Affirmative Action and Academic Freedom: Why the Supreme Court Should Continue Deferring to Faculty Judgments About the Value of Educational Diversity

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AFFIRMATIVE ACTION AND ACADEMIC FREEDOM:
WHY THE SUPREME COURT SHOULD CONTINUE DEFERRING TO FACULTY JUDGMENTS
ABOUT THE VALUE OF EDUCATIONAL DIVERSITY

STEVE SANDERS*

INTRODUCTION

In its landmark 2003 decision *Grutter v. Bollinger*,¹ the Supreme Court held that racial diversity in the context of public higher education is a compelling government interest, and that a university’s affirmative action policy survives strict scrutiny under the Equal Protection Clause if it is based on holistic, individualized consideration of applicants and not a quota.² The key to *Grutter*’s holding was its acceptance of the defendant University of Michigan Law School’s argument that educational diversity “has the potential to enrich everyone’s education and thus make a law school class stronger than the sum of its parts.”³ Speaking through Justice O’Connor, the Court credited the law school’s determination, based on its faculty’s “experience and expertise,” that having a “critical mass” of underrepresented minority students was “necessary to further its compelling

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² See id.
³ Id. at 315.
interest in securing the educational benefits of a diverse student body.” 4 To the extent the Court deferred to the law school’s educational judgment in rejecting the plaintiff’s reverse race discrimination claim, *Grutter* can be understood as an important case for academic freedom.5

During its October 2012 term, the Court will decide *Fisher v. University of Texas at Austin*,6 a case which anti-affirmative action activists hope to use to overturn, or at least narrow, *Grutter*. In defense of its affirmative action practices, the University of Texas and its amici have included among their arguments the same academic freedom justifications that resonated with the *Grutter* majority.7 In this Article, I argue that the academic freedom justification for affirmative action is made stronger if the decision to “secur[e] the educational benefits of a diverse student body” is understood as an educational policy determination within the purview of faculty members exercising their classroom experience, academic expertise, and professional judgment.8

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4 Id. at 333.
5 For other commentaries that have explored *Grutter*’s academic freedom implications at greater length, see generally J. Peter Byrne, *Constitutional Academic Freedom After Grutter: Getting Real About the “Four Freedoms” of a University*, 77 U. COLO. L. REV. 929 (2006); Paul Horwitz, *Grutter’s First Amendment*, 46 B.C. L. REV. 461 (2005).
6 644 F.3d 301 (5th Cir. 2011), cert. granted, 132 S. Ct. 1536 (February 21, 2012) (No. 11-345).
7 See, e.g., Brief for Respondents at 21, Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (No. 11-345) (“The Fifth Circuit [in its decision below] also recognized that certain educational judgments fall within the zone of academic freedom long recognized ‘as a special concern of the First Amendment.’” (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)); Brief for American Council on Education et al. as Amici Curiae Supporting Respondents at 7, Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (No. 11-345) (citing *Grutter* and other authorities for the principle that “academic freedom extends beyond scholarship to governance by the academies themselves, including control over the composition of the student body”).
Once the issue is framed in this way, it becomes even more apparent why the Court should continue to accept a public university’s determination that carefully limited consideration of applicants’ race is necessary and appropriate. Were the Court to overturn *Grutter*, it would repudiate a settled principle of deference to educational decisions made by faculty members in good faith and based on academic criteria. Just as students in a university classroom do not have any constitutional right to create their own syllabus or avoid being exposed to ideas with which they disagree, disappointed applicants should not be endowed by the Court with a constitutional right to object to the faculty’s professional judgment that diversity is essential to the effectiveness of the university’s educational mission.

I. ACADEMIC FREEDOM AND JUDICIAL DEFEERENCE FROM SWEEZY TO GRUTTER

*Grutter* was as much a case about the autonomy and social role of public universities as it was a case about Fourteenth Amendment equal protection doctrine. As Justice O’Connor wrote for the majority, “[w]e have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.”^9^

[^9]: *Grutter*, 539 U.S. at 329.
The Supreme Court first dealt squarely with university academic freedom in the 1957 case *Sweezy v. New Hampshire*, in which it overturned the contempt-of-court conviction of a lecturer at the University of New Hampshire who had refused to cooperate with the state attorney general’s inquiry into “subversive activities.” In an influential concurring opinion, Justice Frankfurter explained,

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail “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.

Two decades later, the Court addressed one of those “four freedoms”—the university’s freedom “to determine for itself on academic grounds who may be admitted to study”—in the landmark affirmative action decision *Regents of the University of California v. Bakke*. In holding that a faculty-designed admissions policy could appropriately take account of the educational benefits of racial diversity in its student body, Justice Powell’s controlling opinion expressly rested on considerations of academic freedom: “The freedom of a university to make its own judgments as to education,” he wrote, “includes the selection of its student body.”

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11 Id. at 236.
12 Id. at 263 (Frankfurter, J., concurring) (quoting A. v. d. S. Centlivres et al., Statement of Remonstrance by The Open Universities in South Africa 10–12).
14 Id.
affirmation to that date that academic freedom . . . contained a significant component of institutional autonomy for colleges and universities.”

In Curators of the University of Missouri v. Horowitz, which was decided the same year as Bakke, the Court again emphasized the need for deference to academic decisions made by universities through their faculties. Rejecting a student’s due-process challenge to dismissal from an academic program, Justice Rehnquist observed that “[c]ourts are particularly ill-equipped to evaluate academic performance.” And in National Labor Relations Board v. Yeshiva University, the Court recognized that the “professional expertise” of faculty members “is indispensable to the formulation and implementation of academic policy.” Observing that “[t]he ‘business’ of a university is education,” the Court said a university’s “vitality ultimately must depend on academic policies that largely are formulated and generally are implemented by faculty governance decisions.”

In another case rejecting a student’s constitutional challenge to his dismissal from a degree program for failure to make adequate academic progress, the Court observed in Regents of the University of Michigan v. Ewing that “[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students,” but

15 Horwitz, supra note 5, at 491.
17 Id. at 92.
18 444 U.S. 672, 689 (1980).
19 Id. at 688.
also “on autonomous decisionmaking by the academy itself.” Writing for a unanimous Court, Justice Stevens emphasized that “the faculty’s decision” not to allow the student to continue in his degree program “was made conscientiously and with careful deliberation.”

The broader principle was that “[w]hen judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.”

The Supreme Court would reaffirm these principles of academic deference in Grutter, which, like Bakke, balanced constitutional considerations and upheld a university’s right to apply the academic judgments of its faculty in the student admissions process. In its brief, the defendant in Grutter argued that “law schools need the autonomy and discretion to decide that teaching about the role of race in our society and legal system, and preparing their students to function effectively as leaders after graduation, are critically important aspects of their institutional missions.”

Various amici drove home the academic freedom argument more explicitly. Three higher education associations emphasized that the “educational benefits of student body diversity” were supported by compelling social science evidence, and that “numerous
research studies show that student body diversity can promote learning outcomes, democratic values and civic engagement, and preparation for a diverse society and workforce—goals that fall squarely within the basic mission of most universities.”24 And a brief by the celebrated First Amendment lawyer Floyd Abrams on behalf of five elite private universities argued that “[g]iven the decision of universities through the nation (including the amici curiae) that the goal of having a diverse campus which reflects the highest academic standards can best be achieved by taking some account of the racial and ethnic background of their applicants, any direction then not to do so necessarily implicates—and threatens—a core principle of academic freedom.”25

In her opinion for the majority, Justice O’Connor embraced these arguments, citing Sweezy, Horowitz, Ewing, and Bakke, among other cases, and observing that “[o]ur holding today is in keeping with our tradition to giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”26 Although the issue presented was one of Fourteenth Amendment equal protection law, Justice O’Connor situated the decision in the context of the Court’s jurisprudence on academic freedom. “[U]niversities occupy a special niche in our constitutional tradition,” she wrote, and their “educational autonomy” has “a constitutional dimension, grounded in the First

26 Grutter, 539 U.S. at 328.
Amendment.” Moreover, “[t]he freedom of a university to make its own judgments as to education includes the selection of its student body.” Here, the University of Michigan Law School was exercising its freedom in order to advance a compelling government interest: the “substantial,” “important,” and “laudable” benefits of a diverse educational environment. As one commentator has explained the decision, in the Grutter Court’s view, “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.”

II. THE CENTRAL ROLE OF FACULTY IN EDUCATIONAL POLICY MAKING

Authority for governance of a public university runs along a continuum, even though the lines of authority frequently blur or overlap. At one end are decisions that are appropriate for elected officials as representatives of the state’s citizens and taxpayers: for example, establishing a new university or setting the amount of the appropriation that the state contributes to a university’s operating expenses. Although they affect education, these sorts of decisions are essentially political judgments, because they are made by political actors.

27 Id. at 329.
28 Id. (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978)).
29 Id. at 330.
30 Byrne, supra note 5, at 937.
31 See AM. ASS’N OF UNIV. PROFESSORS, AAUP POLICY DOCUMENTS AND REPORTS 135–40 (2006) (“The variety and complexity of the tasks performed by institutions of higher education produce an inescapable interdependence among governing board, administration, faculty, students, and others.”).
In the middle are issues appropriate for decision by the institution’s governing board and senior administrators: for example, the decision to create or close an academic school; management of the institution’s budget, physical plant, and investments; long-range planning and the setting of key institutional priorities. These may be broadly categorized as administrative judgments; while they affect education, they also take account of such considerations as institutional mission, available resources, and the needs of various internal and external constituencies.

Finally, at the other end of the continuum lie matters that have traditionally been reserved to faculty members, individually or collectively, because they involve the application of classroom experience, specialized academic expertise, and professional judgment: student admissions criteria; the content of courses and syllabi; the coursework required for specific degrees; and evaluation of students’ academic work and progress toward degrees. These are educational judgments. It is to such educational judgments that the Supreme Court and lower courts have typically been most willing to show deference—as discussed above in cases like Horowitz and Ewing—because they involve the application of specialized academic knowledge and experience that judges lack, but which define what it means to be a university faculty member.

Grutter underscored such deference, accepting the defendant law school’s determination, based on its “experience and expertise, that a ‘critical mass’ of underrepresented minorities is necessary to further its compelling interest in securing the
educational benefits of a diverse student body.” Of course, “experience and expertise” are things that are held and exercised not by institutions as corporate entities, but by the people whom they comprise—in this case, the faculty members who had taught the students, compiled and assessed the social science evidence, and framed the law school’s affirmative action policy. The law school’s argument about the necessity and value of educational diversity was anchored in “the educational experience of the faculty.” The law school’s brief quoted testimony by the dean of another law school, speaking from his experience as a teacher, that the classroom “dynamic is different within the class among the students and between me and the students, when the class is homogeneous’ or has a ‘token minority student’ than ‘when there are enough minority students . . . that there is a diversity of views and experiences among the minority students.’” Thus, the policy upheld in Grutter was not the product of a political judgment, which would deserve little judicial deference. Nor was it the product merely of an administrative judgment by the university’s trustees, president, or the law school dean. Rather, the policy upheld in Grutter was the product of educational judgments by faculty members.

Such educational judgments are entitled to judicial deference because they are formed by the prolonged training, rigorous habits of mind, and continuous engagement with

34 Id. at 26.
their specialties that faculty members are expected to bring to their work. As one longtime academic dean has written,

Final judgments on educational questions are best left in the hands of those with professional qualifications: academics who have experienced a lengthy period of apprenticeship and have given evidence of performing high-quality work, in teaching and research, as judged by their peers on the basis of broad evidence . . . Faculty members know the proper definition of subjects and standards, and are more likely to have a sense of intellectual frontiers.35

Similarly, a former president of Harvard University has explained the modern understanding of institutional academic freedom this way: “curricula, admissions policies, and academic standards should be established by the faculty, rather than by outside groups, and should be fashioned for the sole purpose of carrying out the educational aims of the institution.”36 It follows that, in assessing the constitutionality of any particular university’s affirmative action program, a court should expect evidence that the program is indeed the product of faculty experience and consensus at that institution, and that the program has been studied and endorsed by relevant faculty governance bodies.37

36 Derek Bok, Beyond the Ivory Tower: Social Responsibilities of the Modern University 5 (1982).
37 In Fisher, the brief for the University of Texas does not provide details about the role of faculty in authorizing the university’s affirmative action program, explaining simply that the university “reviewed admissions data, surveyed students, and held discussions with administrators, faculty, constitutional law experts, and others on student body diversity at UT and the possibility of considering race in full-file review of applicants.” Brief for Respondents at 9, Fisher v. Univ. of Tex. at Austin, 132 S. Ct. 1536 (2012) (No. 11-345). However, the brief does assert that the policy proposal ultimately implemented at UT “embraced the diversity interest that this Court found compelling in Grutter in all its dimensions, and observed that ‘[a] comprehensive college education requires a robust exchange of ideas, exposure to differing cultures, preparation for the challenges of an increasingly diverse workforce, and acquisition of competencies required of future leaders.’” Id. at 11.
And so, if universities are owed a degree of deference when they determine that diversity is crucial to their educational missions, as *Grutter* said they were, it is because a university’s decisions about its admissions and educational policies are the products of faculty members’ classroom experience, academic expertise, and professional judgment. Understood this way, a holding that a *Grutter*-style affirmative action program survives strict scrutiny is more than just a policy judgment by the justices that educational achievement for racial and ethnic minorities is important for society, or even that universities traditionally have been accorded deference on the institutional level. It is a recognition that judges should no more second-guess faculty members’ academic professional judgment about the educational value of diversity than they should serve as an outside review board for a student’s exam grade or academic progress through a degree program.

By the same token, a decision to overturn *Grutter* would be a dramatic departure not only from the settled principle that a university should have the freedom “to determine for itself on academic grounds . . . who may be admitted to study,”38 it would also be a dramatic departure from the inseparable and equally settled principle that faculties have “the widest

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range of discretion”\textsuperscript{39} when they make academic judgments, and that this discretion is part and parcel of the “autonom[y of] the academy itself.”\textsuperscript{40}

We would not expect the Supreme Court to announce that students have a constitutional right to create their own course syllabus if they disagree with the one provided by the professor. Nor would we expect the Court to protect students under the Constitution from being exposed in the classroom to ideas or texts that offend their religious values or political views, or from being required to write a paper on a topic they dislike or from a perspective with which they disagree.\textsuperscript{41} If faculty educational judgments are to be respected, it seems just as clear that disappointed applicants should not be endowed by the Court with a constitutional right to object to the university’s determination that diversity is essential to the effectiveness of its educational mission.

In summary, if a university’s faculty members have concluded that a carefully limited program of affirmative action, based on individualized consideration of applicants and otherwise consistent with \textit{Grutter}, is necessary to ensure educational diversity and thus

\begin{quote}
40 \textit{Id.} at 226 n.12.
41 See, \textit{e.g.}, Brown v. Li, 308 F.3d 939, 951–52, 953 (9th Cir. 2002) (recognizing a “university’s strong interest in setting the content of its curriculum and teaching that content” and observing that “consistent with the First Amendment[,] a teacher may require a student to write a paper from a particular viewpoint, even if it is a view-point [sic] with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose”).
A professor obviously cannot selectively disadvantage or create a hostile environment toward certain individuals or subgroups of students based on their race, religion, or political or social views—such treatment would, at a public university, obviously raise serious concerns under the First Amendment, the Equal Protection Clause, or the Due Process Clause. More to the point, such faculty conduct could not be characterized as “genuinely academic,” because it would represent a “substantial departure from accepted academic norms.” \textit{Ewing}, 474 U.S. at 225.
\end{quote}
carry out educational objectives—promoting learning outcomes, democratic values and civic engagement, and preparation for a diverse society and workforce—then that educational judgment should continue to allow the program to survive strict scrutiny. A retreat by the Court on this point would be a retreat from the basic principles of constitutional academic freedom.

CONCLUSION

Affirmative action in higher education remains a controversial legal question, reflecting ongoing political and social debates about the role of race in American life. In Grutter, the Court held that a carefully limited program of affirmative action survived strict scrutiny because educational diversity was a compelling government interest. The value of educational diversity, in turn, was grounded in faculty members’ classroom experience, academic expertise, and professional judgment. As Grutter comes under new attack and possible reconsideration, my goal in this Article has been to explain that, should the Court now retreat from that view, it would be doing more than ignoring stare decisis or enshrining a more conservative view of the Constitution. It would be repudiating a long and important line of jurisprudence respecting the freedom of universities—acting upon the educational judgments of their faculties—to determine for themselves how best to carry out their academic missions.