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Universities as First Amendment Institutions: Some Easy Answers and Hard Questions Symposium: Constitutional Niches: The Role of Institutional Context in Constitutional Law

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UNIVERSITIES AS FIRST AMENDMENT INSTITUTIONS: SOME EASY ANSWERS AND HARD QUESTIONS

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First Amendment doctrine is caught between two competing impulses. On the one hand, courts and scholars face what one might call the lure of acontextuality. They seek a set of rules by which First Amendment law can be understood as a purely, formally legal phenomenon, untainted by the brute contingencies of the actual world. On the other hand, their efforts to construct acontextual legal doctrine are regularly disturbed by particular facts and contexts that fit poorly into existing doctrine. This tension between acontextual doctrine and factual variation has led to an increasing sense that First Amendment doctrine, in attempting to be pure and responsive at the same time, has become incoherent.

This Article argues that one solution to this dilemma is to openly acknowledge, and make room in First Amendment doctrine for, an understanding of the importance of various "First Amendment institutions"—institutions that play a significant role in contributing to public discourse, and that are both institutionally distinct and largely self-regulating according to a set of internally generated norms, practices, and traditions. Under an institutional approach, these entities would enjoy substantial autonomy to make decisions according to their own best sense of their missions—as universities, the press, religious associations, libraries, and so on.

Universities are one especially strong example of a First Amendment institution. In myriad ways, they play a special role in contributing to the broader world of social discourse that we value under the First Amendment. Moreover, they are institutionally distinct, bound by disciplinary constraints and governed by a host of norms and practices that substitute for external regulatory forces while still protecting fundamental speech values. Legal doctrine should recognize the special role played by universities under the First Amendment by largely deferring to these institutions and permitting them to govern themselves according to their own sense of academic mission, without government interference.

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This Article lays out the arguments for a First Amendment institutional approach to universities, and surveys some of the implications of that approach. It also addresses some arguments that might be raised against this approach—that it elides the public-private distinction, that it falls afoul of the principle that "more speech is better," and that it improperly privileges universities as First Amendment actors. These arguments ultimately turn out not to present significant obstacles to the institutional project. But even for those who support such an approach, harder questions remain and deserve to be confronted. In particular, this Article asks how we should think about the proper scope and limits of universities' rights as First Amendment institutions, finding that we should defer substantially to universities provided that they act within the scope of proper academic decisions, and that the question of what, precisely, constitutes an "academic decision" should itself be approached deferentially. It also observes that, although educational autonomy may generally serve academic freedom, the two concepts are not identical. This Article concludes by applying the institutional approach to several controversies involving the university, including the use of race-conscious admissions programs, the Academic Bill of Rights movement in state and federal legislatures, and the recent litigation concerning the Solomon Amendment.

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INTRODUCTION

Writing in these pages over a decade ago, Akhil Reed Amar and Neal Kumar Katyal observed that in a recent spate of decisions addressing affirmative action outside the academy, the U.S. Supreme Court had "said a lot about contracting and rather little about education."[1] Amar and Katyal urged the Court to remember that "[e]ducation is different,"[2] and that this difference required the Court to treat affirmative action in higher education differently than it had in government contracting.

Why this should be so was not entirely clear. Surely we can recognize that education is of fundamental importance to our nation.[3] Yet the U.S. Constitution itself is entirely silent as to education.[4] Aside from some awkwardly grounded private decisionmaking rights concerning parents' rearing of their children,[5] there is no fundamental federal[6] constitutional right to a basic education,[7] let alone a postsecondary education. Moreover, the sweeping terms of the Fourteenth Amendment's Equal Protection Clause certainly do not speak in different terms to government contractors than they do to educators.

Nevertheless, Amar and Katyal were right: Education *is* different, at least in the Court's view. Two recent cases reaffirm the Court's continuing willingness to accord special status to public universities under the Constitution.

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

2. *Id.* at 1779.

3. *See, e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (suggesting that "[t]oday, education is perhaps the most important function of state and local governments," in light of "the importance of education to our democratic society").

4. *See, e.g.*, James W. Guthrie, *American Education Reform: What Is Needed Is "National," Not Federal*, 17 ST. LOUIS U. PUB. L. REV. 125, 133 (1997) (noting that "education was not a principal component" of the constitutional framing debates).

5. *See, e.g.*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (overturning a state compulsory public education law); Meyer v. Nebraska, 262 U.S. 390 (1923) (overturning a state law prohibiting teaching in any language other than English, on substantive due process grounds). For an acknowledgement that these decisions are awkwardly grounded, see, for example, *Troxel v. Granville*, 530 U.S. 57, 92 (2000) (Scalia, J., dissenting) ("[T]he theory of unenumerated parental rights underlying these [decisions] has small claim to *stare decisis* protection."); Emily Buss, *"Parental" Rights*, 88 VA. L. REV. 635, 655–56 (2002) (noting that *Meyer* and *Pierce* offer an "arguably shaky foundation" for constitutional claims of parental rights, but suggesting that the Court's long reliance on this shaky foundation "is itself an odd testament to the doctrine's strength"); David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. 527, 535 (2000) (noting "the hodge-podge character of the theoretical basis for the Court's original holdings in *Meyer* and *Pierce*").

6. The situation is different under many state constitutions. *See* Anita F. Hill, *A History of Hollow Promises: How Choice Jurisprudence Fails to Achieve Educational Equality*, 12 MICH. J. RACE & L. 107, 126 (2006).

7. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35–37 (1972).

Four years ago, in *Grutter v. Bollinger*,[8] the Court observed that universities "occupy a special niche in [the] constitutional tradition of the First Amendment," and thus are entitled to substantial "educational autonomy."[9] The Court therefore was willing to give extra weight to the University of Michigan Law School's claim that "student body diversity" is a compelling state interest, one that was sufficiently strong to permit the law school to administer a carefully tailored program of affirmative action in admissions.[10]

Just last term, in *Garcetti v. Ceballos*,[11] the Court held that public employees enjoy no First Amendment protection when they "make statements pursuant to their official duties."[12] In so ruling, however, Justice Kennedy was careful to note that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence."[13] The Court thus put to one side any suggestion that the rule in *Garcetti* would apply in cases "involving speech related to scholarship or teaching."[14] Although *Garcetti* is not entirely reassuring, the Court's apparent unwillingness to extend the rule in that case to the academic context signals a continuing recognition that something about universities demands a different approach to otherwise generally applicable First Amendment principles.

In asking why this should be so—in asking why, exactly, courts should treat a state actor who happens to be a university professor or administrator any differently than they treat a state actor who happens to be a government contractor or a public employee—two separate but closely related factors spring to mind. First, courts have long recognized the importance of academic freedom in the university setting. Since at least 1957,[15] the Supreme Court has treated academic freedom as "a special concern of the First Amendment."[16] To be sure, the contours of this apparent First Amendment right of academic freedom are unclear,[17] and the Court is

8. 539 U.S. 306 (2003).
9. *Id.* at 329.
10. *Id.* at 325.
11. 126 S. Ct. 1951 (2006).
12. *Id.* at 1960.
13. *Id.* at 1962.
14. *Id.*
15. *See* Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American Universities is almost self-evident.").
16. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).
17. *See, e.g.*, FREEDOM AND TENURE IN THE ACADEMY (William W. Van Alstyne ed., 1993); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251 (1989); Alan K. Chen, *Bureaucracy and Distrust: Germaneness and the Paradoxes of the Academic*

more likely to speak expansively about academic freedom in those cases in which the right is not at issue. Nevertheless, there is little doubt that the "special niche"[18] occupied by universities in the First Amendment context is closely related to courts' interest in protecting a general principle of academic freedom.

There is another reason courts treat universities differently, however; and although it is closely related to the academic freedom justification for treating universities as special creatures under the First Amendment and can be easily mistaken for it, it is not quite the same thing. That is the principle of deference. As J. Peter Byrne, the preeminent legal scholar on academic freedom, has written, there is a long tradition in American law of judicial abstention in favor of university decisionmaking.[19] That early doctrine of abstention has effectively been absorbed into the constitutional doctrine of academic freedom in the form of a general principle of deference to academic decisionmaking. Thus, in *Grutter*, Justice O'Connor, noting the "complex educational judgments" involved in admissions decisions, an area she said "lies primarily within the expertise of the university,"[20] pointed to the Court's purported "tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[21]

In a number of other cases, the Court has emphasized the deference courts must pay to the "genuinely academic decisions" of university officials.[22] This deference is owed, according to the Court, because courts are ill-equipped to deal with "the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'"[23] Thus, although academic freedom justifications for judicial deference to universities may overlap with expertise-based justifications for judicial deference (after all, who is more of an expert on the subject of academic freedom than an academic?), they are not necessarily the same.

In this Article, I explore some questions about why courts should defer substantially to universities across a broad range of issues, and how they

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Freedom Doctrine, 77 U. COLO. L. REV. 955, 956 (2006) ("[T]he law of constitutional academic freedom has not been fully realized in either its theoretical or practical dimensions.").

18. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

19. Byrne, *supra* note 17, at 323–27.

20. *Grutter*, 539 U.S. at 328.

21. *Id.*

22. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); *see also* Bd. of Curators, Univ. of Mo. v. Horowitz, 435 U.S. 78, 90–92 (1978).

23. *Ewing*, 474 U.S. at 226 (quoting *Horowitz*, 435 U.S. at 89–90).

should do so. My goals might be characterized as both internal and external in relation to the subject at hand. From an internal perspective, I show that a number of objections that have been raised to a policy of general deference to universities as autonomous decisionmaking institutions are not as significant as some might think. At the same time, I also raise important questions that even those who support a deferential approach to university decisionmaking must seriously consider.

From an external perspective, I link the question of deference to universities to a larger pattern of judicial deference to a variety of what I call "First Amendment institutions." Although universities merit special treatment under the First Amendment, they are not the only institutions that deserve special care. Rather, a number of other institutions—the press, religious associations, libraries, and others—"play a fundamental role in our system of free speech,"[24] and should enjoy substantial deference from courts when they seek to govern their own affairs.

Part I of this Article lays out a description of and an argument for an institutionally oriented approach to First Amendment law, with special reference to universities. Part II examines some standard critiques of an institutional or deferential approach to universities by courts, and concludes that none of these arguments ultimately have much traction. In Part III, I ask some harder questions about a deferential, institutionally oriented approach to universities and other special creatures of the First Amendment. I also address some of the most contentious issues currently facing universities. In particular, I address the Supreme Court's recent decision in *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)*,[25] which rejected a set of arguments against the coerced presence of military recruiters on law school campuses—arguments that ultimately were grounded on academic freedom, even if the Court largely neglected that aspect of the case. And I discuss scattered legislative efforts, both in the U.S. Congress and in the states, to enforce what purports to be academic heterodoxy and academic freedom through the so-called Academic Bill of Rights.

24. Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 589 (2005) [hereinafter Horwitz, Grutter's *First Amendment*].

25. 547 U.S. 47 (2006).

I. DEFERENCE AND THE ACADEMY: UNIVERSITIES AS FIRST AMENDMENT INSTITUTIONS

In recent years, a number of scholars have argued that the time has come to rethink and refashion First Amendment doctrine.[26] Those contributing to this literature have argued that First Amendment doctrine should partially or wholly abandon the sort of top-down, institutionally agnostic approach regularly favored by the Supreme Court[27] in favor of a bottom-up, institutionally sensitive approach that openly "takes First Amendment institutions seriously."[28] Like others, I have argued that "the Court ought to

26. The charter member of this school is surely Frederick Schauer, although other significant contributions have been made by David Fagundes, Daniel Halberstam, Rick Hills, and Mark Rosen. *See, e.g.*, David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144 (2003); Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223 (2005); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005); Frederick Schauer, *The Supreme Court, 1997 Term—Comment: Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) [hereinafter Schauer, *Principles, Institutions, and the First Amendment*]; Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005) [hereinafter Schauer, *Institutional First Amendment*]; Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907 (2006) [hereinafter Schauer, *Academic Freedom*].

I have made my own modest contributions to this literature. *See, e.g.*, Horwitz, Grutter's *First Amendment*, *supra* note 24, at 563–88 (offering an approach to thinking about the Court's treatment of First Amendment institutions, and applying that approach to universities); Paul Horwitz, *"Or of the [Blog]*," 11 NEXUS 45, 62 (2006) [hereinafter Horwitz, *Blog*] (discussing the press generally, and blogs specifically, as First Amendment institutions); Paul Horwitz, Three Faces of Deference (unpublished manuscript, on file with author) [hereinafter Horwitz, Three Faces] (discussing the role played by deference in the U.S. Supreme Court's Solomon Amendment decision, with a special focus on the insights that an institutional First Amendment approach might have offered in that case).

It should be noted that this literature was substantially prefigured by Robert Post. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT (1995); Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1280–81 (1995) ("The Court must reshape its [First Amendment] doctrine so as to generate a perspicuous understanding of the necessary material and normative dimensions of . . . [various] forms of social order and of the relationship of speech to these values and dimensions."). Post's writing, however, is at a somewhat more abstract remove from the body of institutionally oriented First Amendment scholarship described above, and is less concerned with particular identifiable First Amendment institutions than it is with "broader organizing principles for social discourse." Horwitz, Grutter's *First Amendment*, *supra* note 24, at 567 n.488; *see also* Schauer, *Principles, Institutions, and the First Amendment*, *supra*, at 1273 n.88 (noting the relationship between Post's work and the institutional First Amendment literature but drawing similar distinctions between the two).

27. *See, e.g.*, Horwitz, Grutter's *First Amendment*, *supra* note 24, at 563–88.

28. *Id.* at 589.

recognize the unique social role played by a variety of institutions," such as universities, the press, religious associations, and libraries, "whose contributions to public discourse play a fundamental role in our system of free speech."[29] Accordingly, courts should "defer[ ] to the practices of [these] particular kinds of First Amendment actors,"[30] in ways shaped by the norms and practices of the institutions themselves.[31] Although these ideas are sometimes discernible within the existing body of First Amendment doctrine,[32] this literature would bring this approach to the fore, urging the Court to "explicitly, transparently, and self-consciously"[33] adopt an institutional approach to the First Amendment. Before I examine this approach, however, some background is necessary.

A. The Lure of Acontextuality and the Gravitational Pull of Facts

When interpreting and implementing the First Amendment, as elsewhere in constitutional law, judges have "a deeply felt desire . . . to achieve noninstrumental certainty in the law."[34] In other words, courts interpreting the First Amendment seek a set of rules by which the law of the First Amendment can be understood as a purely, formally legal phenomenon, untainted by the brute contingencies of the actual world. "[A] battery of extraordinarily well-entrenched views about the nature and function of law itself"[35] encourages courts to think of their role as being one of resolving "matters of principle and not of policy."[36] In the First Amendment, courts seek to realize this goal by viewing the law "through a lens of 'juridical categories,' which compress all speakers and all factual questions, no matter how varied and complex, into a series of purely legal classifications."[37] In short, the law of the First Amendment yearns for acontextuality.[38]

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29. *Id.*
30. *Id.* at 570.
31. *See id.* at 572–73.
32. *See, e.g.*, Horwitz, Grutter's *First Amendment*, *supra* note 24, at 569–71; Schauer, *Institutional First Amendment*, *supra* note 26.
33. Horwitz, *Blog*, *supra* note 26, at 61.
34. Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 174 (2006).
35. Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 26, at 107–08.
36. *Id.* at 112.
37. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 564 (quoting Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 26, at 119). *See generally* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773 (1998).
38. *Cf.* Claire L'Heureux-Dube, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363, 370 (2002) (noting "the notoriously disembodied and acontextual

Signs of First Amendment law's urge toward acontextuality may be found "throughout the congeries of rules and principles that govern the law of the First Amendment."[39] Consider the law governing the press under the First Amendment. The Press Clause singles out the press as an institution entitled to special protection under the umbrella of the First Amendment.[40] And yet, with a few exceptions,[41] and in the teeth of the constitutional text itself, the Supreme Court has largely rejected the view that the press enjoys any special constitutional privileges above and beyond those available to other speakers.[42] The refusal to recognize any special press privileges was largely motivated by the Court's concern that such a step would require courts to consider who qualifies as a journalist, a factual question that raised "practical and conceptual difficulties of a high order."[43] Thus, the Court's fear of context has led it to "render[ ] the Press Clause . . . a virtual nullity."[44]

Similar observations could be drawn from a range of other areas of First Amendment concern. Consider the law of free exercise of religion, in which a narrow majority of the Court refused to grant religious claimants special accommodations under the Free Exercise Clause when those claimants challenged neutral laws of general applicability.[45] Raising concerns similar to those it had noted with respect to the Press Clause, the Court suggested that it was not competent to "weigh the social importance of all laws against the centrality of all religious beliefs,"[46] and argued that a judicial-accommodation approach would necessarily confront courts with issues not susceptible to resolution by "principle[s] of law or logic."[47] More generally,

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world of law"). For more on the tension between the law's urge toward acontextuality and its need to respond to facts and institutions on the ground, see Horwitz, Three Faces, *supra* note 26.

39. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 564.

40. *See* U.S. CONST. amend. 1 (Press Clause).

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

42. *See, e.g.*, First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 798–802 (1978) (Burger, C.J., concurring); Branzburg v. Hayes, 408 U.S. 665, 691–92 (1972); *see also* Horwitz, Blog, *supra* note 26, at 46–47; David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77, 118–19 (1975); Anthony Lewis, *A Preferred Position for Journalism?*, 7 HOFSTRA L. REV. 595, 605 (1979) ("No Supreme Court decision has held or intimated that journalism has a preferred constitutional position.").

43. *Branzburg*, 408 U.S. at 704.

44. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 564–65; *see also* Schauer, *Institutional First Amendment*, *supra* note 26, at 1257 ("[E]xisting First Amendment doctrine renders the Press Clause redundant and thus irrelevant, with the institutional press being treated simply as another speaker.").

45. *See* Employment Div. v. Smith, 494 U.S. 872, 890 (1990).

46. *Id.*

47. *Id.* at 887.

the Court's approach to religious freedom has focused less in recent years on context-specific questions about the distinctive role of religious groups and practices, and more on the application of the (seemingly) acontextual general principle of formal neutrality.[48]

More broadly still, one can discern the urge toward acontextuality in the free speech doctrine of content neutrality.[49] This doctrine holds that, "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content."[50] A law is content-based "if its application depends on the message of the speech."[51] By definition, this inquiry is insensitive to the context of the speech. Unsurprisingly, then, it has been applied across the gamut of human expression.[52] Thus, the very essence of the content-neutrality doctrine is the attempt to craft a neutral rule that applies across a variety of instances of protected speech. This doctrine is generally understood to be "the cornerstone of the Supreme Court's [contemporary] First Amendment jurisprudence."[53] Or consider the doctrine governing public fora,[54] under which we are led to believe that a simple taxonomical sorting of the sites in which speech occurs will spit out a result in the case,

48. *See, e.g.*, Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 186–213 (2002); Kent Greenawalt, *Quo Vadis?: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 390 (noting a "movement [by the Court] away from robust interpretations of the Religion Clauses, under which religion must be treated as special, . . . and toward principles of equal treatment and legislative discretion"); Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489, 498–544 (2004); Dhananjai Shivakumar, *Neutrality and the Religion Clauses*, 33 HARV. C.R.-C.L. L. REV. 505, 506–23 (1998).

49. *See generally* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189 (1983).

50. Police Dep't v. Mosley, 408 U.S. 92, 95 (1972).

51. Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000).

52. *See id.* at 49–52. Erwin Chemerinsky has described the doctrine's application in a variety of cases, including *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000) (signal bleed on cable television); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000) (nude dancing); *Board of Regents v. Southworth*, 529 U.S. 217 (2000) (university student activity fees); and *Hill v. Colorado*, 530 U.S. 703 (2000) (abortion clinic protests).

53. Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 650 (2002); *see also* Chemerinsky, *supra* note 51, at 49 ("[I]ncreasingly in free speech law, the central inquiry is whether the government action is content based or content neutral.").

54. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672 (1992).

regardless of whether the forum in question is a public street,[55] an airport terminal,[56] or an internal mail system.[57]

In short, the law's urge toward acontextuality is evident throughout First Amendment doctrine. The Court's approach to the First Amendment has been "institutional[ly] agnostic[ ],"[58] with little evident "regard for the identity of the speaker or the institutional environment in which the speech occurs."[59] As I have noted elsewhere, "[i]ts general approach has been one of generality and principle rather than specificity, narrowness, and policy on the ground."[60] The Court has strived ceaselessly to craft general First Amendment rules that guide us in all situations, and has been as relentless in rejecting the view that context matters, and that different rules should apply in different situations.

If acontextuality has been the goal towards which the Court has been striving, however, it has been equally clear that, as with Sisyphus and his rock, it is one the Court can never hope to reach.[61] When confronted with the impertinent realities of various cases, whether in the First Amendment or elsewhere in constitutional interpretation, it turns out that, as Justice O'Connor observed in *Grutter v. Bollinger*,[62] context does matter.[63] And when factual context meets acontextual doctrine, it is often doctrine that gives way.

So we find that the Court, when asking whether Congress could validly require federally funded public libraries to install filtering software to block the receipt of obscene materials by library computer users, is forced to conclude that the general principles of public forum doctrine "are out of place in the context of this case,"[64] and that it must instead "examine the role of libraries in our society."[65] Similarly, when faced with clear violations of the principle of content neutrality, the Court found those

55. *See, e.g.*, Hague v. Comm. for Indus. Org., 307 U.S. 496, 515–16 (1939).
56. *See, e.g.*, Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830 (1992).
57. *See, e.g.*, Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).
58. Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 26, at 120.
59. Schauer, *Institutional First Amendment*, *supra* note 26, at 1256.
60. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 564.
61. For a different literary metaphor that is, perhaps, less grim and more sublime than that of Sisyphus, see John Keats, *Ode on a Grecian Urn*, *in* 2 THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 822, 822 (M.H. Abrams et al., eds., 5th ed. 1986) ("Bold Lover, never, never canst thou kiss, / Though winning near the goal").
62. 539 U.S. 306 (2003).
63. *See id.* at 327 ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").
64. United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003).
65. *Id.* at 203.

principles inapplicable where the government body in question was an arts-funding body, which necessarily must make content-based distinctions.[66] And, notwithstanding both the existing structure of public forum doctrine and the Court's earlier view that it is impossible to define who is a journalist,[67] the Court held that a federally funded local broadcaster could exclude a candidate from a political debate because it was acting as a journalist and exercising editorial discretion.[68]

Grutter, too, is an example of this phenomenon. Although it was technically a Fourteenth Amendment case, *Grutter* was substantially underwritten by the First Amendment.[69] The Court concluded that the Fourteenth Amendment law that served to resolve affirmative action disputes in a variety of circumstances involving public contracting and employment[70] was inadequate to address the issue of admissions decisions made by universities, given the "complex educational judgments" involved and the "special niche" occupied by universities in the "constitutional tradition" of the First Amendment.[71]

This, in a nutshell, is the dilemma faced by courts as they shape the law of the First Amendment. On the one hand, courts (and, often, scholars[72]) feel compelled to strive to craft pure, formal legal doctrine. In Rick Hills's evocative words, they feel "the call to hunt for the Snark of 'pure,' noninstrumental constitutional value."[73] On the other, they are confronted with brute facts that ill fit the hermetic doctrinal structure they have erected.

Caught between the lure of acontextuality and the competing compulsion to achieve sound results in light of the factual variation and institutional differentiation evident in the speakers whose cases they decide, courts face a Hobson's choice. They can preserve the law's acontextuality at the cost of sound outcomes, or they can bend and distort existing

66. *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569 (1998); Amy Sabrin, *Thinking About Content: Can It Play an Appropriate Role in Government Funding of the Arts?*, 102 YALE L.J. 1209 (1993); *see also* Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 26.

67. *See supra* note 43 and accompanying text.

68. Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998); *see also* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 570; Schauer, *Academic Freedom*, *supra* note 26, at 923.

69. *See generally* Horwitz, Grutter's *First Amendment*, *supra* note 24.

70. *See, e.g.*, Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (hiring of minority subcontractors in federally funded construction projects); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (same, at local level); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (preferential protection against layoffs of minority teachers in K-12 public education).

71. Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003).

72. *See generally* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1 (1998) (remarking on this tendency).

73. Hills, *supra* note 34, at 174.

doctrine, making it ever more complex, until the doctrine approaches incoherence.[74] Some have argued that First Amendment doctrine, warped by the tension between doctrinal generality and factual specificity, has already arrived at a state of incoherence.[75] Courts thus desperately require some vehicle to bring responsiveness into the law,[76] despite their urge toward acontextuality and despite the institutional difficulties they face when attempting to resolve the sorts of questions that arise when courts are responsive to the facts.

When faced with this dilemma, one way courts resolve it is with deference. When they defer, courts suspend their own judgment in favor of the judgment of some other party—another branch of government,[77] an administrative agency,[78] a private institutional actor,[79] or a quasi-public actor.[80] Deference thus requires that courts privilege a party's sense of the relevant facts, and often of the law itself,[81] over their own independent judgment of the case.

The relationship between the law's contextual dilemma and the phenomenon of deference is a complex one, and I cannot deal with it at

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74. *See, e.g.*, Horwitz, Grutter's *First Amendment*, *supra* note 24, at 566; Schauer, *Institutional First Amendment*, *supra* note 26, at 1270–73.

75. *See* Post, *supra* note 26; *see also* Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 26, at 86–87 (noting "an intractable tension between free speech theory [in general] and judicial methodology [in particular cases]" and suggesting that "[i]f freedom of speech . . . is largely centered on the policy question of institutional autonomy, but the Court's own understanding of its role requires it to stay on the principle side of the policy/principle divide, then the increasingly obvious phenomenon of institutional differentiation will prove progressively more injurious to the Court's efforts to confront the full range of free speech issues").

76. *Cf.* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION: TOWARD RESPONSIVE LAW (1978) (defining and describing a regime of responsive justice).

77. *See, e.g.*, Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1172–81 (2003) (discussing the enrolled bill doctrine as a form of "epistemic deference" granted by courts to the U.S. Congress).

78. *See, e.g.*, Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (requiring judicial deference to reasonable agency interpretations of law).

79. *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 258 (1974) (describing "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials" as "the exercise of editorial control and judgment," entitled to substantial deference by courts and lawmakers); Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 856 (1999) (arguing that many courts, when examining the contours of constitutional protection for the press in libel cases, carve out a space for deference to press decisions to publish by asking whether the press actor was exercising "editorial judgment," defined as the "independent choice of information and opinion of current value, directed to public need, and born of non-self-interested purposes").

80. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003) (deferring to admissions decisions by a state law school, not because of its status as a state actor, although it was this status that triggered Fourteenth Amendment scrutiny in the first place, but because of its status as a university).

81. *See, e.g.*, *Chevron*, 467 U.S. 837.

any length here.[82] For now, it is enough to observe that there is an intimate connection between these two legal phenomena. In deferring to other actors, courts open up a space for shared legal and constitutional interpretation by other actors who may be closer to the facts on the ground. Deference thus allows courts to bring responsiveness into the law by taking themselves out of the equation. By deferring—by permitting other institutions, in effect, to shape both the facts and the law—courts offer other institutions substantial autonomy to act in ways that may conform poorly to the general doctrinal structures maintained by courts, but that make complete sense in light of the needs and functions of particular institutions and their superior ability to assess the relevant facts.

B. First Amendment Institutions

The role of deference as a response to the needs of particular institutions brings us to the notion of what I, following scholars such as Frederick Schauer, have called an institutional First Amendment. Rather than build First Amendment doctrine from the top down, crafting general rules that apply imperfectly across a range of situations, courts might begin with the recognition that a "number of existing social institutions"—such as universities, the press, religious associations, libraries, and perhaps others—"serve functions that the First Amendment deems especially important."[83] Building on this foundation, courts could "construct First Amendment doctrine in response to the actual functions and practices" of those institutions that merit recognition as First Amendment institutions.[84]

Under this approach, the Court would identify those institutions that merit recognition as First Amendment institutions.[85] Those institutions would then be granted significant presumptive autonomy to act, and courts would defer substantially to actions taken by those institutions within their respective spheres of autonomy. Courts might go further still by recognizing instances in which the social value served by some First Amendment

82. For further discussion of this issue, see Horwitz, Three Faces, *supra* note 26.

83. Schauer, *Institutional First Amendment*, *supra* note 26, at 1274.

84. *See* Horwitz, *Grutter's First Amendment*, *supra* note 24, at 569.

85. Even critics of an institutional First Amendment approach acknowledge that this call for the identification of particular First Amendment institutions does not present an insuperable obstacle to the project. *See* Dale Carpenter, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407, 1408 (2005) ("[T]he fact that a First Amendment theory calls for line drawing is not a sufficient objection to that theory. Line drawing is both inevitable and desirable in First Amendment doctrine."); *see also* Schauer, *Institutional First Amendment*, *supra* note 26, at 1260.

institutions counsels privileges or immunities, such as some degree of protection for reporters' ability to maintain the confidentiality of their sources, that might not be available to other speakers.[86] Courts might, in short, value First Amendment institutions *as institutions*, according them substantial autonomy to act within that institutional framework.

To argue for an institutional approach to the First Amendment is not necessarily the equivalent of an argument in favor of absolute constitutional immunity for First Amendment institutions. That a First Amendment institution might have substantial autonomy to act does not mean it would not be obliged to act within "constitutionally prescribed limits."[87] Still, this approach does entail granting a substantial degree of independence to those institutions that play a substantial role in contributing to the world of public discourse that the First Amendment aims to promote and preserve. But my point is precisely that these institutions are already substantially self-governing institutions. They observe a detailed and highly constraining set of internal norms that govern the bounds of appropriate behavior within those institutions. These internal norms can substitute for the externally imposed, top-down model of judicial enforcement of standard First Amendment rules.

An institutional approach thus suggests that courts should, in the first instance, defer to those institutions' capacity for self-governance rather than attempt to impose an ill-fitting doctrinal framework based on the idea that one set of First Amendment rules can and should apply to the radically different social institutions in which speech takes place. To the extent it is necessary to build some set of constitutionally prescribed limits around the behavior of those institutions, courts should build from the bottom up, taking their cue from the norms and practices of the institution in question and from the social values served by that institution. Thus, courts might ask of a First Amendment institution's action in a particular case not whether it comports with some universal First Amendment rule, but whether it falls within the boundaries of behavior broadly consistent with the norms and practices of that institution, and whether those norms and practices serve the First Amendment values that are advanced by the role of that institution within the broader society.[88]

86. *See generally* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 571–74; Schauer, *Institutional First Amendment*, *supra* note 26, at 1274–75.

87. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

88. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 578–79 (suggesting that courts "lay down a general procedural requirement—for example, is this a legitimate *academic* decision, or is this task properly within the role of a library, or is this an exercise of professional journalistic discretion?—while permitting the institutions substantial latitude to operate within these minimal standards").

A First Amendment doctrine built from the ground up around the values and practices of existing First Amendment institutions has a number of qualities that ought to be normatively attractive. It offers a way of thinking about the First Amendment that responds to the differentiation that is apparent in the real world between different kinds of speech institutions—the different contexts in which speech occurs, the internalized norms of behavior that constrain the speakers in each institution, and the social values served by the kinds of speech that are central to different kinds of institutions.[89] It is far more attuned to the actual speech-oriented social practices the First Amendment serves to promote. Thus, an institutional approach avoids the doctrinal incoherence that is inevitable when courts attempt to fashion a First Amendment doctrine that tries, and fails, to apply to all kinds of speakers and speech situations.

Moreover, because it is willing to engage in some institutional differentiation rather than fashion generally applicable rules, the institutional approach to the First Amendment may be better suited to protecting the full range of speech and speech-related activities engaged in by different First Amendment institutions, and more conscious of the limits of those institutions. In other words, it may avoid being either overprotective or underprotective of any given institution.[90] The law of reporters' privileges offers one such example.[91] Although many lower courts and state legislatures protect reporters from divulging the identity of their sources, the Supreme Court could not find a majority to firmly back this position, in part due to the "practical and conceptual difficulties" inherent in the question of whether particular "categories of newsmen . . . qualified for the privilege."[92] This unwillingness to engage in any institutional differentiation between the press and other speech institutions may result in a less vigorous protection for newsgathering than is enjoyed in foreign legal systems, some of which have found on both statutory and constitutional grounds that reporters are entitled to such a privilege.[93]

89. *Cf.* Post, *supra* note 26, at 1280 (arguing that First Amendment doctrine should be "refashion[ed] . . . to foster a lucid comprehension of the constitutional values implicit in discrete forms of social order").

90. *See* Schauer, *Institutional First Amendment*, *supra* note 26, at 1270–73.

91. *See id.* at 1270–71; *see also* Horwitz, *Blog*, *supra* note 33, at 51–53.

92. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

93. *See* Floyd Abrams & Peter Hawkes, *Protection of Journalists' Sources Under Foreign and International Law*, MEDIA L. RESOURCE CTR., BULLETIN: WHITE PAPER ON THE REPORTER'S PRIVILEGE 183 (2004), *available at* http://www.medialaw.org/Template.cfm?Section=Bulletin_Archive&Template=/ContentManagement/ContentDisplay.cfm&ContentID=2037.

C. Universities as First Amendment Institutions

Universities are an obvious candidate for an institutional approach to the First Amendment. This is true for a variety of legal and nonlegal reasons, both descriptive and normative. Practically speaking, courts have already accepted that universities play a distinct role in our First Amendment firmament. The *United States Reports* are replete with examples of the Supreme Court extolling the unique, and uniquely important, role played by universities in the accumulation and advancement of knowledge[94] and in contributing to public debate.[95] To this day, the Court's decisions continue to recognize the special role played by universities in public discourse, and to tread lightly around any suggestion that general rules that are otherwise applicable under standard First Amendment doctrine would apply in the same way in the university context.[96] Willie Sutton famously (and, according to Sutton, apocryphally)[97] observed that he robbed banks "because that's where the money is." Similarly, we might begin an exploration of an institutional approach to the First Amendment with universities because the Court has already treated universities as First Amendment institutions.

In nonlegal terms, treating universities as First Amendment institutions makes sense because they are already highly institutionally differentiated creatures. However strong the textual arguments for treating the press as a First Amendment institution might be,[98] doing so nevertheless begs the vexing question of what, exactly, constitutes "the press."[99] In the common run of cases, universities pose no such definitional problems. An individual

94. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (relating academic freedom to the role of universities in making "new discoveries" in various fields of knowledge).

95. *See, e.g.*, Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

96. *See, e.g.*, Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006) (declining, without deciding, to apply a general rule involving government employees in cases "involving speech related to scholarship or teaching"); Rust v. Sullivan, 500 U.S. 173, 200 (1991) (suggesting that the Court's application of unconstitutional conditions doctrine might be different in cases involving universities, which constitute "a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment").

97. WILLIE SUTTON WITH EDWARD LINN, WHERE THE MONEY WAS 159 (1976).

98. *See* Horwitz, *Blog*, *supra* note 33, at 58.

99. *See id.* at 50–52. *See generally* Lange, *supra* note 42.

journalist, a blogger,[100] or a "lonely pamphleteer"[101] may or may not be "the press." But it is harder to pose as an entire university. To be sure, some such questions of definition may arise on occasion; and one may fairly debate what special features or qualities distinguish universities as institutions uniquely deserving of First Amendment protection. Nevertheless, on the whole, it is easy enough to recognize a university. We simply "know it when [we] see it."[102]

There are also a host of normative reasons why we might value universities as communities whose nature and whose contributions to public discourse are so unique that they merit special institutional recognition. Universities, at their best,[103] are places of discovery, innovation, and heterodoxy. They provide knowledge, debate, and a meaningful foundation to the intellectual, professional, and civic life of students; resources, collegial support, and a haven for the free and unfettered work for scholars; and direct and indirect collateral benefits for the broader society. Academic speech—again, at its best—is characterized by "its commitment to truth . . . its honesty and carefulness, its richness of meaning, its doctrinal freedom, and its invitation to criticism."[104] It can "provide[ ] our most important model of expression that is meaningful as well as free, coherent yet diverse, critical and inspirational."[105] These are virtues well worth protecting.

Perhaps as important, for institutional purposes, is the fact that the university is also a highly disciplined environment.[106] In a recent article, Emily Calhoun observed that "faculty in our universities . . . live their professional lives within disciplinary constraints and norms."[107] Those disciplinary constraints apply within specialized fields of knowledge, not

100. *See generally* Horwitz, *Blog*, *supra* note 33.

101. Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

102. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

103. And they are not always at their best, as Larry Alexander reminds us. *See* Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006). Countless other writers have also examined the failings of the modern American university. For a recent account of the university's problems, one written with affection and sympathy, see DEBORAH L. RHODE, IN PURSUIT OF KNOWLEDGE: SCHOLARS, STATUS, AND ACADEMIC CULTURE (2006). For more perfervid critiques, see, for example, ROGER KIMBALL, TENURED RADICALS, REVISED: HOW POLITICS HAS CORRUPTED OUR HIGHER EDUCATION (1990); CHARLES J. SYKES, PROFSCAM: PROFESSORS AND THE DEMISE OF HIGHER EDUCATION (1988).

104. Byrne, *supra* note 17, at 259–60.

105. *Id.* at 261.

106. I mean that in the more literal sense of the word, as should be clear to anyone who has spent much time on campus. For evidence, albeit of a fictionalized nature, that the university could not possibly be said to be disciplined in the casual sense of the word, see, for example, KINGSLEY AMIS, LUCKY JIM (1954); MICHAEL CHABON, WONDER BOYS (1995); DAVID LODGE, CHANGING PLACES (1979); RICHARD RUSSO, STRAIGHT MAN (1997).

107. Emily M. Calhoun, *Academic Freedom: Disciplinary Lessons From Hogwarts*, 77 U. COLO. L. REV. 843, 844 (2006).

the university as a whole. Within each discipline, scholars operate according to a set of finely detailed, widely shared standards, methodologies, and norms. Only by traversing the entry barriers set by each discipline does each scholar attain meaningful membership in his or her field, and only by satisfying his or her peers within the discipline does the scholar attain or maintain a reputation as someone worth listening to. To be fully accepted within a discipline, a scholar must ultimately "be certified by her peers as competent to engage in scholarly exchange."[108] Indeed, academic tenure within the university generally has far more to do with the scholar's acceptance by his or her own discipline than it has to do with any decisions made by the provost, president, or any other corporate representative of the university as a whole.[109] Thus, the scholar's life is a life of disciplinarity, one every bit as finely grained, closely monitored, and ritualized as the most exquisite tea ceremony.[110]

To this set of disciplinary constraints, we might add general scholarly standards that apply across disciplines: norms against plagiarism and in favor of proper attribution, norms in favor of peer review,[111] and so on. Finally, we might add the myriad bureaucratic rules, processes, and layers of decisions—the host of "structural mechanisms"[112]—that characterize the life of the university. Taken together, we might say that the scholar, and, by extension, the broader university, is thrice constrained in his or her actions: by disciplinary norms, by general scholarly norms, and by the governance norms of the university itself. It is thus hardly surprising that an institution such as the university, which is defined by a disciplined and well-regulated production of speech and knowledge, might be marked for recognition as an entity well suited for treatment as a First Amendment institution.

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108. Byrne, *supra* note 17, at 258–59.

109. *See id.* at 266 (noting the general acceptance "of a crucial tenet that invigorates the notion of academic freedom whether the professor is tenured or not: Judgments of scholarly and teaching competence must ordinarily be made by peers. Judgments of hiring and firing are made in the first instance by other faculty deemed capable of evaluating on appropriate academic grounds the potential and accomplishment of the candidate"); Calhoun, *supra* note 107, at 851 ("The university especially acquiesces in the influence of the discipline in its tenuring processes, which rest heavily on a system of disciplinary peer review.").

110. *See* Byrne, *supra* note 17, at 258 ("Academic speech is rigidly formalistic.").

111. With the notable, and perhaps unique, exception of that odd creature within the modern academy: the American law review.

112. Byrne, *supra* note 17, at 267.

D. Three Versions of the Treatment of Universities as First Amendment Institutions

We come, then, to the crucial question of what the treatment of universities as First Amendment institutions entails. Here, we can describe three possible paths for the institutional First Amendment treatment of universities: a weak-form treatment of universities as First Amendment institutions, a medium-form treatment, and a strong-form vision of the university as a First Amendment institution.

The weak-form version of the university as a First Amendment institution should be familiar enough. Under the weak-form approach, the university would be treated as a generally favored institution under First Amendment law and perhaps in other areas of constitutional law. More generally, it would be treated as an especially expert institution, one whose relative superiority in administering its own affairs would counsel a fair degree of deference on the part of courts dealing with disputes involving core academic functions. This degree of deference would often serve to insulate the university from legal claims challenging its decisions in academic areas, but would hardly amount to immunity from most generally applicable laws. Such an approach would not, however, provide additional positive privileges to the university not enjoyed by other institutions, beyond the advantage of deference itself.

Whether or not courts would label it as an institutional First Amendment approach, this is, in fact, fairly close to the law as it currently stands. There is little doubt that universities, as institutions, are special creatures of the First Amendment, and courts have repeatedly said so.[113] That status has led courts to accord universities a substantial degree of deference, at least where core academic decisions, such as whether to grant or deny tenure to a professor or whether to discipline or expel a student, are concerned.[114] In other areas, courts treat the university's interest in academic

113. *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

114. *See, e.g.*, Univ. of Pa. v. EEOC, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments."); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (deferring substantially to an academic decision to dismiss a student where the university reasonably exercised professional judgment according to "accepted academic norms"); Toledo v. Sanchez, 454 F.3d 24, 39–40 (1st Cir. 2006) ("[T]he [Americans with Disabilities Act] does not require public schools and universities to accommodate disabled students if the accommodation would substantially alter their programs or lower academic standards, and courts give due deference to the judgment of education officials on these matters."); Kobrin v. Univ. of Minn., 34 F.3d 698, 704 n.4 (8th Cir. 1994) ("[C]ourts accord a high degree of deference to the judgment of university decisionmakers regarding candidates' qualifications for academic positions."); Brousard-Norcross v. Augustana Coll. Ass'n,

freedom, and its decisionmaking autonomy with respect to genuinely academic decisions, not as an absolute right, in the sense of a trump over other competing interests,[115] but as a constitutional "interest" or "dimension," grounded in the First Amendment, that weighs heavily in the balance against countervailing legal interests.[116] Such has been the case in the university admissions cases, in which the universities' claimed interest in classroom diversity was accepted as a compelling state interest but still weighed against the competing constitutional interest in nondiscrimination. Note that in those cases, the courts' acceptance of diversity as a compelling interest was itself substantially underwritten by the courts' deference to the universities' own academic judgment that diversity was an important factor in shaping the face of the university class.[117]

Finally, although courts currently defer to universities across a wide variety of legal claims touching on academic decisions, they are loath to convert this deference into a more positive privilege in which universities, by virtue of their institutional status, enjoy special rights against generally applicable laws not enjoyed by other institutions. Thus, in *University of Pennsylvania v. EEOC*,[118] the Court rejected a university's claim to what it deemed "an *expanded* right of academic freedom to protect confidential peer review materials from disclosure"[119]—in effect, a new evidentiary privilege for the university. Similarly, in *Bob Jones University v. United States*,[120] the Court held that a university that chooses to enforce a racially discriminatory admissions policy enjoys no special right to retain access to tax-exempt status under the tax code.[121]

If the current state of the law resembles something like the weak-form treatment of universities as First Amendment institutions, it takes little work to imagine a slightly stronger version of the institutional First Amendment

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935 F.2d 974, 975–76 (8th Cir. 1991) (indicating that courts will defer substantially to university tenure decisions); Zahorik v. Cornell Univ., 729 F.2d 85, 93 (2d Cir. 1984) (same).

115. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 184–205 (1977) (advancing the concept of rights as trumps). For pertinent criticisms of the "rights as trumps" approach, see Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1810–16 (1999).

116. *Grutter*, 539 U.S. at 330; Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 313 (1978) (opinion of Powell, J.); Schauer, *Academic Freedom*, *supra* note 26, at 921.

117. *See, e.g.*, *Grutter*, 539 U.S. at 328–29; *Bakke*, 438 U.S. at 312–15.

118. 493 U.S. 182 (1990).

119. *Id.* at 199.

120. 461 U.S. 574 (1983).

121. Properly speaking, *Bob Jones University v. United States* was a Free Exercise Clause case, not a Free Speech Clause case. Nevertheless, I do not doubt the Court would have reached the same conclusion had the case been framed differently.

treatment of universities. Under this medium-form approach, courts would, as they do now, accord substantial deference to universities' academic decisions. The key difference would be in the extent to which such deference is explicitly based on the special institutional status of the university under the First Amendment. This openly institutionally based judicial deference to the determinations of universities would thus demarcate the university as a substantially autonomous institution within the law. What is now often little more than a rhetorical frill[122] would become a more concrete and meaningful reality.

To be sure, even this form of First Amendment institutionalism would be subject to limits. First, as the Court suggested in *Grutter v. Bollinger*,[123] protection for universities as First Amendment institutions would run up against at least some "constitutionally prescribed limits,"[124] although this language begs the question of what sorts of limits would apply, and how much the Court would defer to the universities' own sense of those limits.

More importantly, perhaps, a proper regard for universities as First Amendment institutions would lead courts to require those institutions to operate within a sphere marked by the distinctive cultural and professional norms and practices of the university itself.[125] A university that operated in defiance of its own norms would be entitled to little judicial deference. Within the shelter of those institutional norms, however, the university would be accorded substantial deference to operate as it thinks best. Thus, under a medium-form treatment of universities as First Amendment institutions, universities might well enjoy a fairly substantial positive privilege to rebut government attempts to intrude upon their ability to shape their own affairs.

Four examples help illustrate how such a medium-form treatment of universities as First Amendment institutions might affect current law. First, as Schauer writes, to the extent that an institutional approach to the First Amendment suggests that "the autonomous decision making of academic

122. *See, e.g.*, J. Peter Byrne, *Constitutional Academic Freedom After* Grutter: *Getting Real About the 'Four Freedoms' of a University*, 77 U. COLO. L. REV. 929, 935 (2006) [hereinafter Byrne, *After* Grutter] (noting the "rhetorical ambiguities in *Grutter*" that "raise doubts about the depth of the Court's commitment to [the] principle" that universities' "core institutional choices are protected by the First Amendment"); J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J. COLL. & UNIV. L. 79, 118 n.69 (2004) [hereinafter Byrne, *Threat*] (noting that "academic freedom cases often employ stirring rhetoric without deciding much" (citing Byrne, *supra* note 17, at 257)).

123. 539 U.S. 306 (2003).

124. *Id.* at 328.

125. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 572–73.

institutions [genuinely] counts for something," then a court might recognize at least a qualified privilege against the discovery of promotion and tenure records, a privilege the Court refused to recognize in *University of Pennsylvania v. EEOC*.[126] Second, a court that recognized a genuine right of institutional autonomy for universities might give serious weight to that interest when considering the government's attempt to link the receipt of federal funds to the requirement that military recruiters be allowed on campus on equal terms with other visitors. In *Rumsfeld v. FAIR*,[127] an eight-member Court unanimously failed to give such arguments so much as the back of its hand. Third, notwithstanding state constitutional law, a private university would have far greater latitude to exclude unwanted speakers, at least where such exclusion was the product of a meaningful decision by the university about the nature of desirable speech on campus.[128] Finally, a stronger degree of recognition of the institutional autonomy of the university might well suggest that courts should reevaluate their blanket rejection of campus speech codes grounded in the universities' own considered judgment of the kinds of speech that do and do not contribute to the academic mission, whether on public campuses or, under state law, even private ones.[129]

Finally, we could imagine a genuinely strong-form version of recognizing universities as First Amendment institutions. At its core, this approach shares with the weak-form and medium-form versions the same basic concept: that universities should enjoy an institutional right "to make [their] own academic decisions, even if those decisions might, when made by a public college or university, constitute otherwise constitutionally problematic . . . decisions."[130] The difference, then, is primarily one of degree.

But differences of degree are not a little thing. Consider the potential gulf between courts' relatively deferential treatment of decisionmaking by other branches of government,[131] and their conclusion in some areas that

126. Schauer, *Academic Freedom*, *supra* note 26, at 921–22.

127. 547 U.S. 47 (2006).

128. *See* State v. Schmid, 423 A.2d 615 (N.J. 1980) (holding under New Jersey constitutional law that a nonmember of the university community was entitled to leaflet on the Princeton University campus), *appeal dismissed sub nom.* Princeton Univ. v. Schmid, 455 U.S. 100 (1982); *see also* Byrne, *After* Grutter, *supra* note 122, at 946 (criticizing the New Jersey Supreme Court's decision in *Schmid*).

129. *See generally* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 503–11. *See also* Corry v. Leland Stanford Univ., No. 740309 (Cal. Super. Ct. Feb. 27. 1995), *available at* http://www.ithaca.edu/faculty/cduncan/265/corryvstanford.htm (invalidating Stanford University's campus speech code, relying on a California law giving students at private universities the same free speech rights as students at public universities).

130. Schauer, *Academic Freedom*, *supra* note 26, at 923–24.

131. *See, e.g.*, Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195–96 (1997).

certain decisions by government are either beyond the scope of judicial review altogether,[132] or are entitled to a level of deference that approaches "de facto non-justiciability."[133] A strongly protective treatment of universities as First Amendment institutions might approach such a level.

In effect, a strong-form version of universities as First Amendment institutions would treat them as legally autonomous institutions, which enjoy a First Amendment right to operate on a largely self-regulating basis and outside of the supervision of external legal regimes. Deference, on this view, would not be simply a matter of putting a thumb on the scale in favor of universities on a case-by-case basis as disputes arise. Instead, it would declare such disputes to be largely or completely beyond the jurisdiction of courts altogether.[134] Thus, universities would enjoy near-absolute discretion to self-regulate across a range of academic activities, from hiring and firing, to the selection of campus speech codes or the restriction of religious speech, to the composition of the student body based explicitly on considerations of race or gender.[135] A decision like *FAIR*, allowing the government to place military recruiters on university campuses as a condition of continued government funding, might well turn out differently. And universities might claim other privileges and immunities from generally applicable laws, as in their claim to a privilege against disclosure in *University of Pennsylvania v. EEOC*. Unlike the medium-form treatment of universities as First Amendment institutions, in which some of these outcomes might also obtain, the strong-form version would treat universities as presumptively autonomous institutions under the law, rather than simply weigh their interests heavily in the balance against competing government interests.

Put so starkly, the gap between where we are now and the strong-form version of universities as First Amendment institutions may seem wide indeed, if not unbridgeable. But that gap may seem less dramatic, and the contours of such an approach might begin to take on a more discernible shape, if we compare it to a similar legal doctrine that already exists in the law.

Consider the legal status of religious institutions. Under the church autonomy doctrine, courts are prohibited from reviewing "internal church disputes involving matters of faith, doctrine, church governance, and polity."[136]

132. *See, e.g.*, Adler & Dorf, *supra* note 77, at 1172–81.

133. C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 819 (1988).

134. *Cf.* Hills, *supra* note 34, at 186–87.

135. *See generally* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 503–46.

136. Bryce v. Episcopal Church in the Diocese of Colo., 289 F.3d 648, 655 (10th Cir. 2002) (citing Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 116–17 (1952)). For a useful discussion, see Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59 (2006).

In words similar to those I have used here in describing the strong-form treatment of universities as First Amendment institutions, Carl Esbeck describes the doctrine of church autonomy as a "recognition" that "the civil courts have no subject-matter jurisdiction over the internal affairs of religious organizations."[137]

That doctrine means, at the least, that courts refuse to "undertake to resolve [religious] controversies" involving the disposition of church property.[138] But the doctrine extends beyond that, into questions of the application of civil rights law to churches as employers. By law, churches already enjoy a substantial immunity from liability under Title VII of the Civil Rights Act "with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."[139] Under that provision, churches are still prohibited from discriminating on the basis of other protected categories, such as race, color, national origin, or sex.[140] But courts have read the Constitution to require a still broader scope of immunity for churches under civil rights law, concluding that church autonomy "bars *any* inquiry into a religious organization's underlying motivation for [a] contested employment decision" involving "who will perform particular spiritual functions."[141] This rule has been extended beyond the core "minister-church relationship"[142] to such individuals as lay teachers at parochial schools,[143] secretaries,[144] and church organists.[145] Churches have, in short, been granted substantial immunity from the ordinary operation of civil rights laws that regulate the day-to-day internal operations of countless other institutions.

Now, that is far from a strong justification for a strong-form treatment of universities as First Amendment institutions, at least as I have described

137. Carl H. Esbeck, *Dissent and Disestablishment: The Church-State Settlement in the Early American Republic*, 2004 BYU L. REV. 1385, 1589.

138. Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church, 393 U.S. 440, 449 (1969).

139. 42 U.S.C. § 2000e-1(a) (2000).

140. *See, e.g.*, Rayburn v. Gen'l Conf. of Seventh Day Adventists, 772 F.2d 1164, 1166 (4th Cir. 1985); Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 HASTINGS CONST. L.Q. 1, 3 (2002).

141. Petruska v. Gannon Univ., 462 F.3d 294, 304 (3d Cir. 2006).

142. *Id.* at 303.

143. *See* NLRB v. Cath. Bishop of Chi., 440 U.S. 490 (1979).

144. *See* EEOC v. Pac. Press Publ'g Ass'n, 676 F.2d 1272 (9th Cir. 1982).

145. *See* Assemany v. Archdiocese of Detroit, 434 N.W.2d 233 (Mich. Ct. App. 1988). *But see* EEOC v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980) (refusing to extend the exception to claims involving nontheology faculty at a sectarian college).

such a regime. First, the analogy might not hold. Religious institutions may occupy a very different place in our constitutional order, thus requiring very different treatment; few individuals would likely take the view that universities occupy as central a place in their own lives as religious institutions do in the lives of many. Moreover, the immunity of religious institutions is founded not just on the distinctness of those entities, but also at least in part on the substantial degree to which courts are incompetent to evaluate the relevant factors involving decisions by religious organizations.[146] We might reach a different conclusion with respect to courts' ability to evaluate claims made by universities. Furthermore, even if the analogy does hold true, an analogy is not the same thing as a justification. The ministerial exception has had its share of critics,[147] and drawing a likeness to what is, for some, a disfavored doctrine will hardly satisfy those critics.

It is perhaps worth pointing out that the model of First Amendment institutionalism I have previously championed[148] does not go as far as the strong-form version I have described here. Like the medium-form brand of institutionalism I have described, rather than grant absolute immunity to First Amendment institutions such as universities, it grants them autonomy only to the extent that they observe "procedural and substantive requirements drawn from the norms and practices of [those] institutions."[149] But my point here is a more modest one. I wish simply to point out that even a strong-form treatment of universities as First Amendment institutions is not as radical as one might think at first blush.

To summarize, I have thus far offered three different ways in which we might treat universities as First Amendment institutions, ranging from a relatively watered-down version to a fairly stringent version. Under the weakest version, universities would simply be entitled to some measure of factual deference. Under the strongest, they would be entitled to a substantial degree of legal immunity. Somewhere in the middle, universities would be entitled to substantial decisionmaking autonomy and legal immunity for actions falling within "procedural and substantive requirements drawn from the norms and practices of the institutions themselves."[150]

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146. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-11, at 1232 n.46 (2d ed. 1988) (quoting P. KAUPER, RELIGION AND THE CONSTITUTION 26 (1964)).

147. *See, e.g.*, Ira C. Lupu, *Free Exercise Exemptions and Religious Institutions: The Case of Employment Discrimination*, 67 B.U. L. REV. 391 (1987); Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049 (1996). Ira Lupu has since revised the views stated in his earlier article. *See* Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 90 n.177 (2002).

148. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 578–79.

149. *Id.* at 579.

150. *Id.* at 579–80.

What these approaches all share is a rejection of institutional agnosticism under the First Amendment. Each of them proceeds from the position that universities are among those institutions that "play a fundamental role in our system of free speech."[151] Accordingly, courts "ought to attend to the unique social practices of these institutions, allowing the scope of [their] deference [to these institutions] to be guided over time by the changing norms and values of those institutions."[152] This is at least something of a departure from the Court's current approach, whose tendency is to exhibit "[a] reluctance to make . . . distinctions" among speakers and institutions under the First Amendment.[153] How much of a departure the institutional approach is in fact, and what sorts of questions are raised by such an approach, are matters I take up below.

II. EASY ANSWERS

Having set the scene, I want to consider some questions that arise when we think of the First Amendment in institutional terms, and particularly when we think of universities as First Amendment institutions. Doubtless this discussion does not exhaust the questions we might ask about an institutional approach.[154] Nevertheless, it will at least cover some of the most obvious questions about the institutional approach.

As I make clear in this Part, some of the most obvious objections one might raise to an institutional approach ultimately present little real difficulty. In particular, I have already argued that, in many respects, the weak-form version of the institutional approach I have outlined above differs little from the law as it stands.[155] At the very least, it is not much of a departure from what courts actually do in this area, no matter what they may say.[156] Thus, I need not address further the objection that the treatment of universities as First Amendment institutions represents a significant departure from current First Amendment doctrine. In some ways, it might

151. *Id.* at 589.

152. *Id.*

153. Dale Carpenter, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407, 1409 (2005).

154. For recent efforts to raise questions about the institutional approach to the First Amendment, focusing on Schauer's work, see, for example, Carpenter, *supra* note 153; David McGowan, *Approximately Speech*, 89 MINN. L. REV. 1416 (2005).

155. *See supra* notes 113–125 and accompanying text.

156. *See* Fagundes, *supra* note 26, at 1686 ("The Speech Clause itself may be object-neutral, but our First Amendment jurisprudence is nevertheless premised on implicit status distinctions among various speakers."); McGowan, *supra* note 154, at 1432 ("[J]udges do pay attention to institutions when engaging in free speech analysis, though the doctrine does not.").

be, at least if one adopted a particularly strong version of the institutional approach. In other ways, it simply represents what courts already do, and the question is then merely one of whether courts should be more aboveboard about doing so.

To the extent that one might raise more meaningful objections to the institutional approach, I believe those arguments are weaker than their proponents might suggest. That is not to say that the institutional approach does not raise a number of far more difficult questions. Rather, it is to suggest that the most difficult questions stem not from frontal assaults on an institutional approach in general, but from questions of scope and execution that those of us who already favor an institutional approach must confront.[157] Although I thus believe that the following suite of potential objections to the institutional approach is not sufficiently persuasive to present a significant obstacle to First Amendment institutionalism, they are still worthy of serious consideration.

A. The Public-Private Distinction

We might begin with a fairly obvious objection that any treatment of universities as First Amendment institutions raises. Crafting a First Amendment doctrine that treats universities as an undifferentiated institutional whole ignores "a crucial distinction" among them: "[E]ach lies on a different side of the public/private divide."[158] The First Amendment, like much of the rest of the Constitution, erects a line between private actors and state actors. How, then, does it make sense to insist on a doctrinal focus that would treat, say, the (public) UCLA School of Law as the constitutional equivalent of the (private) USC Gould School of Law?

Private universities are generally thought of as enjoying greater freedom to regulate speech taking place on campus than are public universities.[159] Nevertheless, for a number of reasons, I doubt that the distinction between public and private universities is as great as this description of current law may suggest. Much of the reason for this conclusion lies in state law rather than federal constitutional law. First, under state constitutional law, some courts have already erased some of the distinctions between public and private universities. Most famously, the New Jersey Supreme Court, in the well-known case of *State v. Schmid*,[160] held that the New Jersey

157. *See infra* Part III.
158. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 583–84.
159. *See id.* at 584 n.554 (collecting sources).
160. 423 A.2d 615 (N.J. 1980).

state constitution required Princeton University to permit a nonstudent leafletter to distribute pamphlets on campus, holding that the state's free speech provision reached "unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property."[161] Although this is the minority position in the states,[162] New Jersey is not the only state to so hold.[163] Other states have taken a similar approach through legislation rather than constitutional law; California law, for instance, requires certain state educational institutions to provide speech rights to their students that are equivalent to the rights they would enjoy under state or federal constitutional law.[164]

These laws and rulings raise troubling questions of their own,[165] and my own view is that both public *and* private institutions should enjoy greater legal latitude to shape their own student speech rules to fit their own sense of their academic missions. My point here is simply to suggest that the legal divide between public and private universities is not as great as one might initially assume.

State law also narrows the gap between public and private universities, because many state constitutions already give their universities at least some form of independent constitutional status.[166] Michigan, for example, gives the Board of Regents of the University of Michigan the right of "general supervision of its institution."[167] Again, this fact points to the view that the public-private distinction is not as great as one might assume where universities are concerned.

More broadly, whatever views lawyers may have about the public-private distinction, I do not doubt that most academics, and indeed just about everyone else, share the general intuition that there is not much of a difference between public and private universities on a day-to-day basis.[168] And that is precisely the point of the institutional approach: Universities share common institutional

161. *Id.* at 628.

162. *See* 1 JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES § 9-3(a) (3d ed. 2000).

163. *See* Commonwealth v. Tate, 432 A.2d 1382 (Pa. 1981) (applying a state free speech provision to a private university).

164. *See* CAL. EDUC. CODE § 94367 (West 2002).

165. *See* Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537 (1998); *see also* Byrne, *After* Grutter, *supra* note 122, at 946; Byrne, *Threat*, *supra* note 122, at 104 n.171.

166. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 585 n.563.

167. MICH. CONST. art. VIII, § 5.

168. *See, e.g.*, Nelson Lund, *The Rehnquist Court's Pragmatic Approach to Civil Rights*, 99 NW. U. L. REV. 249, 285 (2004) (describing the competition between public and private universities as one of "competition between government agencies staffed by self-perpetuating groups of life-tenured professors on one side, and tax exempt, nonprofit, government-subsidized institutions staffed by self-perpetuating groups of life-tenured professors on the other").

features and processes that transcend their source of funding, and it makes far more sense for the law to organize around these common institutional features than it does for it to organize around their private or public status. The UCLA School of Law and the USC School of Law, to take one example, share far more in common across the public-private divide than the UCLA School of Law shares, within the sphere of "state actors," with the California Department of Transportation. As I have written elsewhere, "the most salient consideration in these cases should be the nature of the institution and its role in strengthening public discourse"[169]—not its public or private status.

B. State Actors as First Amendment Speakers[170]

A closely related question, drawing on but advancing the public-private question, is whether it makes sense to think of First Amendment institutions such as universities as enjoying constitutional rights if those institutions are, in fact, state-funded. As J. Peter Byrne has written, "[a] state university is a unique state entity in that it enjoys federal constitutional rights against the state itself."[171] This may be troubling for those who are willing to grant students and faculty members rights against public universities, but who believe that such universities enjoy no institutional rights against the larger state of which they are a part. As the Sixth Circuit recently observed, in yet another case addressing the use of race in admissions at the University of Michigan, "[o]ne does not generally think of the First Amendment as protecting the State from the people but the other way around—of the Amendment protecting individuals from the State."[172]

Under this conventional understanding of the legal status of state actors, there is no doubt that recognizing public universities as First Amendment institutions, with corresponding rights against the state, presents an awkward

169. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 588.

170. The title of this Subpart is taken from David Fagundes's valuable recent article of the same name. *See* Fagundes, *supra* note 26.

171. Byrne, *supra* note 17, at 300.

172. Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 247 (6th Cir. 2006); *see also* Columbia Broad. Sys. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring); Hopwood v. Texas, 78 F.3d 932, 943 n.25 (5th Cir. 1996). This is the position taken by Paul Secunda in his contribution to this Symposium. *See* Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1771 ("[T]he Bill of Rights protects the governed, not the governing"). Specifically, Secunda argues against constitutional rules that would insulate public universities, as public employers, from claims brought by faculty members and other university employees, while leaving open the possibility that universities might enjoy rights against competing sovereigns such as the federal government. *See, e.g.*, *id.* at 1807 n.251.

fit with standard assumptions about the limited or nonexistent nature of First Amendment rights for state actors. That might seem to preclude any strong version of a First Amendment institution argument for educational autonomy, at least where public institutions are concerned.

For several reasons, I doubt that this objection has as much traction as one might assume. First, the doctrine in this area is hardly set in stone. As David Fagundes has written,[173] the most definitive statement by the Supreme Court suggesting that government actors are not entitled to claim First Amendment rights is a mere concurrence by Justice Stewart in *Columbia Broadcasting System v. Democratic National Committee*.[174] In that case, Justice Stewart suggested that treating broadcasters as state actors would eliminate their ability to engage in a constitutionally protected exercise of editorial discretion, because the First Amendment "protects the press from governmental interference; it confers no analogous protection on the Government."[175]

Although this point has often been treated as "well-settled,"[176] the Supreme Court in fact has left open the question of state actors' First Amendment rights against other and higher government authorities, at least in some circumstances.[177] Most recently, in *United States v. American Library Ass'n*,[178] the Court again noted the argument that "Government entities do not have First Amendment rights," but declined to "decide this question."[179] While most courts have nevertheless treated the question as closed, several thoughtful opinions by lower federal and state courts have suggested that state actors may enjoy at least some First Amendment rights in some circumstances. For example, in *Creek v. Village of Westhaven*,[180] Judge Posner noted that in a variety of other areas, municipal corporations are treated as persons under the law.[181] More importantly, he noted that in some circumstances, "a municipality is the voice of its residents—is, indeed, a megaphone amplifying voices that might not otherwise be audible," and thus, it would be appropriate to see a law affecting the municipality's right to speak as a kind of "curtailment of the unquestioned First Amendment

173. *See* Fagundes, *supra* note 26, at 1641–42.
174. 412 U.S. 94.
175. *Id.* at 139.
176. Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d. 941, 944 (W.D. Va. 2001).
177. *See, e.g.*, City of Madison, Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167, 175 n.7 (1976) ("We need not decide whether a municipal corporation as an employer has First Amendment rights to hear the views of its citizens and employees.").
178. 539 U.S. 194 (2003).
179. *Id.* at 210–11.
180. 80 F.3d 186 (7th Cir. 1996).
181. *Id.* at 193 (citing Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978); Moor v. Alameda County, 411 U.S. 693, 717–18 (1973)).

right of those residents."[182] And in the lower court decision in *American Library Ass'n*,[183] the three-judge panel carefully examined the status of public libraries' First Amendment rights, noting that "the First Amendment is not phrased in terms of who holds the right, but rather what is protected," and concluding that "the notion that public libraries may assert First Amendment rights for the purpose of making an unconstitutional conditions claim is clearly plausible, and may well be correct."[184]

Thus, current law does not authoritatively require us to assume that state actors can never claim First Amendment rights against other governmental entities. In appropriate contexts, the argument to the contrary may well be more persuasive. As Fagundes notes, neither the constitutional text nor constitutional history demand a different conclusion.[185] At the level of theory, the argument for an absolute bar against the First Amendment rights of state actors also falls short. In some cases, according First Amendment rights to some subset of state actors may "further[ ] the Constitution's systemic goal of maintaining a free and open marketplace of ideas,"[186] by ensuring that discrete governmental actors can continue playing a vital role as participants in the marketplace of ideas with at least some protection from larger or superior governmental actors.

This point, it bears emphasizing, is especially true for governmental entities such as public universities, although it applies equally well to other public entities that I would classify as First Amendment institutions, such as libraries.[187] For these institutions are precisely that—*institutions*, which operate far more according to the norms and traditions of the university than they do as typical government sovereigns. The relationship between universities and the larger state around them, or between universities and their constituents, such as students or faculty, is thus far closer to the relationship between private universities and other internal or external actors than it is to the usual relationship between the sovereign and its citizens. In short, whatever the merits of Paul Secunda's view that

182. *Id.* at 193.

183. Am. Library Ass'n, Inc. v. United States, 201 F. Supp. 2d 401 (E.D. Pa. 2002), *rev'd*, 539 U.S. 194 (2003).

184. *Id.* at 492 n.36.

185. Fagundes, *supra* note 26, at 1647–59.

186. *Id.* at 1662.

187. *Cf. Am. Library Ass'n*, 539 U.S. at 226 (Stevens, J., dissenting) (drawing an analogy to the Court's constitutional academic freedom decisions to argue that publicly funded libraries are entitled to First Amendment protection in their exercise of discretion with respect to collection decisions).

the "Bill of Rights protects the governed, not the governing,"[188] public universities hardly fit our usual conception of what it means to be a "governing" state body.

As I have already suggested, this conclusion is buttressed in the case of public universities by the fact that most of them are expressly granted an atypical amount of autonomy under state law. To reprise my earlier example, Michigan's constitution grants the regents of the University of Michigan "general supervision of its institution and the control and direction of all expenditures from the institution's funds."[189] Where states themselves are willing to grant whole or partial autonomy to public universities in conducting their affairs, we may perhaps be less disturbed by the notion that those institutions might enjoy some ability to assert constitutional rights as First Amendment rights holders against the state itself.

Finally, even if one is unwilling to adopt wholesale the view that public universities, as First Amendment institutions, can assert a broad array of rights against the state, in practice it may not matter much. On at least the tacit level on which First Amendment institutionalism operates in current jurisprudence,[190] courts are likely to continue applying existing constitutional doctrine in the area of public universities with at least some sense of the qualities that mark those entities as institutionally distinct and as valuable contributors to public discourse. Although I have argued for a more vigorous reading of the case and its implications, *Grutter v. Bollinger*[191] itself might be seen in this light. There, in its application of strict scrutiny in a Fourteenth Amendment context, the Court did not expressly give the University of Michigan Law School a freestanding First Amendment right to preserve its race-conscious admissions program. Rather, it engaged in its strict scrutiny analysis in a deferential fashion, in keeping with the "special niche in our constitutional tradition" that universities occupy.[192] Thus, even if we do not accept that public universities enjoy full First Amendment rights against other state actors, we might still resolve any disputes involving those institutions with a sense of the First Amendment dimensions raised by those actors.[193] Secunda himself, as I understand his

188. Secunda, *supra* note 172, at 1771.
189. MICH. CONST. art. VIII, § 5.
190. *See supra* notes 113–121 and accompanying text.
191. 539 U.S. 306 (2003).
192. *Id.* at 329.
193. *Cf.* Schauer, *Academic Freedom*, *supra* note 26, at 925.

argument, would require at least this much in the context of employer-employee disputes in the university context.[194]

In sum, the conventional assumption that governmental actors enjoy no First Amendment rights would seem to present difficulties for a First Amendment institutional approach, or at least an institutional approach that would treat public and private universities as essentially identical for most constitutional purposes. But that assumption is neither as well-grounded in the case law nor as supported by broader theories of state action and the First Amendment as one might assume. In many instances, it may well make sense to think of state actors as First Amendment speakers. That is especially true in the case of public universities, whose institutional distinctness and unique role in advancing First Amendment values set them apart from the common run of state actors. I thus conclude that this objection ultimately does not derail the First Amendment institutional project.

C. "More Speech Is Better": The Argument for Extending First Amendment Norms to the Private Sector

The objections discussed above focus largely on the difficulties of thinking about public universities as rights holders. Objectors to an institutional approach who take such a perspective might allow for an expansive view of private universities as First Amendment rights holders, while applying the full panoply of First Amendment restrictions to the public university as if it were a typical state sovereign. Under this approach, public universities, under the weight of generally applicable First Amendment doctrines such as public forum law, or under general rules of content neutrality, would thus be greatly limited in their ability to regulate their own affairs in accord with their academic missions.

By contrast, another set of potential objections to the treatment of universities as First Amendment institutions comes from the other side of the public-private divide. Rather than resisting the treatment of public universities as if they are private actors, it urges the application to private universities of First Amendment standards that would typically apply to

194. *See* Secunda, *supra* note 172, at 1809–13; *see also* Byrne, *After* Grutter, *supra* note 122, at 937–38 (noting that the Court has often employed constitutional academic freedom "as a counter to constitutional arguments posed by challengers to university actions" rather than directly labeling it as a freestanding right, and observing that "it would introduce a novel notion of what is a constitutional right to hold that one has special, constitutional weight against other constitutionally protected interests while still being vulnerable to state legislation").

state actors. Thus, rather than treating all universities as if they were private institutions, it would erase the public-private divide from the opposite direction, seeking the greater application of First Amendment norms to private-sector educational institutions when they seek to regulate their own speech environment. In recognition of Erwin Chemerinsky's contribution in these pages a decade ago, we might label this suite of arguments the "more speech is better" objection to First Amendment institutionalism.[195]

The crux of Chemerinsky's argument is that "[t]raditional law always favors the institution's interests over the individual's. Traditional law, as embodied in the state action doctrine, creates a bright-line rule that the private institution always wins and the individual fired or disciplined by it for expression always loses."[196] Chemerinsky is troubled by this because, in his view, "in general, speech interests of individuals are more important than free speech interests of institutions," and "private power can infringe the same [individual] rights [of expression] with the same effect as the government."[197] Because, in his view, "if speech is good, more speech is better," Chemerinsky argues that it is positively desirable for legislatures to enact "statutes that provide that individuals in private schools have the same speech right as individuals in public schools," provided that those statutes allow private institutions to restrict speech by their constituents if they can show that it is "expression unprotected by the First Amendment"—a relatively small and unremarkable category—or "that a sufficient interest is served by limiting expression."[198]

In the course of advancing this argument, Chemerinsky makes a number of key moves that further demonstrate its tension with the First Amendment institutions approach I have offered here. He is emphatic that the application of antidiscrimination statutes to private schools "is a government-imposed orthodoxy that is now widely accepted."[199] He largely denies that there is anything to be gained by cloaking universities in the garb of "communitarian self-determination," writing, "I am very skeptical that many . . . institutions really are communities in any meaningful sense of that term. A university the size of the University of Southern California is hardly a community in any meaningful way."[200] He rejects any analogy

195. *See* Erwin Chemerinsky, *More Speech Is Better*, 45 UCLA L. REV. 1635 (1998) [hereinafter Chemerinsky, *More Speech*].
196. *Id.* at 1639.
197. *Id.* at 1641.
198. *Id.* at 1643.
199. *Id.* at 1637.
200. *Id.* at 1639.

between private institutions such as universities and the parade organizers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*.[201] And he suggests that it is not especially harmful to subject private institutions to the sorts of First Amendment norms that might apply to public actors, arguing:

> Institutions still can express their own messages, they just cannot do so by silencing others. If the institution wants to express its opposition to civil rights or its support for the Viet Nam War, it can do so, but it should not advocate its position by suppressing the speech of others. . . . [P]rivate institutions required to obey First Amendment norms by other laws are not obligated to express any specific message and can disavow any message expressed by others.[202]

In short, the more speech is better argument advances a view that would subject private institutions, including universities, to the whole panoply of First Amendment doctrines that generally limit attempts on the part of the institution—usually, a state actor—to regulate its speech environment in any sort of content- or viewpoint-specific way.

Such an approach would obviously curtail the institutional First Amendment project. After all, the institutional approach, if anything, seeks the opposite: It wishes to "incorporate private sector norms into the First Amendment."[203] Under the more speech is better approach, to the contrary, a private university would be hard pressed to justify any effort to select, exclude, or restrict either particular speakers on campus, whether professors, students, or others, or the content of that speech. Under the framework that a more speech is better approach seems to propose, for example, any law school, public or private, would likely be obligated to allow full and equal access to all manner of on-campus employers, including the military employers whose on-campus presence the plaintiffs in *Rumsfeld v. FAIR*[204] sought to restrict.[205]

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201. 515 U.S. 557 (1995).

202. Chemerinsky, *More Speech*, *supra* note 195, at 1642.

203. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 587.

204. 547 U.S. 47 (2006).

205. It is worth noting that Chemerinsky served as one of the named plaintiffs in *Rumsfeld v. Forum for Academic & Institutional Rights* (*FAIR*), and has subsequently written in criticism of the Court's decision in that case. *See* Erwin Chemerinsky, *Why the Supreme Court Was Wrong About the Solomon Amendment*, 1 DUKE J. CONST. L. & PUB. POL'Y 201 (2006) [hereinafter Chemerinsky, *Why the Court Was Wrong*]. Of course, his views may have changed in the intervening years. And one might attempt to reconcile the views he takes in his earlier article with those he advanced as a litigant in *FAIR*. Nevertheless, I find it difficult to fairly reconcile his earlier views with his willingness to advance the *FAIR*

The best response to the more speech is better suite of arguments remains the important article to which Chemerinsky was responding—one published in these pages by the late Julian Eule, with the assistance of Jonathan Varat.[206] Eule questioned "the wisdom and constitutionality of imposing the speech norms of the First Amendment on the private sector."[207] "Uniformity imposed in

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litigation as a named plaintiff. I do not mean to overstate this criticism, and hence have relegated it to a footnote, but it merits some discussion.

On a basic level, some of the arguments advanced in *More Speech* are in tension with some of his later statements in and about the *FAIR* litigation. For example, he argued in *More Speech* that the Supreme Court's decision in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston* adds little to the argument against importing First Amendment norms to private institutions, because "[a] parade . . . exists to convey a message. A school or workplace, by contrast, exists primarily to perform other functions," and thus may be required to "tolerate in its midst speech that it dislikes." Chemerinsky, *More Speech*, *supra* note 195, at 1642–43. Today, by contrast, he calls *Hurley* an example of "forced expression" that applies to the law school plaintiffs in *FAIR*. *See* Chemerinsky, *Why the Court Was Wrong*, *supra*, at 211–15. Similarly, he wrote in *More Speech* that private institutions "can protect [their] speech interests by expressing [their] own message," but cannot "silenc[e] others." Chemerinsky, *More Speech*, *supra* note 195, at 1642 (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980)). In *FAIR*, by contrast, the respondents argued that *PruneYard* "does not come close to justifying a law that demands a school's active assistance in helping a specified outsider disseminate a specific message that is deeply objectionable to the institution." Brief for Respondents, Rumsfeld v. FAIR, 547 U.S. 47, at 23 (2005). To be sure, the addition of the law schools' compelled "active assistance" superficially distinguishes *PruneYard* from *FAIR*—*if* one believes that such acts as "maintain[ing] leaflets in binders for reference by students" rise to the level of compelled speech. Chemerinsky, *Why the Court Was Wrong*, *supra*, at 210. But it is hard to square that distinction with the earlier view that schools "primarily . . . perform other functions" that the government may legitimately regulate without falling afoul of constitutional values.

These tensions are worth addressing because they lead to a broader point. If one believes that it is permissible to impose First Amendment norms on private-sector actors such as universities because universities are not "communit[ies] in any meaningful way," Chemerinsky, *More Speech*, *supra* note 195, at 1639, one ought to be reluctant to advance the kinds of arguments made on behalf of the respondents in *FAIR*, in which law schools were treated as "normative institution[s]," Brief for Respondents, *supra*, at 28, with a strong sense of community. If one believes that universities *are* communities, however, that belief should call into question the application of antidiscrimination laws to these institutions. Despite the respondents' valiant efforts to distinguish such laws in *FAIR*, *see* Brief for Respondents, *supra*, at 33–35, a defense of the law school on the grounds that it is a unique expressive community ought to raise serious questions about the vitality of decisions such as *Runyon v. McCrary*, 468 U.S. 609 (1984), at least as applied to private universities. Conversely, one may argue that those laws properly apply to law schools—but one should then seriously question the merits of the arguments made by the respondents in *FAIR*. I doubt that one can comfortably maintain both views. Thus, the tensions between Chemerinsky's earlier writing and his current views on *FAIR* are worth noting because they stand in for a broader tension, evident in *FAIR* itself, between the view that universities are expressive communities and the view that they should be subject to antidiscrimination laws. I have more to say about these issues below. *See infra* Part III.

206. *See generally* Eule & Varat, *supra* note 165; *see id.* at 1537 n.** (describing the project and Jonathan Varat's generous contribution to completing it); *see also* Jonathan D. Varat, *When May Government Prefer One Source of Private Expression Over Another?*, 45 UCLA L. REV. 1645 (1998).

207. *See* Eule & Varat, *supra* note 165, at 1542.

the name of free speech" on both public and private institutions, he asserted, "is in tension with the core of the very right itself—the proscription against government-imposed orthodoxy."[208] That is especially true, I think, in the case of universities.[209] As Eule observed, the more speech is better approach

> deprives private communities and institutions—particularly those devoted to expressive functions—of rights to offer to, and consume from, the marketplace of ideas alternative conceptions of how best to facilitate speech, including how best to allocate speech authority among its constituents; and, in the case of private educational or other institutions that take on the function of inculcating norms of behavior and attitude, how best to socialize or acculturate its constituents through speech norms that the community freely chooses itself.[210]

This point is especially pertinent in the case of universities because, as I argue more fully below,[211] although universities may share a number of common features, they do not all share precisely the same definition of their educational mission, of academic freedom, or of what is required by either. Simply imposing on all universities, public or private, a uniform vision of free speech rules derived from the First Amendment doctrine that applies to typical state actors thus deprives them of the "'ability to define their missions with different emphases,'" with all that may follow from those differences.[212] It deprives "[p]rivate communities and institutions"—including universities—of "the freedom to define themselves."[213]

Eule makes these and other arguments at greater length than I can afford here, and with more eloquence than I can muster. Suffice it to say that I share his general sense that, at the very least, we should hesitate long and hard before seeking to treat both public and private universities under the same set of acontextual, individual-centered First Amendment doctrines

208. *Id.*

209. Julian Eule and Jonathan Varat themselves are far more circumspect in making this point, however, since they do not believe the Supreme Court has clearly delineated either the existence or the scope of some degree of "institutional freedom from government intervention" enjoyed by universities. *Id.* at 1615 (emphasis omitted). *See generally id.* at 1613–17. Nevertheless, their general attitude appears to be that courts and legislatures should think carefully before treading in this area. *See id.* at 1617. Given that this Article argues positively for such a right of educational institutional autonomy, I would go further than Eule and Varat, whose approach was largely descriptive and thus relied more closely on existing doctrine.

210. *Id.* at 1617–18.

211. *See infra* pp. 1547–49.

212. *Id.* at 1622 (quoting KENT GREENAWALT, FIGHTING WORDS: INDIVIDUALS, COMMUNITIES, AND LIBERTIES OF SPEECH 75 (1995)).

213. *Id.* at 1623.

recommended by the more speech is better argument. We might at least conclude, with Varat, that "blanket government elimination of the free speech interests of private institutions . . . ought not to be exempted from meaningful First Amendment scrutiny just because the government is flying the banner of promoting speech"—or, I would add, equality, or other constitutional values.[214] The more speech is better argument ultimately fails to "[p]rotect[ ] the right of interpretive variation among private institutions" including universities, and, in so doing, may reduce, rather than enhance, the stock and variety of useful speech available to us.[215] The more speech is better arguments are thus ultimately an unpersuasive barrier to the project of treating universities as First Amendment institutions.

D. The Special Privileges Objection

Finally, a standard set of objections one can anticipate in advancing an institutional First Amendment approach to the university is that, to the extent that such an approach would leave educational institutions, public or private, with a greater set of rights or privileges than those enjoyed by other speakers or institutions, such an approach is inconsistent with both existing First Amendment doctrine and with broader First Amendment values. We might call this the argument against special privileges for universities as First Amendment institutions.

Of course, this objection is not limited to universities alone. Any approach to the First Amendment that advances the view that a variety of institutions—the press, religious associations, libraries, and so on—deserve distinctive treatment under the First Amendment will inevitably invite the same complaint. And indeed, the objection to granting a "preferred constitutional position"[216] to particular institutions has been raised in other areas in which institutional arguments have been made. In particular, the objection to preferred status has long been part of the standard suite of arguments against granting the press any special privileges under the First Amendment, despite the textual warrant for such an approach provided by the very existence of the Press Clause.[217] Thus, the argument from special privileges is not limited to universities alone, but might be applied across a range of potential First Amendment institutions.

214. Varat, *supra* note 206, at 1647.
215. *Id.* at 1650.
216. Lewis, *supra* note 42, at 605.
217. *See, e.g.*, Lange, *supra* note 42; Lewis, *supra* note 42, at 605.

There are a number of responses to such an objection, some descriptive and some normative. First, as I have argued above, despite the acontextual impulse in First Amendment law, courts already grant some special status to universities as First Amendment institutions. That is most apparent in the area of public universities and affirmative action, in which, as I noted at the outset of this Article,[218] it is difficult, if not impossible, to see the Supreme Court in *Grutter v. Bollinger*[219] as having treated the University of Michigan Law School the same as it would have treated other state actors. But it is also apparent elsewhere. Take, for example, the greater latitude to engage in content-specific speech selection that the Court allowed the defendant in *Arkansas Educational Television Commission v. Forbes*,[220] where it treated the defendant, a public entity, not as "the State," but as a broadcaster engaging in the "exercise of journalistic discretion."[221] Even the press, the original font of the objections to preferred status for speakers under the First Amendment, in many ways enjoys a quiet form of preferred status under both constitutional and statutory law.[222] As a descriptive matter then, it is not clear how well-founded this argument really is.

A lesser descriptive point must also be made, one that centers directly on the university as distinct from other First Amendment institutions. Much of the force of the objection to treating the press, in particular, as a preferred institution comes from the sheer difficulty of distinguishing the press from other individual or institutional speakers.[223] I am not convinced that this objection poses any insuperable obstacles to conferring special institutional status on the press—or, for that matter, that it precludes courts from conferring a somewhat different set of privileges on other press-like institutions like the blogosphere.[224] But as I have already argued, I doubt the same objection can be raised to the treatment of universities as First Amendment institutions. Whatever questions might exist around the margins, in general the university is sufficiently distinct and identifiable that it does not raise the same kind of difficult definitional questions that might arise in taking a First Amendment institutions approach in other areas.[225]

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218. *See supra* note 117 and accompanying text.
219. 539 U.S. 306 (2003).
220. 118 S. Ct. 1633 (1988).
221. *Id.* at 1637; *see also* Schauer, *Principles, Institutions, and the First Amendment*, *supra* note 26, at 89.
222. *See* Horwitz, *Blog*, *supra* note 26, at 51–52.
223. *See, e.g.*, First Nat'l Bank v. Bellotti, 435 U.S. 765, 798–801 (Burger, C.J., concurring); David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 435–45 (2002).
224. *See generally* Horwitz, *Blog*, *supra* note 33.
225. *See supra* notes 94–112 and accompanying text.

More generally, the special privileges objection rests in part on the view that it would disserve the values of the First Amendment to confer any special constitutional status on particular institutions. This is, after all, an age of content neutrality, an age in which courts "frown[ ] on regulations that discriminate based on the content of the speech or the identity of the speaker."[226] This is a valid concern, to be sure. We should be reluctant to give courts and legislators the tools by which they can disadvantage particular speakers, or which they can use as proxies for purposes of engaging in viewpoint discrimination.[227] But we must also keep in mind the possibility that, as Varat puts it in a somewhat different context, an institutional approach might actually "produce *more* speech" than the current approach.[228] As Varat writes, "[p]rotecting the right of interpretive variation among private institutions about what rules will facilitate speech may promote speech as well as, or possibly better than, a lock-step approach."[229] We need do little work to extend that statement somewhat further for present purposes. A legal approach that acknowledges institutional variation in the universe of First Amendment subjects, and recognizes the importance of granting some degree of autonomy to some of those institutions, may promote the capacity of these institutions to make vital contributions to the broader public discourse better than an approach that treats all speakers the same.[230] Nor is it clear that these privileges would come at the significant loss of speech rights for other noninstitutional speakers.

Finally, two important points should be made about the very notion of First Amendment institutionalism as a form of privilege. First, as Schauer notes, the point of First Amendment institutionalism may be "less about the degree of protection" such institutions enjoy, and "more about the kinds of institutions . . . that might serve as appropriate units of First Amendment analysis."[231] In other words, the argument for First Amendment institutionalism is not simply an argument for special treatment of particular institutions, although that might be the outcome of such an approach in some cases. Rather, there is a broader issue at stake here: whether it makes sense for the law to blind itself to the existence and the nature of various speech institutions and structure itself around a set of legal categories, an approach that many have

226. L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 47 n.4 (1999) (Stevens, J., dissenting).

227. *See* Carpenter, *supra* note 153, at 1410.

228. Varat, *supra* note 206, at 1650 (emphasis added).

229. *Id.*

230. *See generally* Schauer, *Institutional First Amendment*, *supra* note 26.

231. *Id.* at 1277.

concluded has simply led to doctrinal incoherence, or whether First Amendment doctrine might more sensibly be organized around a different and prelegal set of categories, including institutional categories. In this sense, the institutional approach has less to do with privilege as such, and more to do with how the law should understand the world, and whether there are better ways for courts to deal with the tension in the law between acontextuality and facts on the ground.[232]

Lastly, as I discuss below,[233] it is a mistake to think of the institutional approach invariably as a question of additional privileges enjoyed by universities or other First Amendment institutions. From the beginning of our country's understanding of academic freedom, it has always been understood that any privileges enjoyed by the university or its faculty carry with them a corresponding set of obligations. Thus, in its 1915 Declaration of Principles, the American Association of University Professors stressed that "there are no rights without corresponding duties."[234] For example, although we would not normally think of First Amendment freedoms for the individual speaker as dependent upon the content and quality of his or her speech, the academic freedom of individual faculty members exists only within the framework of the expectation that they will "carry on their work in the temper of the scientific inquirer."[235] In modern terms, we assume that the academic freedom of a faculty member depends on his or her ability to satisfy the standards of his or her discipline. Similarly, as we shall see, autonomy carries with it a concomitant obligation for universities to seriously ponder, and then live by, their own sense of what academic freedom requires. In some cases, that sense of academic freedom might well constrain the freedom of the institution to act, beyond any constraints on speech that normally apply to individual speakers.

We thus ought not assume that educational autonomy is an absolute license for universities. Rather, it is a way of suggesting that the liberties and constraints under which universities operate ought to come from our understanding of the nature of the university as an institution itself, and not from an awkward attempt to flatten out differences between all speakers and all institutions across the vast terrain of public discourse occupied by the First Amendment.[236]

232. *See* Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747 (2007) [hereinafter, Schauer, *Institutions*].

233. *See infra* pp. 1555–58.

234. Am. Ass'n of Univ. Professors, *General Report of the Committee on Academic Freedom and Academic Tenure* (1915), *reprinted in* LAW & CONTEMP. PROBS., Summer 1990, at 393, 401; *see also* Byrne, *supra* note 17, at 277–78; Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J.C. & U.L. 1, 2–3 (1993).

235. Am. Ass'n of Univ. Professors, *supra* note 234, at 401.

236. *Cf.* Post, *supra* note 26.

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In sum, although a number of important questions and objections have been raised to the treatment of universities as First Amendment institutions, in my view, none of them are sufficiently disturbing or persuasive to rebut the arguments for an institutional approach. That is not to say, however, that those of us who favor such an approach are not confronted by other, more difficult, questions. It is to those hard questions that I now turn.

III. HARD QUESTIONS

Although I have argued that a variety of what might be deemed external objections to the institutional approach to the university are not sufficiently persuasive to derail the institutional project, we are still left with some hard questions that are internal to the project. That is, even if one takes as a given that the institutional approach is, on the whole, a good one, champions of this approach must openly confront some difficult questions about how to apply it. In this Part, I confront two sets of hard questions about the treatment of universities as First Amendment institutions, and then apply the insights gathered over the course of Parts II and III to several recent controversies that have arisen in the university context.

A. The Scope and Limits of the Treatment of Universities as First Amendment Institutions

The first set of questions we must confront here has to do, on the most basic terms, with the application of the First Amendment institutional approach to universities. What is the scope of an approach? How should courts go about applying a distinctly institutional vision of the university under the First Amendment? To what sorts of questions would the institutional approach apply, and with what outcomes? And what are the limits of such an approach, if any?

As I have already argued, the answer to these questions depends considerably on the degree of stringency of the institutional approach one adopts.[237] A weak-form institutional approach, for instance, would differ little in outcome from the current approach courts take in cases involving universities, although it might be somewhat more open in acknowledging the role that institutionalism has to play in such questions. A medium-form institutional approach might ratchet up the autonomy of the university still further,

237. *See supra* Part I.D.

leading to a set of outcomes favoring universities' freedom to act according to their academic missions without outside interference, while still leaving room for the imposition of some "constitutionally prescribed limits."[238] A strong-form version of the institutional approach, on the other hand, would be a substantially jurisdictional approach, in which the fact that a university made a decision would be substantial or conclusive grounds for finding that, absent unusual circumstances, the law could have no further operation within the borders of the university community.[239]

Under any of these versions of the institutional approach to the university, but especially under the latter two versions, we quickly run into pressing questions about the scope and limits of such an approach. Universities, after all, are expansive communities, microcosms of society that engage in a wide variety of activities we might not associate exclusively or even strongly with their traditional academic missions. Would an institutional approach to the university, for example, insulate a university from the operation of antitrust laws with respect to college sports?[240]

One might respond easily enough that such activities are not the central concern of the institutional approach to universities under the First Amendment; our primary concern is with "genuinely academic decisions,"[241] and there the university should, indeed, enjoy substantial, or even absolute, autonomy. Outside the scope of academic decisionmaking, however, the university should be subject to generally prevailing laws and legal norms. Of course, this response raises difficult questions of boundary drawing, since it will not always be clear what constitutes the subject of a genuinely academic decision.

Leaving aside that question, however, one might still resist the conclusion that the law should have a limited role to play within the sphere of genuinely academic decisions. What of a decision to refuse to hire or to promote a faculty member, which that individual contends is the result of nothing more than racial or gender discrimination? What of decisions to use race, not as a factor in creating a diverse classroom, but in order to exclude students of some races in

238. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

239. *Cf.* Hills, *supra* note 26, at 186 (discussing the idea of "judgment according to academic standards" as "incorporating a jurisdictional component").

240. *See, e.g.*, Byrne, *Academic Freedom*, *supra* note 17, at 332 (citing NCAA v. Bd. of Regents, 468 U.S. 85 (1984) (applying the Sherman Act to the National Collegiate Athletic Association's (NCAA) plan to restrict the total number of live televised football games, without any special regard for the collegiate context in which the case arose)); Mark D. Selwyn, *Higher Education Under Fire: The New Target of Antitrust*, 26 COLUM. J.L. & SOC. PROBS. 117 (1992) (discussing other areas in which universities have been subject to regulation under the antitrust laws).

241. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985).

order to create a nondiverse student body?[242] To the extent that an institutional approach to universities favors some positive rights against the imposition of state or federal laws attached to funding or other benefits, as seemed to be the plaintiffs' argument in *FAIR*, what of the university that seeks to retain tax-exempt status despite its sincere desire to engage in discriminatory academic policies?[243] What of a university's insistence that students fulfill academic requirements that allegedly fall especially heavily on students suffering from disabilities?[244] And, specifically on the public side of the ledger, what of state universities that use the institutional autonomy argument to impose student speech codes?[245] In short, does this list of examples demand that advocates of an institutional approach closely define and defend a more limited scope of operation for an institutional treatment of universities under the First Amendment? Does this list of potential "bad" outcomes compel a different or narrower approach?

In my view, although it surely is not the only possible approach, one should treat questions of scope and limits as follows. Universities are not entitled to blanket immunity from the general operation of the law. But they should be entitled to substantial deference, to a degree that indeed approaches immunity, to the extent that they are making genuinely academic decisions.[246]

242. *See* Runyon v. McCrary, 427 U.S. 160 (1976).

243. *Cf.* Bob Jones Univ. v. United States, 461 U.S. 574 (1983) (upholding the denial of tax-exempt status to Bob Jones University, which argued on free exercise grounds for the right to deny interracial dating among its students).

244. *See, e.g.*, Patricia L. Bors, *Academic Freedom Faces Learning Disabilities:* Guckenberger v. Boston University, 25 J.C. & U.L. 581 (1999); James Leonard, *Judicial Deference to Academic Standards Under Section 504 of the Rehabilitation Act and Titles II and III of the Americans With Disabilities Act*, 75 NEB. L. REV. 27 (1996).

245. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 503–11.

246. The litigation in *Guckenberger v. Boston University*, 8 F. Supp. 2d 82 (D. Mass. 1998), a case involving Boston University's refusal to lift foreign-language requirements for students claiming an exemption under the Americans With Disabilities Act (ADA), may be instructive on this point. In this case, the district court initially refused to dismiss the action, noting that the university administration had not "engage[d] in any form of reasoned deliberation as to whether modifications [in the foreign-language policy] would change the essential academic standards of [the College's] liberal arts curriculum." *Id.* at 85 (quotation and citation omitted). On remand, the court held that the university had subsequently engaged in careful deliberation on the question of whether "the foreign language requirement is fundamental to the nature of the liberal arts degree at Boston University." *Id.* at 87. The court then deferred to that determination, holding that in such circumstances, "the ADA does not authorize the courts to intervene even if a majority of other comparable academic institutions [would] disagree [in similar circumstances]." *Id.* at 90. While one may disagree about the burden of proof a university must meet in the first instance in asserting a right to deference to genuinely academic decisions, and about the propriety of a court ordering a university to adopt a particular deliberative process in reaching such a situation, *see id.* at 85–86, *Guckenberger* still nicely illustrates the degree to which a university may be protected from the application of generally applicable nondiscrimination laws such as the ADA if such laws would interfere with a sincere and genuine decision on the part of the university—*even if* other universities might reach different conclusions in similar cases.

The argument for strong deference will be especially weighty in those cases in which the university, in reaching an academic decision, is roughly following the established norms and procedures that are in place for such questions. Those practices will have developed in light of both the general norms that govern most universities and academic disciplines, and the particular sense of that individual university as to what its academic mission requires. Courts should defer substantially to the university in such circumstances. Moreover, in deferring to a university's academic decisions, and in ceding their own authority in favor of the norms and practices in place at a university, courts should be careful not to police the boundaries of the "genuinely academic" too rigorously. They should be reluctant to second-guess a university's own judgment as to the proper scope of academic decisions. Thus, courts should grant universities substantial autonomy to engage in educational decisions; and they should defer, too, in determining what constitutes an academic decision.

One might object that such an approach would give universities (and, in analogous situations, other First Amendment institutions) far too much license to abuse their autonomy.[247] As understandable as these objections may be, they are surely overstated. They are premised on the belief that any institution given such legal license will act irresponsibly once loosed of the restraints placed on it by the law. But—and this is a central piece of the argument for First Amendment institutionalism—there are strong reasons to believe otherwise. We ought to remember first that academic freedom in the United States is not a concept that is native to the law. Rather, it developed over more than a century of debate and discussion within the academy itself.[248] A sense of the scope and limits of proper behavior within the university setting has long since been internalized by universities themselves, and incorporated into a framework of norms and practices driven by universities as corporate entities, and by the demands of the scholarly disciplines that form the body of departments within the university.[249]

247. I imagine this objection would flow naturally, for example, from Chemerinsky's more speech is better arguments, for both public and private universities. *See* Chemerinsky, *More Speech*, *supra* note 195. Neal Katyal also addresses the risks of abuse that an autonomy-oriented approach to universities entails. *See* Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 565 (2003) ("As with all forms of deference, the risk with educational autonomy arguments is that the institutions to which deference is shown will use them to hide their abuses.").

248. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 472–73.

249. *See supra* notes 106–112 and accompanying text; *see also* Byrne, *Threat*, *supra* note 122, at 91 n.77 ("The Constitution does not create the speech norms of academic freedom; they have been created by the values and practical needs of organized scholarship and advanced teaching.").

Although universities, like all institutions, are imperfect, it is nevertheless true that they have generally coalesced around a set of institutional norms that would govern and restrain the university even in the absence of externally imposed legal constraints. These institutional norms will generally serve as a strong barrier against abuses of the privilege of institutional autonomy. Indeed, it may well already be the case that these institutional norms are a far more important constraint on the university on a day-to-day basis than are existing legal norms.

Most academics, for example, would resist any move by a university to engage in flagrant discrimination in faculty hiring on the basis of race or gender; as J. Peter Byrne notes, "[p]rejudice is not an academic value."[250] An effort by a university to engage in open discrimination of this kind would run into a series of barriers, including the pressures imposed on the university by its students and alumni. More importantly, perhaps, it would run into resistance from faculty members whose sense of the proper bases for a university's decisionmaking are influenced by the professional norms they absorb through their disciplines.[251] Finally, a university's exercise of its autonomy will be strongly influenced and constrained by the university's own sense of its academic mission.

Thus, we can predict that most universities, even if granted considerable legal autonomy, would still observe most of the civic norms—nondiscrimination, due process, and so on—that are usually enforced through the law. When these internal constraints are added to the importance of universities in the broader firmament of public discourse and discovery, it is far from clear that the marginal increased risk of abuse on the part of these institutions outweighs the potential value of treating them as meaningfully autonomous entities.

It is not clear that even the worst-case scenarios painted by those who strongly support the imposition of generally applicable laws to the university community provide undue cause for alarm. Chemerinsky, for example, worries openly about any argument that would seem to obstruct the operation of antidiscrimination laws in the university context. He acknowledges that such laws represent "a tremendous intrusion on the daily operations of an entity" such as a university, but nevertheless strongly resists any argument that private universities, let alone public universities, might invoke any autonomy claims against such laws.[252] For similar reasons,

250. Byrne, *After* Grutter, *supra* note 122, at 941.
251. *See generally* Calhoun, *supra* note 107.
252. Chemerinsky, *More Speech*, *supra* note 195, at 1638.

the plaintiffs in the *FAIR* litigation went to great lengths to distinguish whatever claims for institutional autonomy they were making in that case from the broader question of whether universities should be subject to any degree of immunity from the federal civil rights statutes.[253]

But it is not clear to me that advocates of an institutional approach to the First Amendment should be so reluctant to acknowledge that an argument for a genuinely meaningful degree of institutional autonomy for universities does call into question the circumstances in which antidiscrimination laws can apply to the university. The strong-form version of an institutional First Amendment approach to universities, at least, would likely undermine the vitality, in cases in which the university openly asserted an academic interest in discrimination, of the Court's rulings in *Runyon v. McCrary*[254] and *Bob Jones University v. United States*.[255] For the reasons I have offered, most universities are unlikely to take advantage of such a right to openly discriminate, especially if they are obliged to link their interest in discrimination to a public statement that their academic mission requires them to do so. Nevertheless, an institutional approach to universities under the First Amendment surely suggests that any university bold enough to invoke such a right would have a serious argument against the enforcement of the civil rights laws.

That fact is surely a breaking point for those who might otherwise favor such an approach. For myself, I recognize the strong appeal of decisions like *Runyon* or *Bob Jones*, given this nation's long history of discrimination and the value of maintaining equality as a social and legal norm. Nevertheless, such decisions should be at least somewhat troubling to those who believe that universities and other First Amendment institutions ought to enjoy substantial autonomy. I thus conclude that the benefits of defining a broad scope of autonomy for universities as First Amendment institutions outweigh the potential risks of granting them substantial autonomy in the face of generally applicable laws, such as the civil rights statutes, at least in cases in which the university is engaging in genuinely academic decisionmaking. Obviously, there is room for reasonable disagreement here, and much may turn on how strong a form of institutionalism one favors. For now, at least, we can conclude that those who champion the notion of the university as a substantially autonomous First Amendment institution

253. *See* Brief for Respondents, *supra* note 205, at 33–35.

254. 468 U.S. 609 (1984).

255. 461 U.S. 574 (1983). For similar arguments in the private university context, see David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619 (2001).

must acknowledge that important and difficult questions will surround the issue of the scope and limits of that autonomy.

B. The Relationship Between the Institutional Approach and Academic Freedom

A second set of hard questions arises with respect to the relationship between the institutional approach to the university sketched out above and the concept of academic freedom itself. In the scholarly literature on the constitutional principle of academic freedom, one often comes across the assumption that academic freedom is largely synonymous with institutional educational autonomy, or efforts to subsume one under the other.[256] This understanding is surely encouraged by the courts, whose defense of institutional autonomy for universities is generally closely linked to the value of academic freedom. For example, in his famous concurrence in *Regents of the University of California v. Bakke*,[257] Justice Powell identifies a university's ability "to make its own judgments as to education" as a fundamental aspect of the four freedoms of a university outlined by Justice Frankfurter in his concurrence in *Sweezy v. New Hampshire*.[258] Educational institutional autonomy has thus often been closely equated with academic freedom.

In fact, however, the two are not synonymous. Granting institutional autonomy to universities may generally serve the cause of enhancing academic freedom, but the two are not necessarily the same thing.[259] There may be good reasons to equate the two, particularly for legal purposes,[260] but it is important to keep in mind that there is a distinction between a legal principle of institutional autonomy for universities and the general principle of academic freedom outside the courts. For one thing, referring to

256. *Cf.* Schauer, *Academic Freedom*, *supra* note 26, at 919 (discussing the ways in which "an institutional understanding of academic freedom" is "more faithful to the best account of what academic freedom is all about").

257. 438 U.S. 265 (1978).

258. *Id.* at 312 (opinion of Powell, J., concurring) (citing Sweezy v. New Hampshire, 354 U.S. 234, 264 (1957) (Frankfurter, J., concurring)).

259. *See, e.g.*, Matthew W. Finkin, *On "Institutional" Academic Freedom*, 61 TEX. L. REV. 817, 818 (1983) ("[T]he reasons that make a strong case for institutional autonomy are not identical to those that justify the protection of academic freedom. Institutional autonomy and academic freedom are related but distinct ideas. Indeed, while they reinforce one another at some points, they may straightforwardly conflict at others.").

260. Thus, in contrast to Matthew Finkin, J. Peter Byrne argues that "constitutional academic freedom" should be understood as an institutional and not an individual freedom. Byrne, *supra* note 17, at 255. Note, however, that defining a legal principle of "constitutional academic freedom" in institutional terms is not the same thing as defining academic freedom generally, in its nonlegal aspects, as a purely institutional right.

academic freedom in purely institutional terms may obscure our understanding of academic freedom as involving not only institutional rights against the state, but also the rights of individual faculty members.[261] More importantly, one must keep in mind the distinction between academic freedom as a general principle, and educational institutional autonomy as a legal principle, because the nonlegal principle of academic freedom is deeply contested within the academy itself.[262] The academy has long debated the precise meaning and purpose of academic freedom, just as it has long debated the very purpose of higher education.[263]

That debate can have significant implications for any effort to constitutionalize either some form of institutional autonomy for universities, or some version of academic freedom, or both. One might conclude that if academic freedom either no longer exists, or is so vague or contested a value as to escape definition, then there is no sound basis for recognizing it in any form as a "special concern of the First Amendment."[264] So, for example, Larry Alexander, in the course of arguing that "the topic of academic freedom should be separated from that of freedom of speech,"[265] contends that the academy has become unmoored from classic conceptions of the "responsibility [of professors] . . . to act as academics."[266] "If academics are functioning not as academics but as political advocates," he continues, "then they do not merit academic freedom. If politics is the game, then politicians representing the public have every right to enter it and call the shots."[267] In short, to the extent that an argument for strong judicial deference to universities, like the argument advanced here, is based on the benefits of this

261. *See, e.g.*, Finkin, *supra* note 259, at 849–51; *see also* Richard H. Hiers, *Institutional Academic Freedom—A Constitutional Misconception: Did* Grutter v. Bollinger *Perpetuate the Confusion?*, 30 J.C. & U.L. 531 (2004) (criticizing arguments in favor of an institutional understanding of constitutional academic freedom); Elizabeth Mertz, *The Burden of Proof and Academic Freedom: Protection for Institution or Individual?*, 82 NW. U. L. REV. 492, 519–20 (1988) (arguing for primacy of individual academic freedom claims over institutional academic freedom claims).

262. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 480–81; Timothy C. Shiell, *Three Conceptions of Academic Freedom*, *in* ACADEMIC FREEDOM AT THE DAWN OF A NEW CENTURY: HOW TERRORISM, GOVERNMENTS, AND CULTURE WARS IMPACT FREE SPEECH 17, 18 (Evan Gerstmann & Matthew J. Streb eds., 2006). *See generally* THE FUTURE OF ACADEMIC FREEDOM (Louis Menand ed., 1996); Stanley Fish, *Holocaust Denial and Academic Freedom*, 35 VAL. U. L. REV. 499 (2001); David Rabban, *Can Academic Freedom Survive Postmodernism*, 86 CAL. L. REV. 1377 (1998) (reviewing THE FUTURE OF ACADEMIC FREEDOM, *supra*).

263. *See* Byrne, *supra* note 17, at 279–81; Horwitz, Grutter's *First Amendment*, *supra* note 24, at 479–80.

264. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

265. Alexander, *supra* note 103, at 883.

266. *Id.* at 884.

267. *Id.*

approach for academic freedom, one must ask how it is possible to ground that approach on academic freedom when that very concept is shifting and under attack, often from within the university itself.

Conversely, one might respond to the distinction between academic freedom as a nonlegal value and academic freedom as a constitutionally protected right, whether individual or institutional, by attempting to arrive at a definitive view about the meaning of academic freedom and the purpose of the university. One could then limit any legal protections for universities or academics to those actions that meet this specific definition of academic freedom. This seems to be Byrne's approach. Although Byrne, like me, argues that "constitutional academic freedom cannot be violated by any personnel decision based upon professional competence and taken by peers in good faith,"[268] his definition of constitutional academic freedom is bounded by his views about "the indigenous values served by universities,"[269] which he defines as "the fundamental academic values of disinterested inquiry, reasoned and critical discourse, and liberal education."[270] University actions that do not serve these academic values may perforce fall outside the scope of constitutional academic freedom protected by the First Amendment.

In thus seeking to limit the scope of institutional autonomy for universities under the First Amendment, Byrne surely has valid practical concerns. As he has written, "[s]eeking to protect aspects of autonomy removed from [the fundamental values of the university] will fail and threaten to bring the entire right [of constitutional academic freedom] into disrepute."[271] Similarly, he writes, "[p]ublic, 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."[272]

While I fully acknowledge the practical concerns raised by Byrne, I am not convinced that they justify a response that effectively crystallizes a particular definition of academic freedom in law, and then evaluates any legal claims to autonomy made by universities on the basis of that crystallized definition. My own view is that, rather than imposing a static conception of academic freedom and the mission of the university when defining the scope of constitutional educational autonomy for universities, courts should be quite flexible. They should defer substantially to universities' own sense of what their academic mission requires, and their own sense of

268. Byrne, *supra* note 17, at 306.
269. *Id.* at 333.
270. *Id.* at 338.
271. Byrne, *After* Grutter, *supra* note 122, at 939.
272. *Id.* at 952.

what academic freedom entails, rather than evaluate those claims against a top-down, judicially imposed understanding of academic freedom.

Of course, most universities do share a common sense of academic mission, one that dovetails with Byrne's own interest in "disinterested inquiry, reasoned and critical discourse, and liberal education."[273] Thus, there may be less reason to worry, as Byrne does, that judges will lose faith in the special role of universities under the First Amendment if they do not have recourse to a specific traditional definition of academic freedom. But some universities may indeed come to a different view of what academic freedom requires, or of the mission of the university. For example, while most universities may conclude that the university's sole or primary mission is to encourage disinterested inquiry, others may conclude that their mission equally involves inculcating a set of more or less specific democratic values in its students or faculty. That understanding of the role of the university might suggest, for some universities, that university speech that falls outside the scope of this democratic mission should be subject to a greater degree of regulation. Thus, some universities might argue that a democratic understanding of the mission of the university justifies the imposition of student speech codes that have been struck down under current law in both public and private universities.[274] Similarly, religious universities might have a different conception of their academic mission, and a correspondingly different conception of what academic freedom entails on such campuses, for both faculty and students.

Of course, we may sympathize or disagree with one or another of these distinct conceptions of the university mission and of academic freedom. Where we do, there is room for the exercise of both "voice" and "exit" within the broader academic community.[275] That is, we may publicly question whether such universities are right to govern themselves according to these norms, and we may choose to associate ourselves only with universities that serve the academic values we hold dear.

But we should allow this conversation to take place at the level of the institutions themselves, rather than limiting the legal principle of educational autonomy only to those universities that comply with a narrow, time-bound, and judicially imposed definition of the meaning of academic freedom. That, after all, is ultimately part of what institutional autonomy

273. Byrne, *supra* note 17, at 338.

274. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 479–80; *see also id.* at 503–11.

275. *See generally* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

entails, and it is certainly part of what we mean when we think of these institutions as engaging in a genuinely shared act of constitutional interpretation.[276] Indeed, in a broader sense, the very dialogue that I have suggested should take place within and between universities about their educational missions and about the meaning of academic freedom, and the diversity of views that may arise within the larger family of universities, may ultimately be far more productive of free speech values than a narrow and specific conception of the scope of constitutional academic freedom would be. We should be willing to let "a thousand flowers bloom."[277]

Thus, in my view, courts should be reluctant to condition the university's status as a First Amendment institution on a narrow definition of academic freedom. Rather, they should allow universities considerable scope to define the exercise of their autonomy according to their own sense of academic mission. Again, however, we can at least acknowledge the complexity of the relationship between the institutional approach to universities I have advocated here, which focuses on the autonomy of universities, and the somewhat distinct and contested concept of academic freedom itself.

C. Some Timely Applications

Having considered at length some of the easier and harder questions raised by the institutional First Amendment approach to the university, we might gain further traction in understanding this approach by examining a few recent examples of legal controversies involving the university, and considering what an institutional approach would have to say about each of them.

An obvious place to begin is with the issue with which this Article began: universities' use of race-conscious admissions processes, a position that was given the Court's blessing—albeit a qualified blessing only[278]—in *Grutter v. Bollinger*.[279] As I have written at length about this decision elsewhere,[280] I will add little more to that discussion here. Suffice it to say that the outcome in *Grutter* would clearly be compelled by the institutional First Amendment approach to universities, and indeed seems to be substantially underwritten by

276. *See supra* pp. 1513–14.

277. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 563.

278. *See* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down as unconstitutional a race-conscious admissions program for undergraduate applications to the University of Michigan on the grounds that the university's consideration of undergraduate applicants was insufficiently individualized).

279. 539 U.S. 306 (2003).

280. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24.

precisely that approach. If "who may be admitted to study" is one of the "essential freedoms" of a university,[281] and if a university's desire to structure its admissions so as to ensure a critical mass of students of various backgrounds in the classroom is the product of a genuinely academic decision based on that school's sense of what its academic mission requires,[282] then courts should defer substantially to that university's decision, allowing it an autonomous space in which to select its students in light of its academic mission.

A more difficult question, perhaps, is whether a public university can engage in race-conscious admissions where the state itself has said it cannot. For example, can the State of Michigan, through a popular referendum, prohibit the use of racial preferences in public university admissions within the state, against the universities' own wishes?[283] In declining to preliminarily enjoin the operation of such a law, the Sixth Circuit recently suggested that it can, concluding that while the First and Fourteenth Amendments "*permit* States to use racial and gender preferences under narrowly defined circumstances," they "do not *mandate* them, and accordingly . . . do not prohibit a State from eliminating them."[284] In an analysis that he concedes "may seem appalling" to some,[285] Byrne concludes that constitutional academic freedom means that state laws "that purport[] to deprive universities of authority to consider race in admissions at all violate[] the federal Constitution."[286]

This conclusion surely follows from the arguments raised here in favor of an institutional approach to universities under the First Amendment. Of course, this case raises the question noted above: whether the First Amendment should be understood to grant public universities rights against the state. And given that the Michigan referendum is effectively a statement by the people of Michigan about the desired scope of operation of a university that they created and for which they supply public funding, the question is put especially starkly here.

We might understand Byrne's argument, and mine, in these terms. The people of the State of Michigan are entitled to rid themselves of the University of Michigan and other state universities altogether if they so choose. And they may well be free to vote to alter the nature and mission of those

281. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

282. *See Grutter*, 539 U.S. at 329.

283. *See* Coal. to Defend Affirmative Action v. Granholm, 473 F.3d 237, 239–40 (6th Cir. 2006) (discussing Michigan's passage in November 2006 of Proposal 2, a statewide ballot initiative proposing to prohibit the use of racial preferences in public university admissions).

284. *Id.* at 240.

285. Byrne, *After* Grutter, *supra* note 122, at 938.

286. *Id.* at 937.

universities so deeply that we would no longer recognize them as First Amendment institutions entitled to autonomy as universities. To take an extreme example, if the people voted to replace a university's usual functions and turn the whole campus into a branch of the state Department of Motor Vehicles, replacing classrooms and teachers with lineups, eye charts, and petty bureaucrats processing applications for drivers' licenses, it would matter little for purposes of that site's constitutional status that it happened still to have the words "University of Michigan" engraved on its gates. So long as the people have chosen to maintain the University of Michigan *as a university*, however, they must stand by the bargain. At least as long as it is to retain its constitutional value as a First Amendment institution, we should treat even a public university as an entity that retains the full set of institutionally oriented rights and privileges that mark it as a university. Thus, as shocking as the outcome may be, an institutional approach to the university would support Byrne's argument that a state that voluntarily maintains a public university is not free to intrude upon its affairs in ways that fundamentally interfere with the university's status as a self-governing institution.

Another current issue in academia worth examining has to do with efforts in various states and in Congress to champion legislation known generally as the Academic Bill of Rights.[287] Although there are variations in the content of the various versions of the Academic Bill of Rights that have wended their way through different legislatures, certain core approaches contained in these bills are especially worthy of notice. The bills state generally that decisions of the university should not be made "on the basis of . . . political or religious beliefs."[288] That rule applies broadly to the hiring, firing, tenure, or promotion of faculty; the composition of student grades; the content of course curricula; and other university decisions.[289]

If one takes the concerns of the proponents of the Academic Bill of Rights at face value,[290] such bills may seem unobjectionable. After all, their ostensible purpose is to guarantee the values of fairness, evenhandedness, and disinterestedness that ought to appeal to any champion of the traditional conception of academic freedom. To the extent that the Academic Bill of

287. For discussion of the Academic Bill of Rights, see Horwitz, Grutter's *First Amendment*, *supra* note 24, at 533–37; *see also* Byrne, *After* Grutter, *supra* note 122, at 939–46; Cheryl A. Cameron et al., *Academic Bills of Rights: Conflict in the Classroom*, 31 J.C. & U.L. 243 (2005); Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985 (2006).

288. Students for Academic Freedom, Academic Bill of Rights, http://cms.studentsforacademicfreedom.org (last visited Mar. 31, 2007).

289. *Id.*; *see also* Byrne, *After* Grutter, *supra* note 122, at 942; O'Neil, *supra* note 287, at 999.

290. *But see* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 534.

Rights simply instantiates norms like "the pursuit of truth" or "pluralism, diversity, opportunity, critical intelligence, openness and fairness,"[291] then surely the legislation serves, rather than detracts from, the purposes of constitutional academic freedom.[292]

And yet, it is clear that under the institutional First Amendment approach to the university that I have offered here, the Academic Bill of Rights would be a nonstarter.[293] For if the sort of institutional autonomy I have argued the university must enjoy means anything, and if the idea of judicial noninterference within the scope of university autonomy means anything, it is precisely that the very questions to which the Academic Bill of Rights supplies an imposed legislative answer—questions about the nature and purpose of the university, the proper scope of a university's academic mission, how a university should go about fulfilling that mission, whether a university must remain ideologically neutral, the content of academic freedom, and so on—are for the universities themselves to decide.

Again, it is likely that different universities might decide some or all of these questions differently. One university might decide that its mission involves the disinterested pursuit of truth, and that this requires rigidly observed ideological neutrality in the classroom and in faculty hiring and promotion. Another might decide that while ideological neutrality is required in making personnel decisions, classrooms themselves cannot and should not be micromanaged to ensure ideological neutrality. A third university might decide that its mission requires it to make certain ideological commitments in its personnel decisions and policies—if not base partisan commitments, then perhaps a commitment to a particular value such as nondiscrimination, or a commitment to a set of religious values in the case of a sectarian university. Whatever the outcome of particular cases, the institutional approach to universities requires that the debate over institutional mission be held by individual universities, and that neither courts nor legislatures be given jurisdiction to interfere with that debate. Thus, treating universities as

291. Students for Academic Freedom, *supra* note 288.

292. *See* Byrne, *After* Grutter, *supra* note 122, at 943 ("One might plausibly argue that the [Academic Bill of Rights] could be implemented in a manner that would enhance rather than impair academic freedom."); O'Neil, *supra* note 287, at 1005 (noting that some provisions of the Academic Bill of Rights simply "invoke or recite" principles long recognized as central to academic freedom by the American Association of University Professors).

293. Byrne and Robert O'Neil both agree with this proposition, whether on institutional or other grounds. *See* Byrne, *After* Grutter, *supra* note 122, at 943–46; O'Neil, *supra* note 287, at 1015 ("[W]hatever is done in this sensitive area must reflect the academic judgment of the institution and its faculty, not the dictates of a state legislature or other governmental body, or pressure from a private organization of alumni or others; any other approach ill serves the interests of academic freedom.").

First Amendment institutions would require courts to rule that measures such as the Academic Bill of Rights are flatly unconstitutional. Given that the Academic Bill of Rights at least purports to serve the interests of academic freedom as that value is commonly understood, this outcome again demonstrates that while educational institutional autonomy generally serves academic freedom, it is not synonymous with it.

Finally, consider the *Rumsfeld v. FAIR*[294] case, which was decided last term by the Supreme Court. In that case, the Court unanimously upheld the Solomon Amendment, which effectively requires as a condition of universities' receipt of federal funds that law schools, among other university actors, welcome military recruiters to their campus on equal terms with other employers, against a challenge brought by a variety of law schools and other plaintiffs. The Court's decision seemed so straightforward and so consistent with existing doctrine[295] that the general response to the decision when it came down was a sense of incredulity that any reasonable collection of law professors could ever have imagined that the Court would reach a different result.[296]

I do want to imagine otherwise, however. This is not the place for an extended critique of *FAIR*.[297] But what is striking about the Court's opinion in this case is its failure to confront fully what this Article has argued is a central feature of any approach to constitutional law (including the Court's current approach) that attempts to negotiate some space for institutional context in the face of the urge toward acontextuality—namely, deference. Three sorts of deference were potentially at issue in *FAIR*: deference to the military, or to congressional decisions involving the regulation of military affairs; deference to expressive associations (or *Dale* deference[298]), and *Grutter* deference—the kind of deference to a university as a First Amendment institution that has been the subject of this Article. The Court gave great weight, at least implicitly, to the first category of deference.[299] It paid lip service, at best, to the notion of *Dale* deference.[300] But deference to the academic judgment of universities as largely autonomous institutions, an approach that

294. 547 U.S. 47 (2006).

295. *But see* Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217 (suggesting that the Court's opinion was—well, read the title); Chemerinsky, *Why the Court Was Wrong*, *supra* note 205 (criticizing the decision in *FAIR*); Horwitz, Three Faces, *supra* note 26 (arguing that the Court's superficially reasonable opinion in *FAIR* obscures a variety of difficult questions about its application of existing First Amendment doctrine).

296. *See, e.g.*, David L. Hudson, Jr., *Law Schools Told to Allow Military Recruiters*, 5 A.B.A. J. REP. 10 (2006).

297. For that critique, see Horwitz, Three Faces, *supra* note 26.

298. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000).

299. *See FAIR*, 547 U.S. at 58–59.

300. *See id.* at 68–70.

had been so strongly relied upon by a majority of the Court less than three years earlier in *Grutter*, was basically ignored by the Court altogether, without explanation.

A robust First Amendment institutional approach to the university might, or might not, have reached a similar bottom-line outcome in the case, but it surely would have produced an opinion that read very differently. Under the institutional approach, courts would be obliged to defer substantially to a law school's assertion that its desire to exclude military recruiters from campus, or to grant them something less than absolutely equal access, was compelled by its own sense of its academic mission, and that compliance with the Solomon Amendment would do serious violence to that academic mission. Under a strong-form institutional approach, that assertion might well be all that would be required to defeat the government's own interest in placing military recruiters on campus. Even under a weaker approach, the presumption in favor of educational institutional autonomy, in cases that go to the core of what the university asserts is its own academic mission, might well outweigh the admittedly significant competing government interests at stake in the case. To be sure, one might reasonably doubt that law schools actually care that much about on-campus recruiting as an educational matter.[301] It seems likely that this was the Court's implicit judgment as well.[302] But an institutional First Amendment approach to the case would have left that judgment for the law schools themselves to make in the first instance.[303]

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301. *See* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 525 n.312.

302. *See, e.g.*, *FAIR*, 547 U.S. at 61–62, 69–70.

303. In a recent article, Byrne, who surely is no champion of the Solomon Amendment itself, argues that the plaintiffs in *FAIR* nevertheless engaged in a "misguided" and "unpersuasive" "effort to 'stretch' institutional academic freedom beyond the breaking point." Byrne, *After* Grutter, *supra* note 122, at 948. *See generally id.* at 946–53. Byrne's arguments are eminently reasonable, and as the discussion below indicates, I might well agree with his views if the question were abstracted from the matter of who is to make such decisions. I think it is precisely there that our differences lie, however. Recall that Byrne advocates limiting the scope of institutional autonomy by linking it to a particular definition of what academic freedom entails—a definition that leaves on-campus recruiting outside the scope of constitutional protection. *See id.* By contrast, I have argued that courts should avoid enforcing through law a particularized definition of academic freedom, and instead should leave individual universities free to arrive at their own understanding of what their academic mission requires. Under this approach, it is at least imaginable that a law school might conclude that its mission did involve on-campus recruiting, and thus might conclude that its conception of that mission required the exclusion of military recruiters. *Cf. id.* at 949 (noting that professional schools might have appropriate "normative commitments" to values such as nondiscrimination, which might counsel in favor of excluding military recruiters, but arguing that such norms are not shielded, under his definition of academic freedom, "from displacement by other civil norms" through law). Of course, as I make clear below, to say that a law school might conclude that its academic mission required excluding military recruiters, and that courts should defer to the school's wishes on this point, is not to say that we should not argue, *outside* the courts, over whether the law schools are acting correctly as academic institutions when they assert such a right.

That is not the end of the matter, however. For, as I have argued, the institutional First Amendment approach to the university is not simply a matter of unconditional license. Deference to an institution carries with it responsibilities as well as rights for the deferred-to institution.[304] In particular, deference to universities as First Amendment institutions carries with it a corresponding obligation on the part of the university to exercise its autonomy in a way that is consistent with the deeper values of that institution. If we are willing to grant universities substantial autonomy as First Amendment institutions, it is largely because we trust and expect that they will seriously consider just what their own sense of their academic mission entails and act accordingly, within the best traditions of those institutions. We may conclude that those expectations should be enforced from within the academic community rather than by the courts, but we expect it nevertheless.

Of course, it is possible that the law school plaintiffs in *FAIR* genuinely believed that their academic missions would be endangered by the presence of military recruiters on campus, and that their missions thus required them to exclude those recruiters. And certainly, if the law schools were willing to make such an assertion, the institutional approach would require courts to defer to such assertions rather than second-guess them. But one might reasonably suspect that some of these institutions, at least, did not believe that their academic missions really required any such thing, or that they simply had not given much thought to the question.[305] Although the *FAIR* litigation made it expedient for the schools to describe their desire to exclude military recruiters in terms of academic mission, it is possible that at least some of the schools

304. *See generally* Horwitz, Three Faces, *supra* note 26. *See also* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 580–81.

305. One might also suspect that at least some law schools have abdicated their responsibility to decide such questions for themselves, and instead have simply surrendered to the hard or soft coercions of other organizations, such as the American Association of Law Schools (AALS), whose policies require member schools not to permit discrimination on campus. This point is beyond the scope of this Article. But it does suggest that law schools, other faculties, and universities as a whole have an obligation, if they are to enjoy the autonomy to pursue their academic missions that I have argued for here, to resist undue efforts on the part of accreditation agencies and other centralized bodies to impose particular academic missions and policies on their members; and those bodies should in turn be careful to leave space for their members to pursue reasonable understandings of their own academic missions rather than impose ideologically based requirements on member schools. *Cf.* Horwitz, Grutter's *First Amendment*, *supra* note 24, at 530 n.331 (quoting a memorandum from Mark Tushnet, then president of the AALS, in which he asks of the Solomon Amendment, "how can the Association assert that its member schools have made academic freedom judgments [to bar on-campus military recruiters] when the policies at issue were adopted because of pressure from the Association, not because of member schools' own reflection on their missions?").

had no real *academic* interest in doing so, or at least failed to "engage in any act of reasoned elaboration" on this question.[306]

One might go further and suspect that, for some of these institutions, their own sense of academic mission might actually cut against such a conclusion. For example, their understanding of their academic mission might generally counsel in favor of the value of permitting a wide diversity of viewpoints and arguments on the law school campus, or permit the presence of student groups or legal clinics whose own policies were in some way exclusionary. In such circumstances, one might reasonably question the good faith of any such institution that then sought to argue, notwithstanding a general policy of welcoming others on campus despite their discriminatory views or policies, that it was acting within its academic mission when they sought to exclude military recruiters. Similarly, one might ask whether a law school that sought to exclude the military on the grounds that its policies violated the school's academic mission of nondiscrimination should be equally obliged to restrict recruitment efforts by members of Congress, which is ultimately responsible for the military's policies, or to expel private employers if it reasonably believed that those employers failed to hire a diverse group of students.

In short, we must acknowledge that as to at least some of the plaintiffs in *FAIR*, a due consideration of their own sense of their academic mission, and their own sense of what academic freedom required for them as university departments, taken as a whole, might have compelled the conclusion that they could not require the expulsion of military recruiters consistently with their own understanding of their mission. Of course, they were entitled to reach a contrary conclusion, and my position suggests that the courts were not entitled to second-guess them. But as fellow members of the academic community, we are fully entitled, if not obliged, to do so.

In short, under the institutional First Amendment approach to the university, the Court was far too quick to dismiss the law schools' case in *FAIR*. But it is also possible that the law schools were far too quick to bring the case. The institutional approach I have argued for here demands that law schools and other entities fully consider, and then make every effort to live consistently with, their own sense of their academic mission, rather than use deference as a mere tool to achieve nonacademic goals. It is, of course, possible that the law schools involved in the *FAIR* litigation, or at least some of them, lived up to that obligation; but we are entitled to some reasonable suspicion on this point. If that suspicion is justified, we are left

306. Guckenberger v. Boston Univ., 8 F. Supp. 2d 82, 85 (D. Mass. 1998).

with the conclusion that the law schools ought, perhaps, to have won the day in *FAIR*—and also, perhaps, ought never to have brought the litigation in the first place.

CONCLUSION

I close with the hope that the institutional approach to the First Amendment I have advanced here will find a willing audience beyond the community of scholars who are interested in the constitutional status of the university alone, and indeed beyond the broad community of First Amendment scholars. As I have argued, constitutional law as a whole faces a tension: It is caught between the law's desire to define itself acontextually according to formal legal categories, and its competing need to recognize the myriad factual and institutional contexts in which human activity actually takes place.[307] As the other articles in this issue make clear, this dilemma is present in a variety of guises throughout the body of constitutional law. The institutional approach I have advocated here is one way of resolving this tension, and it should thus be of interest to constitutional scholarship generally.

Indeed, we might see the institutional approach to universities and other entities that occupy "special niche[s]"[308] within the First Amendment as one that finds its echoes elsewhere in contemporary currents in constitutional scholarship. For example, the institutional approach is in some ways a close relative of the call by a number of scholars, including most prominently Michael Dorf and Charles Sabel, for an "experimentalist" approach to constitutional law that would "accord a variety of local institutions substantial latitude 'for experimental elaboration and revision [of their activities] to accommodate varied and changing circumstances.'"[309] Under this approach, courts would "devolve[e] deliberate authority for fully specifying norms to local actors,"[310] rather than simply "laying down specific rules" to guide those actors.[311] The institutional approach obviously is sympathetic to, and may be part of, such an approach to constitutional law.

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307. *See generally* Schauer, *Institutions*, *supra* note 232.

308. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

309. Horwitz, Grutter's *First Amendment*, *supra* note 24, at 575 (quoting Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283 (1998)).

310. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 978 (2003).

311. *Id.* at 961.

From a still broader perspective, the institutional approach may ultimately be related to the recent effort by a variety of scholars to explore the gap between constitutional meaning and constitutional implementation.[312] This literature argues that "a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other."[313] Thus, "we should understand the Supreme Court's role" not in terms of "a search for the Constitution's one true meaning," but "as a more multifaceted one of 'implementing' constitutional norms."[314] As Richard Fallon notes, much remains to be done in exploring implementation as a central subject of constitutional law, especially at the operational level.[315] This Article explores one important device for constitutional implementation by courts—the use of deference as a means of opening up a space for shared constitutional interpretation by autonomous actors such as universities.[316]

It is thus clear that this discussion should not be of interest to scholars of the university, or of the First Amendment, alone. Although the university is indeed one important subject of the First Amendment institutional approach, the institutional approach is ultimately part of a broader discussion in constitutional law. It offers a way of understanding our Constitution that resists the lure of acontextuality in constitutional interpretation, and instead is responsive to the call of those institutions that play a vital role in the Constitution as we experience it in real life.

312. *See* Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 220 (2006) (noting that the last ten years have "witnessed a steady increase in scholarly attention to the meaning/doctrine distinction").

313. Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1276 (2006).

314. RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001).

315. *See, e.g.*, Fallon, *supra* note 313, at 1321 ("Frank recognition of the judicial function in crafting and choosing among judicially manageable standards triggers questions about judicial power and competence that have not received much helpful study. . . . Questions about the empirical predicates for constitutional analysis cry out for further examination."); *id.* at 1322, 1331 (arguing that the notion of a meaning-implementation gap in constitutional law "furnishes an agenda" for further academic work, and suggesting some possible lines of inquiry).

316. For more on this point, see Horwitz, Three Faces, *supra* note 26. In arguing that courts should evaluate academic freedom claims by universities according to "their germaneness to the university's central academic mission," Alan Chen similarly sees a connection to Richard Fallon's work on constitutional implementation. *See* Chen, *supra* note 17, at 973–75.