be carried on as well in any number of institutions as in universities. Citizens will be perplexed why legislatures may not regulate activities they normally regulate, simply because universities carry them out. Public, including judicial, support for academic freedom will wane when citizens no longer can perceive how it functions to protect the important public interest in producing knowledge.<sup>96</sup>

---

92. See *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 n.11 (1985).

93. AAUP Brief, *supra* note 87, at 12.

94. 468 U.S. 85 (1984).

95. Compare *George Washington Univ. v. District of Columbia*, 318 F.3d 203 (D.C. Cir. 2003) (rejecting academic freedom challenge to zoning requirement to house a percentage of students on campus), and *Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ.*, 174 S.W.3d 98, 118–19 (Tenn. Ct. App. 2005) (academic freedom does not excuse university from complying with terms of gift agreement naming dormitory "Confederate Memorial Hall"), with *Yacovelli v. Moeser*, No. 1:02CV596, 2004 WL 1144183, at \*14–16 (M.D.N.C. May 20, 2004) (citing academic freedom as factor in rejecting Establishment Clause challenge to university's assignment of a book about Islam to first-year students).

96. Derek Bok has warned about an analogous sapping of scholarly ideals and public sup-

Similarly, exempting peripheral university functions from government regulation will create an unwholesome incentive for school officials and entrepreneurs to use the university form as a vehicle to carry out new and additional economic activities. Universities already struggle to reconcile their intellectual missions with many schemes used to raise the funds to carry out that mission. Providing a new reason to do business through a university would further bolster the economic interests of schools against core intellectual values.

Stated positively, constitutional academic freedom protects the core intellectual missions of the university: research, scholarship, and liberal education. Although it primarily protects the institution from outside interference and includes policies and administrative practices as well as speech, it does so to protect the professional academic freedom of its members. Academic speech, which is distinctively collective, whether within disciplines or in classrooms, is of utmost value to society because it constitutes a uniquely powerful method for seeking truth, both in actual practice and in equipping graduates better to practice that essential task. My fear is that claiming constitutional protection for other tasks performed by universities will obscure this vital connection and weaken the moral appeal of academic freedom.

## CONCLUSION

After *Grutter*, we urgently need to specify the nature and content of constitutional academic freedom. In this essay, I have reviewed a few contemporary controversies to conclude that academic freedom is a real constitutional right that a court should use to invalidate conflicting legislation, that its essence involves the autonomy of academic institutions to maintain scholarly standards and processes without the outside intrusion of political tests or controls, and that it must be limited to those policies and practices essential to maintaining the professional academic freedom of its members. As such, constitutional academic freedom has a plausible and important role to play in First Amendment jurisprudence.

