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Fisher, Academic Freedom, and Distrust

Paul Horwitz

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Fisher, Academic Freedom, and Distrust

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INTRODUCTION

Is the Supreme Court's recent decision in *Fisher v. University of Texas at Austin*¹ monumental or inconsequential? Is it a major or a minor addition to the jurisprudence on affirmative action in higher education? The early returns suggest that a consensus is forming around the latter conclusion.

Post-decision commentary on SCOTUSblog tells the story. While calling *Fisher* "a break with the Court's earlier decisions on affirmative action in higher education," Richard Sander cautioned that "[t]his is not the sweeping repudiation of racial preferences that many conservatives hoped for."² After all the excitement about the case, Elise Boddie wrote, the opinion "fizzles. It charts no new doctrinal territory but instead reads more like a hornbook on strict scrutiny."³ The big news about *Fisher*, Olatunde Johnson concluded, was that there was "no big news."⁴ In the world of constitutional law casebooks, there are major cases and there are squibs. *Fisher*, this view holds, is a squib.

Not much background is needed to see why this consensus formed, both as a matter of good-faith analysis and for more strategic reasons. In *Grutter v. Bollinger*,⁵ the University of Michigan law school case, the Supreme Court upheld an affirmative action program for law school admissions, in a decision by Justice Sandra Day O'Connor that gave such broad latitude to the law school's own determinations that it was widely viewed as applying something less or different from the ostensible standard of strict scrutiny that the Court purported to apply.⁶

¹ 133 S. Ct. 2411 (2013).

² Richard Sander, *Commentary on Fisher: A classic Kennedy compromise*, SCOTUSblog, June 24, 2013, <http://www.scotusblog.com/?p=165770>.

³ Elise Boddie, *Commentary on Fisher: In with a bang, out with a fizzle*, SCOTUSblog, June 24, 2013, <http://www.scotusblog.com/?p=165809>.

⁴ Olatunde Johnson, *Commentary: Fisher's big news: No big news*, SCOTUSblog, June 24, 2013, <http://www.scotusblog.com/?p=165811>.

⁵ 539 U.S. 306 (2003).

⁶ See, e.g., Nelson Lund, *Justice Kennedy's Stricter Scrutiny and the Future of Racial Diversity Promotion*, 9 Engage: J Federalist Soc'y Prac. Groups 20, 21 (Oct. 2008) ("The *Grutter* majority purported to apply a familiar constitutional test, but in fact radically transformed its meaning."); Robert C. Post & Neil S. Siegel, *Theorizing the Law/Politics Distinction: Neutral Principles, Affirmative Action, and the Enduring Legacy of Paul*

Noting that 25 years had passed between its seminal decision in *Bakke*⁷ and the decision in *Grutter*, Justice O'Connor also wrote, "We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest" in student diversity "approved today."⁸ That language was seen as indicating the Court's hope that it might keep higher education affirmative action cases off its docket for a substantial period of time, while warning that its decision came with an effective sunset provision.⁹

Mishkin, 95 Cal. L. Rev. 1473, 1505 n.170 (2007) (arguing that in *Grutter*, Justice O'Connor applied "the test of strict scrutiny in a manner that was so deferential as to be inconsistent with the generally accepted meaning of the test"); Ian Ayres & Sydney Foster, *Don't Tell, Don't Ask: Narrow Tailoring After Grutter and Gratz*, 85 Tex. L. Rev. 517, 519 (2007) (the Court's decisions in the University of Michigan cases "represent a sea-change in the requirement that affirmative action plans be 'narrowly tailored' to further a compelling government interest."); Martin D. Carcieri, *Grutter v. Bollinger and Civil Disobedience*, 31 U. Dayton L. Rev. 345, 360 (2006) ("Justice O'Connor simply abandoned strict scrutiny in *Grutter*"); Jack M. Balkin, *Plessy, Brown, and Grutter: A Play in Three Acts*, 26 Cardozo L. Rev. 1689, 1721-28 (2005) (arguing that the majority in *Grutter* altered or worked around existing doctrinal categories and tests, including the elements of the strict scrutiny test); Leslie Yalof Garfield, *Back to Bakke: Defining the Strict Scrutiny Test for Affirmative Action Policies Aimed at Achieving Diversity in the Classroom*, 83 Neb. L. Rev. 631, 633-34 (2005) (describing *Grutter*, approvingly, as having applied a "new strict scrutiny test").

⁷ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

⁸ *Grutter*, 539 U.S. at 343.

⁹ For an early take on this statement, see generally Vikram David Amar & Evan Caminker, *Constitutional Sunsetting?: Justice O'Connor's Closing Comments in Grutter*, 30 Hastings Const. L.Q. 541 (2003). As one reader of a draft of this article noted, there is a more charitable reading of O'Connor's statement, in which O'Connor is expressing the hope that by that time, there will be sufficient diversity in the applicant group in higher education that race-conscious admissions measures will no longer be necessary. See *id.* at 541-42 (discussing this possibility); Daniel Kiel, *An Ounce of Prevention is Worth a Pound of Cure: Reframing the Debate About Law School Affirmative Action*, 88 Denv. U. L. Rev. 791, 793-94 (to same effect); Lani Guinier, *Admissions Rituals as Political Acts: Guardians at the Gates of Our Democratic Ideals*, 117 Harv. L. Rev. 113, 118-19, 179-81

When the Court granted cert in the *Fisher* case,¹⁰ it seemed as if “later” had come around sooner than expected. With the retirement of Justice O’Connor and the addition of more politically conservative personnel on the Court, the fact that the Court had granted cert at all was taken as an indication that *Grutter* might be headed for the chopping block.¹¹ As is so often the case, the swing vote in the case was expected to be that of Justice Anthony Kennedy—who dissented in *Grutter*, expressing strong skepticism about the majority’s application of strict scrutiny.¹² The expectation of a major shift in direction was not universally shared,¹³ but it was not unreasonable.

In the event, it didn’t *quite* happen. To his credit, Justice Kennedy is remarkably consistent: He never fails to disappoint. Writing for a 7-1 Court, with Justice Elena Kagan not participating in the decision, Kennedy concluded that the Fifth Circuit, which had upheld the use of race by the University of Texas in its undergraduate admissions process, “did not apply the correct standard of strict scrutiny,” and remanded the case for further proceedings by the court below.¹⁴ Affirmative action in higher education survived, but with the important caveat that the Court would henceforth insist on genuine strict scrutiny in evaluating such programs.

So it makes sense that there would be a push to describe *Fisher*

(2003) (reading O’Connor’s statement as “a potential catalyst” for universities to do more to address “the achievement gap that makes affirmative action necessary”).

¹⁰ See *Fisher v. Univ. of Texas at Austin*, 132 S. Ct. 1536 (2012).

¹¹ See, e.g., Stephen Clowney, *Doing Affirmative Action*, 111 Mich. L. Rev. First Impressions 27, 27 (2013) (“Most Court watchers predict that the five conservative justices will vote [in *Fisher*] to curtail the use of racial preferences.”); Ian Haney-López, *Intentional Blindness*, 87 N.Y.U. L. Rev. 1779, 1782 (2012) (“Given the emergence of Justice Kennedy as the swing vote in racial cases, there is also good reason to fear that the Court will soon end affirmative action in higher education.”) (citing the cert grant in *Fisher*); Ellen D. Katz, *Grutter’s Denouement: Three Templates From the Roberts Court*, 107 Nw. U. L. Rev. 1045, 1046 (2013) (*Fisher* “is widely expected to end race-based affirmative action in higher education”).

¹² See *Grutter*, 539 U.S. at 387-95 (Kennedy, J., dissenting).

¹³ See, e.g., [cites tk].

¹⁴ *Fisher*, 133 S. Ct. at 2415.

as “no big deal.”¹⁵ As a matter of doctrinal analysis, there is at least some truth to it, compared to what *might* have happened. *Grutter* was not overruled, and affirmative action survived, at least in theory—although the Court certainly signaled that such programs would have to undergo more rigorous review.¹⁶

At the same time, the “no big deal” conclusion seems to undersell the extent to which courts are now instructed to conduct a genuinely strict scrutiny of university admissions programs and demand a meaningful inquiry into whether those programs are narrowly tailored. From a tactical standpoint, however, if you are a supporter of affirmative action, underselling the possible effects of *Fisher* also makes sense. It’s good strategy to accentuate the positive and eliminate the negative. Sea-change, or squib? You decide.

In this Article, I focus on roughly the same issue—what *Fisher* means for strict scrutiny, “critical mass,” and other aspects of

¹⁵ Johnson, *supra* note ____.

¹⁶ For arguments that universities will still manage to meet those standards by hook or by crook, see, e.g., Clowney, *supra* note __, at 33 (if the Court had “announce[d] the end of affirmative action” for universities in *Fisher*, some universities would “simply tweak their definitions of merit to include qualitative factors that track closely with race,” thus “more or less preserv[ing] the status quo”); Katz, *supra* note __, at 1051-55 (predicting as one possible outcome of *Fisher* more or less what happened – that Justice Kennedy would insist on a stricter scrutiny of means while leaving the basic end of student diversity untouched, leaving universities “free to consider race in admissions so long as they do so the way administrators at the University of Michigan Law School once did”); Leslie Yalof Garfield, *The Inevitable Irrelevance of Affirmative Action Jurisprudence*, 39 J.C. & U.L. 1, 3-5 (2013) (arguing that a predicted ruling in *Fisher* much like the one we got could leave universities “free to construct some type of race-preference admissions policy in an effort to ensure diversity among their classes,” but that wholly external pressures might deter them from doing so regardless of what the courts held). For an argument that *Fisher*, while not a total victory for affirmative action opponents, will indeed make it harder for universities to maintain such programs, see Roger Clegg, *Commentary on Fisher: Better off than we were a year ago*, SCOTUSblog, June 24, 2013, <http://www.scotusblog.com/2013/06/commentary-on-fisher-better-off-than-we-were-a-year-ago/>.

judicial review of affirmative action in higher education admissions programs—but from a somewhat different perspective. As with most of my work in this area, my interest has less to do with affirmative action or equal protection as such. Rather, it has to do with what the affirmative action cases say about the general relationship between courts and universities, particularly with respect to academic freedom.¹⁷

From this perspective, what I find most striking about *Fisher*—especially the dueling opinions that emerged from the Fifth Circuit prior to review in the Supreme Court—is what it says about competing judicial conceptions of the university itself. That is so in two respects. First, the discussions in *Fisher*—and elsewhere, including in other decisions of the Supreme Court—reveal a couple of different visions of what the university is for. No less important, they reveal competing views about where and how debates about the university should be undertaken and settled. Is the question fundamentally one for *universities* themselves to decide? Or are courts themselves entitled to establish, as a matter of law, a definition of the purpose and nature of the university—and, if so, how fixed should that definition be?

Second, the decisions in *Fisher*—and elsewhere—suggest a growing judicial mistrust of universities altogether, an increasing unwillingness to defer to them on core questions of academic functioning. This should not, perhaps, be a surprise, in an era in which the headlines are filled with talk of the failure to prevent child sexual abuse at Penn State, the skyrocketing costs of university education, and other seeming breakdowns in the system of higher education. But the distrust runs deeper than any particular incident, reflecting in part a view on the part of some judges that universities are in, and on the wrong side of, the culture wars. And it has implications that run broader than any particular incident or occasion for judicial review, and may leave judges inclined to be more distrustful and less deferential even in standard cases involving academic freedom.

¹⁷ See Paul Horwitz, *First Amendment Institutions* (2013) [hereinafter Horwitz, *First Amendment Institutions*]; Paul Horwitz, *Three Faces of Deference*, 83 *Notre Dame L. Rev.* 1061 (2008) [hereinafter Horwitz, *Deference*]; Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 *UCLA L. Rev.* 1497 (2007) [hereinafter Horwitz, *Universities*]; Paul Horwitz, *Grutter's First Amendment*, 46 *B.C. L. Rev.* 461 (2005) [hereinafter Horwitz, *Grutter*].

Both trends may be a reflection of what is already going on in other academic freedom cases. Or they may represent something new, a change with potential implications for future academic freedom cases. Perhaps both are partly true. In any event, I disagree with both trends. I believe courts should defer substantially to universities, and that in doing so they should leave open some space for institutional pluralism—for the possibility that different, but equally constitutionally legitimate and protected, conceptions of the university can and should coexist within the broader academy.

To the extent that courts have moved away from both views, however, I suggest that a good portion of the fault lies with the universities themselves. We live in an era of generalized distrust for institutions, and universities have hardly emerged unscathed. If they want to retain or revive meaningful legal and/or constitutional autonomy, to continue to be able to make their own decisions for themselves, they are going to have to work hard to make sure that judges, and others, understand them—and, above all, that they trust them.¹⁸

I. COMPETING CONCEPTIONS OF THE UNIVERSITY

One of the most curious features of the Supreme Court's decision in *Grutter*, and one of the likeliest explanations, as a doctrinal matter at least,¹⁹ for the gentle form of "strict" scrutiny the Court applied in that case, is that it is an Equal Protection case that is subtended in a somewhat odd fashion by the First Amendment.²⁰ The First Amendment entered into the calculus in the Court's consideration of whether the University of Michigan's law school had "a compelling interest in achieving a diverse student body."²¹ In holding that it did, the Court made the following statement:

The Law School's educational judgment that such

¹⁸ I make similar arguments about other institutions in Horwitz, *First Amendment Institutions*, *supra* note __, at __, and Paul Horwitz, *Act III of the Ministerial Exception*, 106 Nw. U. L. Rev. 973 (2012).

¹⁹ For expressions of doubt that this doctrinal move was wholly sincere, see, e.g., Horwitz, *First Amendment Institutions*, *supra* note __, at __-__.

²⁰ See generally Horwitz, *Grutter*, *supra* note __.

²¹ *Grutter*, 539 U.S. at 328.

diversity is essential to its educational mission is one to which we defer. . . . Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits. . . . We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition. . . . Our conclusion that the Law School has a compelling interest in a diverse student body is informed by our view that attaining a diverse student body is at the heart of the Law School's proper institutional mission, and that good faith on the part of a university is presumed absent a showing to the contrary.²²

Characteristically for Supreme Court pronouncements on academic freedom, this statement is filled with ambiguities and generalities, making it hard to see with clarity exactly what it means or where its limits lie in practice.²³ It is hardly surprising that such a broad statement, so pregnant with promise and effusive about both the importance and the expertise of the university, seemed to overflow its bounds in *Grutter* itself, leading to a strict scrutiny discussion that was as deferential in the narrow tailoring portion of the analysis as it was in the compelling interest portion.

Still, we can tease out two distinct points in this statement, each of which are relevant to the analysis in this Article. The first has to do with the constitutional value of academic freedom itself. On this view, as the Court puts it, "universities occupy a special niche in our constitutional tradition,"²⁴ one that is undergirded by the

²² *Id.* at 328-29.

²³ The dean of academic freedom law, J. Peter Byrne, put it best in his classic article on constitutional academic freedom: "The cases, shorn of panegyrics, are inconclusive, the promise of their rhetoric reproached by the ambiguous realities of academic life." J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 *Yale L.J.* 251, 252-53 (1989) [hereinafter Byrne, *Academic Freedom*].

²⁴ *Grutter*, 539 U.S. at __.

First Amendment. As Justice Brennan put it in one case, which represented a pre-*Grutter* high-water mark for the constitutional rhetoric of academic freedom:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.²⁵

The second point concerns deference. As the *Grutter* Court pointed out, there is a substantial tradition of judicial deference to “complex educational judgments . . . that lie[] primarily within the expertise of the university.”²⁶ The Court has written that judges are ill-equipped to make decisions concerning “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.’”²⁷ So there are, in fact, two important aspects of academic freedom as a legal concept: judicial protection of academic freedom as a constitutional right (or at least a constitutional sensibility), and judicial deference to the expertise of the university when it makes academic judgments.²⁸

Importantly, both aspects imply or require some underlying vision of what the university *is*: how and why it functions, and what aspects of its activities fall within the scope of concern of academic freedom. Universities do all sorts of things. They field football teams, secure patents, raise money, hire and fire janitors and engineers—and, yes, occasionally they are involved in teaching, research, and service. Neither courts nor academics are equally concerned with all these activities as a matter of academic

²⁵ *Keyishian v. Bd. of Regents of Univ. of St. of N.Y.*, 385 U.S. 589, 603 (1967).

²⁶ *Grutter*, 539 U.S. at ___. For examples, see, e.g., *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985); *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90-92 (1978).

²⁷ *Ewing*, 474 U.S. at 226 (quoting *Horowitz*, 435 U.S. at 89-90).

²⁸ See, e.g., *Horowitz, Universities*, *supra* note ___, at 1501; *Horowitz, Deference*, *supra* note ___, at 1128-29.

freedom. They are concerned only with the “*academic decisions*” of a university.²⁹ As a First Amendment matter, non-academic decisions are likely to fall outside the scope of the constitutional right of academic freedom (if such a right exists). As a matter of deference, courts are concerned to defer to “complex educational judgments,”³⁰ not to anything and everything a university does, much of which judges will consider routine material for judicial decision-making.³¹

In short, “‘Academic’ must itself be defined so that those [legal] boundaries can come clearly into view.”³² As Mark Yudof warned some years ago, “If academic freedom is thought to include all that is desirable for academicians, it may come to mean quite little to policy makers and courts.”³³ In short, in order to protect academic freedom, we have to define it.³⁴ And to do that, we need some understanding or definition of the university itself: what it does, what lies at the heart of its mission, which of its actions are particular to its functioning as a university and which would be undertaken by any large institution, and so on.

Enter the Fifth Circuit. The panel decision in *Fisher* is striking because it places in the foreground two very different judicial visions of the university—and of the overarching question of *who* gets to decide what a university is and what its mission consists of. Those visions have a substantial effect on the judges’ differing approaches and the result they recommend. Both of them are worth setting out.

Judge Patrick Higginbotham wrote for the panel in *Fisher*. Near the beginning of his opinion, Judge Higginbotham, drawing

²⁹ *Grutter*, 539 U.S. at __ (emphasis added).

³⁰ *Id.* at __.

³¹ Cf. Frederick Schauer, *The Dilemma of Ignorance: PGA Tour, Inc. v. Casey Martin*, 2001 Sup. Ct. Rev. 267.

³² Stanley Fish, *Versions of Academic Freedom: From Professionalism to Revolution* (forthcoming 2014) (manuscript at 9) (on file with author).

³³ Mark G. Yudof, *Intramural Musings on Academic Freedom: A Reply to Professor Finkin*, 66 Tex. L. Rev. 1351, 1356 (1988). See also Philip Hamburger, *More is Less*, 90 Va. L. Rev. 835, 837 (2004) (asking “whether the definition of any right can be expanded without risking access to the right,” because a right that is defined too broadly may “stimulate demands for a diminution of its availability”).

³⁴ See generally David M. Rabban, *Can Academic Freedom Survive Postmodernism?*, 86 Cal. L. Rev. 1377 (1998).

heavily on *Grutter*, describes three “distinct educational objectives served by the diversity [Justice O’Connor] envisioned.”³⁵ Those objectives are to improve educational quality by increasing the number of perspectives available in the classroom; to better prepare students as professionals; and to encourage and enhance civic engagement.³⁶

Although most of these objectives arguably fall pretty squarely within what is widely understood as the traditional mission of the university, it is still noteworthy how Judge Higginbotham prefaces this discussion: “[Justice O’Connor’s] opinion recognizes that universities do more than simply impart knowledge to their students.”³⁷ Thus, the Higginbotham version of the university already emphasizes a somewhat broad understanding of what it does rather than a narrow or traditionalist one. It stresses that a “diversity of views and perspectives” is “paramount to a university’s educational mission.”³⁸

There are also indications in Higginbotham’s opinion of an acknowledgment of and respect for the possibility of institutional pluralism. Higginbotham recognizes that different universities may have different missions and goals. Thus, in evaluating the value of educational diversity and its relationship to a university’s mission, Higginbotham writes that “[p]reparing students to function as professionals in an increasingly diverse workplace . . . calls for some consideration of a university’s particular educational mission and the community it serves.”³⁹ A “nationally renowned law school,” for example, may take applicants from across the country and “send[] its graduates into careers in all states; therefore it is appropriate for such a school to consider national diversity levels when setting goals for its admissions program.”⁴⁰ Or a university might be committed to serving local needs, in which case it may adopt “a more tailored diversity emphasis.”⁴¹ Similarly, to the extent that “foster[ing] civic engagement and maintain[ing] visibly open paths to leadership”

³⁵ *Fisher v. Univ. of Texas at Austin*, 631 F.3d 213, 219 (5th Cir. 2011).

³⁶ *See id.* at 219-21.

³⁷ *Id.* at 219.

³⁸ *Id.* at 236-37.

³⁹ *Id.* at 237.

⁴⁰ *Id.*

⁴¹ *Id.*

are part of a university's goals, those goals may "require[] a degree of attention to the [university's] surrounding community."⁴²

Note that Higginbotham does not fix in place a particular mission that applies to all universities. Some may serve a local community and some a national one; some may seek to foster civic engagement and some may not. The kinds of goals they pursue will differ; presumably the kinds of actions they take to achieve those goals, and the concomitant constraints on their actions, will vary accordingly. Higginbotham's approach is thus not a general blessing of any affirmative action policy, undertaken using any metrics the university wishes. Rather, it defers substantially to university admissions programs only to the extent that those programs correspond to the university's own particular mission.

Given this kind of approach, which takes an expansive and pluralistic view of the university's purpose, it is hardly surprising that Higginbotham's view of the role of the courts in assessing a university's academic decisions, including those concerning admissions, is highly deferential. He accepts both the authority-based and the epistemically-based justifications for judicial deference in university cases, emphasizing a right of "educational autonomy grounded in the First Amendment" and asserting that academic decisions lie "far outside the experience of the courts."⁴³ And although he makes a pro forma statement that "the scrutiny triggered by racial classification 'is no less strict for taking into account' the special circumstances of higher education,"⁴⁴ he makes clear that the manner of strict scrutiny in cases involving universities should focus on the process the university adopts rather than its substance: "Rather than second-guess the merits of the University's decision, a task we are ill-equipped to perform, we instead scrutinize the University's decisionmaking process to ensure that its decision to adopt a race-conscious admissions policy followed from the good faith consideration *Grutter* requires."⁴⁵

Moreover, citing *Grutter*, Higginbotham asserts that even this process-based scrutiny should begin with a presumption that "the

⁴² *Id.*

⁴³ *Id.* at 231 (quoting *Grutter*, 539 U.S. at 328).

⁴⁴ *Id.*

⁴⁵ *Id.*

University acted in good faith.”⁴⁶ And he insists, with the majority in *Grutter*, that narrow tailoring “does not require exhaustion of every conceivable race-neutral alternative,” especially if the proffered alternatives would require the University to sacrifice other important interests, like its academic selectivity and reputation for excellence.”⁴⁷

Judge Emilio Garza filed a special concurrence in the *Fisher* panel decision. In his view, although he was obliged to follow *Grutter* and the panel opinion represented a “faithful” application of that decision, *Grutter* itself was a “misstep,” a “digression in the course of constitutional law,” a “detour from constitutional first principles.”⁴⁸ For Garza, as for many other critics of *Grutter*, despite the Court’s invocation of strict scrutiny, “what the Court applied in practice was something else entirely.”⁴⁹ So Garza concurred in Judge Higginbotham’s opinion, while urging the Court to take the case and reverse its errors in *Grutter*.

What is most relevant for present purposes is not Judge Garza’s view of Equal Protection doctrine, but his view of the purposes of the university itself. Garza writes that “[s]tate universities are free to define their educational goals as broadly as needed to serve the public interest,” and courts “defer to educators’ professional judgments in setting these goals.”⁵⁰ But just as there is an arguable gap between what Judge Higginbotham says about traditional strict scrutiny and what he does in his opinion, so there is a gulf between that statement by Garza statement and his evident views in the rest of his opinion. He writes:

Notwithstanding an institution’s decision to expand its institutional mission more broadly, the university’s core function is to educate students in the physical sciences, engineering, social sciences, business and the humanities, among other academic disciplines.⁵¹

Garza is not adamant about restricting universities to this

⁴⁶ *Id.*

⁴⁷ *Id.* at 238 (citing *Grutter*, 539 U.S. at 339-40).

⁴⁸ *Id.* at 247 (Garza, J., specially concurring).

⁴⁹ *Id.* at 248.

⁵⁰ *Id.* at 256-57.

⁵¹ *Id.* at 257.

narrow, traditional understanding of their function.⁵² But it is equally clear that his understanding of the university's "core function" influences the course of his opinion. Thus, he rejects the *Grutter* Court's emphasis on civic engagement as a justification for affirmative action in university admissions, arguing that it "has nothing to do with the university's core education and training functions."⁵³ And he questions whether there is any good reason for deference to universities that argue that things like "promoting 'cross-racial understanding' and 'enabling students 'to better understand persons of different races'" are necessary aspects of their "educational goals."⁵⁴ These matters, Garza argues, "could just as easily be facilitated in many other public settings where diverse people assemble regularly."⁵⁵ He adds: "I do not believe that the university has a monopoly on furthering these societal goals, or even that the university is in the best position to further such goals."⁵⁶

Unsurprisingly, Garza's narrow definition of the university's mission, and his skepticism that universities have any special role or expertise with respect to broader goals, colors his own application of strict scrutiny. His vision leaves little room for the kind of respect for "complex educational judgments in an area that lies primarily within the expertise of the university" that *Grutter* and the academic freedom jurisprudence command,⁵⁷ precisely because he doubts that racially conscious admissions policies fall within the expertise of the university. Thus, he criticizes *Grutter*'s reliance on the "educational benefits of diversity" arguments advanced by the University of Michigan in that case and by the University of Texas in *Fisher*, arguing that "it remains suspended

⁵² See, e.g., *id.* at 258 n.14 ("This is not to criticize universities, like the University of Texas, for implementing policies that seek to increase minority representation, not merely for its educational benefits on campus, but also for the secondary benefits that such increases in minority enrollment can have in the workplace and in society generally. . . . I do not question this goal, but rather the constitutionality of using race to attain it.").

⁵³ *Id.* at 258.

⁵⁴ *Id.* at 257.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Grutter*, 539 U.S. at __.

at the highest levels of hypothesis and speculation.”⁵⁸ He is skeptical that anyone, including the university, is capable of testing or judging whether “a critical mass of minority students could perceptibly improve the quality of classroom learning.”⁵⁹ Far from presuming the good faith of the university, he argues that its findings could be manipulated to achieve a desired result.⁶⁰

In short, two related currents run through Judge Garza’s special concurrence: a narrow, traditionalist view of the “core function” of the university, and a strong skepticism that anything it says or any studies it conducts in support of a broader vision—or, indeed, in support of the view that race-conscious admissions are central to the core function of educating students—is either valid or based on meaningful expert opinion. Garza’s vision of the university colors his views on whether the university is acting in good faith and how much deference is due to it. Conversely, his lack of deference is clearly influenced by his view that universities have wandered far afield from their core function, and are acting in areas about which they know nothing and in which they are indistinguishable from any other public institution.

The two opinions in the *Fisher* panel opinion thus suggest two competing visions of the university. One, the vision offered by Judge Higginbotham, suggests that diversity can be a strong, almost independent interest for the modern university, and more generally that universities should not be understood as simply “impart[ing] knowledge” to students.⁶¹ It also suggests the possibility that there is no one “core” function, narrowly understood, of the university. Rather, different universities can serve a plurality of purposes, purposes that vary depending on a university’s “particular educational mission” and “the community it serves.”⁶² Judge Garza’s vision of the university, in contrast, is narrow and traditional, emphasizing that “the university’s core function is to educate students in the physical sciences, engineering, social sciences, business and the humanities, among other academic disciplines.”⁶³ This vision leads him to refuse to

⁵⁸ *Id.* at 255.

⁵⁹ *Id.*

⁶⁰ *See id.* at 255; *see also id.* at 255 n.10.

⁶¹ *Id.* at 219 (Higginbotham, J.).

⁶² *Id.* at 237.

⁶³ *Id.* at 257.

give much credit or deference to aims that arguably fall outside the scope of that core function.

Put to one side for now the Supreme Court's own decision in *Fisher*, which focuses less on the function of the university and more on the role of deference.⁶⁴ Similar disagreements about the purpose of the university also crop up from time to time elsewhere in the jurisprudence of the Supreme Court. On the High Court, too, the doctrinal argument between the justices concerning academic freedom is sometimes subtly influenced by the justices' competing visions concerning what the university exists to do and who gets the final word on that question.

The Higginbotham vision—one that is characterized by respect for the potential breadth of the university's mission and the possibility of institutional pluralism within the universe of higher educational institutions—appears in the Supreme Court mostly indirectly, by hints and signs. It is somewhat apparent in Justice John Paul Stevens's concurrence in *Widmar v. Vincent*.⁶⁵ There, Justice Stevens rejected the majority's fairly mechanical use of public forum doctrine to evaluate a university speech controversy, arguing that “the use of the terms ‘compelling state interest’ and ‘public forum’ to analyze the question presented in this case may needlessly undermine the academic freedom of public universities.”⁶⁶

Stevens did not expressly speak in terms of varied university missions. To the contrary, he spoke in fairly basic terms about universities' “learning and teaching missions.”⁶⁷ More broadly, however, the central point of his concurrence was to emphasize that “the managers of a university routinely make countless decisions based on the content of communicative materials” and student extracurricular activities,⁶⁸ and that the decision how to allocate its resources should be left to the university itself. Thus, in deciding between two competing uses by a student group of a room in the university, one devoted to the classics and one to “Mickey Mouse cartoons, . . . a university should allowed to decide for itself whether a program that illuminates the genius of Walt Disney should be given precedence over one that may

⁶⁴ See Part II, *infra*.

⁶⁵ 454 U.S. 263 (1981).

⁶⁶ *Id.* at 277-78 (Stevens, J., concurring in the result).

⁶⁷ *Id.* at 278.

⁶⁸ *Id.* at 278-79.

duplicate material adequately covered in the classroom.”⁶⁹

Of course, this standard is primarily about deference. But note that Stevens does not argue that either decision by the university—whether to privilege Shakespeare or Walt Disney—would be presumptively right or wrong. Rather, he leaves the decision to the university itself, and implicitly recognizes that different universities may make different reasonable choices in allocating their own resources. Thus, in effect if not in intent, Justice Stevens’s vision of the university leaves room for institutional pluralism in the implementation of the “learning and teaching missions” of the university. Just as important, he sees that decision as belonging to universities, not courts.

Justice Stevens’s banner was taken up and carried forward, briefly, by Justice David Souter. The similarity of approach is apparent in Souter’s concurrence in *Board of Regents of University of Wisconsin System v. Southworth*,⁷⁰ a case involving the constitutionality of mandatory student activity fees. As with the majority opinion in *Widmar*, the case was decided by the majority using fairly conventional and mechanical doctrinal tools. It was this approach to which Souter objected.⁷¹ For Souter, other “sources of law” might be more relevant to deciding the case.⁷²

One of those sources consisted of “First Amendment and related cases grouped under the umbrella of academic freedom.”⁷³ A key principle of those cases was that “universities and schools should have the freedom to make decisions about how and what to teach.”⁷⁴ Although in his view the cases had never firmly asserted an absolute right of universities to autonomy *qua* universities, and

⁶⁹ *Id.* at 278.

⁷⁰ 529 U.S. 217 (2000).

⁷¹ See, e.g., *id.* at 236 (“I agree that the University’s scheme is permissible, but I do not think the Court should take the occasion to impose a cast-iron viewpoint neutrality requirement to uphold it.”) (Souter, J., concurring in the result).

⁷² *Id.*

⁷³ *Id.* at 237; see *id.* at 237 n.3 (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (plurality op.); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

⁷⁴ *Id.*

the courts were still obliged to consider the speech rights of students within universities, it was “enough to say that protecting a university’s discretion to shape its educational mission may prove to be an important consideration in First Amendment analysis of objections to student fees.”⁷⁵

Again, this language has more to do with judicial deference to universities than with the function of universities. But in recognizing the importance of academic autonomy and the right of a university to “shape its educational mission,” Souter necessarily suggests that a university’s own vision of its mission, and of the role of universities generally, may differ from the vision offered by the courts—and that the university’s vision must take precedence. Indeed, under Souter’s approach, “acceptance of the most general statement of academic freedom” might even render acceptable a public university’s decision to impose student speech codes,⁷⁶ a *bête noire* of those who advance a more traditional view of speech within the university.

Compare this with Justice Alito’s vision of the university in *Christian Legal Society v. Martinez*.⁷⁷ In that case, the Supreme Court upheld the Hastings College of the Law’s use of an “all-comers” nondiscrimination policy for student groups to withdraw official recognition from the law school’s chapter of the Christian Legal Society. As with *Southworth*, the case was decided using standard, acontextual doctrinal tools, prominent among them public forum doctrine,⁷⁸ thus, the majority opinion itself said little about universities and their mission(s).

In dissent, however, Justice Alito objected sharply to the decision, in terms that left little doubt that he hewed closely to a more traditionalist vision of the university. Alito argued that the decision stood for the principle that there should be “no freedom for expression that offends prevailing standards of political correctness in our country’s institutions of higher learning.”⁷⁹ Contrasting the decision with the Court’s earlier decision in *Healy v. James*,⁸⁰ Alito emphasized that the *Healy* Court had refused to

⁷⁵ *Id.* at 239.

⁷⁶ *Id.* at 239 n.5.

⁷⁷ 130 S. Ct. 2971 (2010).

⁷⁸ See Horwitz, *First Amendment Institutions*, *supra* note ___, at ___.

⁷⁹ *Martinez*, 130 S. Ct. at 3000 (Alito, J., dissenting).

⁸⁰ 408 U.S. 169 (1972). See *Martinez*, 130 S. Ct. at 3007-09 (Alito, J., dissenting).

defer to university administrators with respect to how to achieve their “educational objectives,” and there was “no reason why we should bow to university administrators” in the present case.⁸¹

This is suggestive language only, to be sure. But it presents a fairly striking contrast with opinions like those of Souter and Stevens, which suggest that universities may contain a multitude of different visions and goals, and that courts should not impose upon them a particular mission or set of policies—no matter how laudable or consistent with the traditional understanding of universities it may be. For Justice Alito, as for Judge Garza, there simply *is* a particular set of core functions or norms that govern the university—one that happens to resemble the standard depiction of a university in the pages of the *National Review* circa 1993. Any departure from that understanding of what universities exist to do will be judged harshly, and certainly not deferentially.

To be clear, I am not endorsing a particular vision of the university here. I am not saying, for example, that seeking student diversity is not just permissible but mandatory for universities—that student diversity is an infeasible part of the mission of *every* university. Nor am I suggesting that the traditionalist view of the university advanced by judges Garza and Alito, one in which teaching and learning on core subjects is the fundamental purpose of every university and “political correctness” must always be anathema on campus, is wholly illegitimate. To the contrary, there is much to be said for Alito’s picture of the university. Indeed, something like this traditional view has been defended quite eloquently by some of the greatest champions of constitutional academic freedom.⁸²

What interests me is simply the *fact* of the dispute, and especially its *location*. The role of the university, and the concomitant boundaries of the professional and legal norms of academic freedom that protect that role, is hotly debated within the

⁸¹ *Id.* at 3008.

⁸² 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, 951, 953 (2006) (asserting that “constitutional academic freedom protects the core intellectual missions of the university: research, scholarship, and liberal education,” and arguing that other goals, such as “[i]nculcation of human values of modeling of professional values,” are peripheral to those core missions).

university itself.⁸³ The different visions of the university that figure in the Fifth Circuit’s opinion in *Fisher*, and that can be seen in scattered opinions by individual Supreme Court justices, suggest that the same debates exist on the courts as well. Although he defends a fairly traditional view of the purpose of the university, J. Peter Byrne has called American universities “dazzlingly diverse” in their aims and “full of conflicting purposes,” both individually and as a whole.⁸⁴ It is ultimately that form of diversity—not the racial diversity of students that is the focus of cases like *Grutter* and *Fisher*, but the plurality of missions and aims that may characterize a modern university—that drives opinions like Judge Higginbotham’s. Others, like Judge Garza, insist that universities have a particular mission, that it is easily identifiable, and that they are perfectly comfortable as judges declaring what it is.

These competing visions are bound to affect outcomes in cases involving universities. They may do so directly, in cases involving standard disputes over academic freedom. Since *Garcetti v. Caballos*,⁸⁵ for example, the law concerning speech by public employees has held that public employers may discipline employees for statements made in the course of their “professional duties.”⁸⁶ Justice Souter worried that such a rule would “imperil First Amendment protection of academic freedom in public colleges and universities,”⁸⁷ and the majority in *Garcetti* left open the question whether the rule announced in the case “would apply in the same manner to a case involving speech [by an academic] related to scholarship or teaching.”⁸⁸ How such a case would play out may depend on what a court concludes about the scope of the professional duties of academics. Similarly, courts are sometimes called upon to decide disputes over the circumstances in which university administrators can take action against professors who arguably depart from proper classroom or scholarly standards.

⁸³ See, e.g., Horwitz, *Universities*, *supra* note __, at 1546; Horwitz, *Grutter*, *supra* note __, at 479-81; Byrne, *Academic Freedom*, *supra* note __, at 279-81.

⁸⁴ J. Peter Byrne, *Neo-Orthodoxy in Academic Freedom*, 88 *Tex. L. Rev.* 143, 170 (2009).

⁸⁵ 547 U.S. 410 (2006).

⁸⁶ *Id.* at 426.

⁸⁷ *Id.* at 438 (Souter, J., dissenting).

⁸⁸ *Id.* at 425.

How they resolve those questions may turn on whether courts believe that universities have the primary say about such matters, or whether judges will instead step in as self-proclaimed defenders of core academic values against those who would “impose a straightjacket upon the intellectual leaders in our colleges.”⁸⁹ Or, as in *Fisher*, they may do so indirectly. Judges’ views about the scope of discretion allowed to universities in admissions programs and other areas may be influenced by their views about what constitutes an appropriate mission for a university. A case may only rarely turn openly on a judge’s conception of the role and purpose of universities. Underneath the doctrinal surface, however, a great deal may depend on what judges think about the proper mission of the university.

II. COMPETING VIEWS ON JUDICIAL DEFERENCE TO ACADEMIC DECISIONS

What judges think about the purpose of the university is closely tied to another question: How much judicial deference is owed to universities? This question played a central part in the debate over the University of Texas’s admissions program in *Fisher*, both in the Fifth Circuit and in the Supreme Court itself.

As we saw earlier, Judge Higginbotham’s panel opinion in *Fisher* rests heavily on deference, beginning with the key phrase that “the Supreme Court has held that ‘[c]ontext matters’ when evaluating race-based government action, and a university’s educational judgment in developing diversity policies is due deference.”⁹⁰ Although Higginbotham insists that this deference does not mean the courts should apply anything less than strict scrutiny, in practice his strict scrutiny analysis is something less than the traditional analysis we would expect, for two reasons. First, he argues that in this context strict scrutiny should focus on the *process* by which the university reaches a policy decision on admissions, not on the substance itself.⁹¹ Second, in applying strict scrutiny he begins with a presumption of good faith on the part of

⁸⁹ *Vega v. Miller*, 273 F. 3d 460, 474 (Cabranes, J., dissenting). See generally J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & Univ. L. 79, 79-82 (2004) (discussing *Vega*), 92-95 (discussing *Levin v. Harleston*, 770 F. Supp. 895 (S.D.N.Y. 1991)).

⁹⁰ *Fisher*, 631 F. 3d at 231 (quoting *Grutter*, 539 U.S. at 327).

⁹¹ See *id.*

the university.⁹²

Thus, even the narrow tailoring portion of the strict scrutiny analysis should be “undertaken with a degree of deference to the University’s constitutionally protected, presumably expert academic judgment.”⁹³ Universities are “engaged in a different enterprise” from other defendants in affirmative action litigation, such as governments engaged in public contracting, and so long as their admissions programs operate in “a holistic and individualized manner,” all that matters is that they reasonably exercised expert judgment and reached the conclusion that some admissions policy was necessary to the achievement of its educational goals.⁹⁴ With this version of strict scrutiny in place, upholding the University of Texas’s admissions plan presented no great challenge.

I am less concerned here with the details than with the general impression one receives from Higginbotham’s presentation of the evidence. What it appears to suggest is not just a formal or mechanical application of deference, but a strong underlying *trust* in the university, and a respect for its academic expertise.

That trust and respect are evident in his description of the University of Texas’s actions. “Over the past two decades,” he says at the opening of this discussion, “UT has repeatedly revised its admissions procedures to reflect its calculus of educational values while navigating judicial decisions and legislative mandates.”⁹⁵ His description of the university’s “calculus” sets out lovingly and at length the care and thought the university put into its admissions program, piling detail upon detail to show that the university operated *as* an expert, informing itself fully on the details and limits of its policy and coming up with a “complex

⁹² *Id.* at 231-32.

⁹³ *Id.* at 232.

⁹⁴ *Id.* at 233; *see also id.* at 238 (“[N]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative,’ especially if the proffered alternatives would require the University to sacrifice other important interests, like its academic selectivity and reputation for excellence.”) (quoting *Grutter*, 539 U.S. at 339-40). For a general discussion of the difference between judicial treatment of affirmative action in public contracting and construction cases and in university cases, see Akhil Reed Amar & Neal Kumar Katyal, *Bakke’s Fate*, 43 *UCLA L. Rev.* 174 (1996).

⁹⁵ *Fisher*, 231 F. 3d at 222.

admissions process.”⁹⁶ He concludes with a warm commendation of the university, writing that “it is evident that the efforts of the University have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion.”⁹⁷ Given Higginbotham’s evident respect for the expert efforts undertaken by the university, it is unsurprising that he rejects any suggestion that courts could oversee its operations in this area by imposing “fixed numerical guideposts” on the university.⁹⁸

That sort of trust in universities all but disappears when one examines the other Fifth Circuit opinions in *Fisher*. As I noted earlier, much of the reason for this is strictly doctrinal, on the surface at least. As presented, the problem is not that the University of Texas did not act sensitively or carefully or was unworthy of trust; it is that the university’s expertise is irrelevant. It may matter in applying the compelling interest strand of strict scrutiny, although even here Judge Garza is doubtful. But it certainly has nothing to do with the narrow tailoring strand, which “the Court [wrongly] redefined” in *Grutter* to remove its sting.⁹⁹ By deferring so much, by vesting universities with so much unguided discretion to determine that a program is the least restrictive means of achieving its educational goals, *Grutter* renders “meaningful judicial review all but impossible.”¹⁰⁰ On the surface, then, the problem is not so much that the University of Texas acted badly, as it is that its program was not subjected to an independent judicial review of the means the university adopted toward the achievement of its educational goals.

Beneath the surface, however, one senses the distrust bubbling up. Garza’s language is shot through with suspicion. Universities like the University of Michigan Law School and the University of

⁹⁶ *Id.* at 226; *see generally id.* at 222-30.

⁹⁷ *Id.* at 231.

⁹⁸ *Id.* at 245.

⁹⁹ *Id.* at 249 (Garza, J., specially concurring); *see also id.* at 256-57 (agreeing that universities are entitled to deference in setting educational goals, but adding, “My concern . . . is not that *Grutter* commands such deference, but that it conflated the deference owed to a university’s asserted interest with deference to the means used to attain it.”).

¹⁰⁰ *Id.* at 251.

Texas, he suggests, “can get away with something less” than what the Constitution requires given the laxity of the narrow tailoring analysis.¹⁰¹ The requirement of good faith consideration on the part of universities, when combined with judicial deference and a presumption of good faith, leaves courts with “a peculiarly low bar” for those schools to leap.¹⁰² Universities, having been given the green light by the Court in *Grutter*, will “do covertly” what they cannot do openly—will, in other words, employ subterfuge, a conclusion that hardly entitles the university to much judicial deference.¹⁰³

Given Judge Garza’s strong distrust of the university, even the deference that ought to be accorded to a university’s expert judgment about its own goals is lacking here. Any determination by universities that racial or other forms of student diversity are an important part of their admissions programs that satisfies the compelling interest standard “remains suspended at the highest levels of hypothesis and speculation,” he writes.¹⁰⁴ The facts suggest that the University of Texas went to great lengths in reaching its conclusion that a racially conscious admissions policy was needed to achieve what it considered the essential educational goal of student diversity. Given his distrust of the university, however, Garza easily waves this off, suggesting that any measure the university might employ here “would be subjective and, at worst, capable of manipulation through framing biases.”¹⁰⁵ Beyond the university’s “core function”¹⁰⁶ of educating students in specific traditional subjects, nothing about the university gives it any special expertise in judging the importance of such goals as promoting cross-racial understanding. Although the university may treat such values as “self-styled educational goals,” it is in no better position than any other institution—including the judiciary itself—to evaluate such goals.¹⁰⁷

In short, for Garza, deference to the university is simply a

¹⁰¹ *Id.* at 250.

¹⁰² *Id.* at 251.

¹⁰³ *Id.* at 252; see also *id.* at 253 (“*Grutter* rewards admissions programs that remain opaque.”).

¹⁰⁴ *Id.* at 255.

¹⁰⁵ *Id.* at 255 n.10.

¹⁰⁶ *Id.* at 257.

¹⁰⁷ *Id.*

mistake, a “digression in the course of constitutional law.”¹⁰⁸ The fact that the case involves race obviously has much to do with Garza’s refusal to defer.¹⁰⁹ But his language suggests something more than this: it suggests a skepticism that universities are entitled to deference *at all*, especially once they move beyond what Garza sees as their narrowly traditional “core function.” It all but accuses them of being unworthy of such trust altogether.

The same distrust of universities is equally apparent in Chief Judge Edith Jones’s dissent from the denial of *en banc* review of *Fisher*.¹¹⁰ If anything, Jones’s dissent is more contemptuous of the university, filled with a degree of sarcasm and accusation that goes beyond a mere conclusion that deference is the wrong doctrinal tool to apply in such cases. “University administrators cherish the power to dispense admissions as they see fit,” she writes, adding with evident disdain and sarcasm that “*even* University administrators can lose sight of the constitutional forest for the academic trees.”¹¹¹ One gets the sense that if given free rein, Jones would take an axe to those academic trees, cutting a judicial swath through the groves of academe and whistling a merry tune all the while.

Leaving unmentioned the *Grutter* Court’s discussion of the complexity of the educational decisions made by universities,¹¹² Jones writes that *Grutter*’s discussion of educational decision-making “was meant to *challenge the university*, not to bless whatever rationale it advances for racially preferential admissions.”¹¹³ It is difficult to read this sentence without concluding that Jones thinks the university’s proffered rationales are really just rationalizations: post hoc justifications for the university to pursue the non-academic and impermissible goal of racial balancing. She not only questions whether it is constitutionally appropriate for the university to seek racial diversity at the classroom level, but suggests again that the university would use such a goal dishonestly, treating it as “carte

¹⁰⁸ *Id.* at 247.

¹⁰⁹ *See id.* at 246-47.

¹¹⁰ *See Fisher v. Univ. of Texas at Austin*, 644 F. 3d 301 (5th Cir. 2011).

¹¹¹ *Id.* at 304 (emphasis added) (Jones, C.J., dissenting).

¹¹² *See Grutter*, 539 U.S. at 328-29.

¹¹³ *Fisher*, 644 F. 3d at 304.

blanche” to do what it wants.¹¹⁴ She agrees that a university is entitled to deference on the narrow question whether it has “a compelling interest in achieving racial and other student diversity,” but concludes that “that is about as far as deference should go.”¹¹⁵

As with Judge Garza’s opinion, then, Chief Judge Jones’s opinion can fairly be read as signaling more than a mere conclusion that *Grutter*, and the Fifth Circuit, deferred to the university too much or on the wrong question. Rather, it suggests a generalized distrust of universities: a conviction that they hardly merit any deference, that they are acting as social meliorists rather than genuine academics and would dither about among the “academic trees” in any event, and that they will act dishonestly to achieve their goal of racial balancing.

The same sarcasm and distrust toward universities played a prominent role in the oral arguments when the Supreme Court heard *Fisher*.¹¹⁶ Again the argument was primarily doctrinal. But, again, a strong undercurrent of skepticism toward universities *tout court* is obviously at work here. It is most prominent, unsurprisingly, in the questions asked by the usual suspects.¹¹⁷

This skepticism appears soon after the argument turns to the merits, in a question by Justice Antonin Scalia suggesting that the University of Texas, no matter what serious study it had devoted to the issue by this time or how long it had had since the Fifth Circuit’s decision in *Hopwood*¹¹⁸ to think about its admissions policy, had simply reinstated “racial quotas” the second *Grutter* came down, without any serious reflection or analysis at all.¹¹⁹ It is evident in Chief Justice John Roberts’s questioning of counsel for the state of Texas on the issue of critical mass, in which he responds to a laundry list of efforts undertaken by the university to

¹¹⁴ *Id.* at 307.

¹¹⁵ *Id.* at 305 n.3.

¹¹⁶ See Oral Arg. Tr., *Fisher v. Univ. of Texas at Austin*, No. 11-345, 2012 WL 4812586 (Oct. 10, 2012) [hereinafter *Fisher* Oral Arg. Tr.].

¹¹⁷ But not the usual suspects alone. Although her questions may have been designed as much to push the University of Texas to make its best case as to criticize it, Justice Sonia Sotomayor’s questions at oral argument also suggested a certain degree of skepticism and exasperation with the university. See, e.g., *id.* at __.

¹¹⁸ *Hopwood v. State of Texas*, 78 F. 3d 932 (5th Cir. 1996).

¹¹⁹ *Fisher* Oral Arg. Tr., 2012 WL 4812586, at *11.

make a determination about critical mass with the skeptical statement, “So, I see—when you tell me, that’s good enough.”¹²⁰ And it reaches its peak when Justice Scalia implies that the very administrative bureaucracies that universities employ in making “complex educational judgments” about admissions in fact reveal the university to have been captured by these bureaucrats, who have grown like kudzu and should just be eliminated:

JUSTICE SCALIA: Since we are asking questions just about . . . curiosity, I am curious to know how many—this is a very ambitious racial program here at the University of Texas. How many people are there in the affirmative action department of the University of Texas? Do you have any idea? There must be a lot of people to, you know, to monitor all these classes and do all of this assessment of race throughout the thing. There would be a large number of people out of a job, . . . wouldn’t [there], if we suddenly went to just [a] 10 percent [plan]?¹²¹

That the Supreme Court’s decision in *Fisher* might turn substantially on the question of the proper scope of judicial deference to universities surprised absolutely no one. The contours of judicial deference to higher educational institutions—indeed, whether there should be any deference at all, at least where race is involved—were hotly contested by the dissenting justices in *Grutter*. Not without reason, Justice Clarence Thomas called the extent of deference shown to the University of Michigan “unprecedented” in his passionate dissent in *Grutter*.¹²² Indeed, Thomas was skeptical that the university was entitled to deference under *either* prong of the strict scrutiny analysis. With respect to whether the law school had a compelling interest, he questioned whether a racially diverse student body could be said to provide any educational benefits at all, let alone whether a compelling

¹²⁰ *Id.* at *48.

¹²¹ *Id.* at *57-58.

¹²² *Grutter*, 539 U.S. at 350 (Thomas, J., concurring in part and dissenting in part); see also *id.* at 380 (Rehnquist, C.J., dissenting) (calling the majority’s application of strict scrutiny “unprecedented in its deference”).

interest in student diversity could be said to exist.¹²³ More broadly, Thomas cast doubt on the very “idea of ‘educational autonomy’ grounded in the First Amendment,”¹²⁴ and made clear his view that even if it existed, it hardly justified lessening the rigor of judicial review in race-based Equal Protection cases.¹²⁵

Justice Anthony Kennedy also dissented in *Grutter*. True to his tendencies, he took a position between that of Justice Thomas and that of the majority. He would have paid deference within limits with respect to the compelling interest portion of the strict scrutiny analysis, concluding that “[o]ur precedents provide a basis for the Court’s acceptance of a university’s considered judgment that racial diversity among students can further its educational task, when supported by empirical evidence.”¹²⁶ But he charged that the majority had “confuse[d] deference to a university’s definition of its educational objective with deference to the implementation of this goal.”¹²⁷ The university might be entitled to deference with respect to the selection of its goal of student diversity, and that goal might constitute a compelling interest. But no deference whatsoever should be given to its use of racial classifications to implement the goal of educational diversity.¹²⁸

* * * * *

Both before and after the oral argument in *Fisher*, it was widely assumed that the outcome would turn on Justice Kennedy’s vote, and on his view of the appropriate scope of deference in the case.¹²⁹ And so it was. Writing for the Court, Justice Kennedy

¹²³ See, e.g., *id.* at 356 n.4.

¹²⁴ *Id.* at 362. See *id.* at 362-64 (questioning the firmness of the foundations laid for constitutional academic freedom in *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967), and emphasizing that the statutes in the latter case “covered all public employees and were not invalidated only as applied to university faculty members”).

¹²⁵ See *id.* at 362-64.

¹²⁶ *Id.* at 387-88 (Kennedy, J., dissenting).

¹²⁷ *Id.* at 388.

¹²⁸ See *id.* (“[D]eference is not to be given with respect to the methods by which [racial diversity] is pursued.”).

¹²⁹ See, e.g., Bret D. Asbury, *The Fisher Oral Argument: Why Affirmative Action Might Endure*, 9 *Stan. J. Civ. Rts. Civ. Liberties* 107, 108, 117 (2013);

neither upheld Texas's program nor struck down *Grutter*. Instead, he remanded the case to the Fifth Circuit for failure to apply strict scrutiny correctly. He accepted *Grutter*'s conclusion that "the decision to pursue 'the educational benefits that flow from student body diversity' that the University deems integral to its mission is, in substantial measure, an academic judgment to which some, but not complete, judicial deference is proper."¹³⁰ Provided that there is "a reasoned, principled explanation for the academic decision," the courts should bow out.¹³¹

But Kennedy insisted that once the initial policy determination is made, it is for the courts to determine "that the admissions process meets strict scrutiny in its implementation."¹³² In other words, deference as to ends, not means; deference on what constitutes a compelling interest, not on narrow tailoring. To be sure, even at the latter stage of strict scrutiny analysis "a court can take account of a university's experience and expertise in adopting or rejecting certain admissions processes."¹³³ But the court must remain in the driver's seat. Contrary to Judge Higginbotham's opinion, it *must* "second-guess the merits" of the university's implementation of its educational goals where racial classification

Allen Rostron, *Affirmative Action, Justice Kennedy, and the Virtues of the Middle Ground*, 107 Nw. U. L. Rev. 1037 (2013); Lucille A. Jewel, *Merit and Mobility: A Progressive View of Class, Culture, and the Law*, 43 U. Mem. L. Rev. 239, 299 (2012); Vinay Harpalani, *Diversity Within Racial Groups and the Constitutionality of Race-Conscious Admissions*, 15 U. Pa. J. Const. L. 463, 464-66 (2012); Girardeau A. Spann, *Whatever*, 65 Vand. L. Rev. En Banc 203, 206 (2012); Vikram David Amar, *Is Honesty the Best (Judicial) Policy in Affirmative Action Cases?: Fisher v. University of Texas Gives the Court (Yet) Another Chance to Say Yes*, 65 Vand. L. Rev. En Banc 77, 85-90 (2012); Tomiko Brown-Nagin, *The Diversity Paradox: Judicial Review in an Age of Demographic and Educational Change*, 65 Vand. L. Rev. En Banc 113, 137-38 (2012).

¹³⁰ *Fisher*, 133 S. Ct. at 2419 (quoting *Grutter*, 539 U.S. at 330).

¹³¹ *Id.*

¹³² *Id.* at 2419-20; see also *id.* at 2420 ("Grutter made clear that it is for the courts, not for university administrators, to ensure that 'the means chosen to accomplish the [government's] asserted purpose must be specifically and narrowly framed to accomplish that purpose.'") (quoting *Grutter*, 539 U.S. at 333).

¹³³ *Id.*

is involved.¹³⁴

Kennedy spoke for six other justices, with only one member of the Court—Justice Ruth Bader Ginsburg—dissenting.¹³⁵ That might seem to belie the prediction that Kennedy would be the swing vote in the case. But there is more than one way to be a swing justice. It is fairly clear that Justice Kennedy wrote the tune here, and that at least some of the liberal—and conservative—justices joined his opinion because it provided adequate security for their own views, and because joining, with the hope of limiting the scope of Kennedy’s wanderings, was preferable to the risk of wrenching defeat from victory. *Fisher* is a Kennedy product through and through.

That has certain consequences for the visibility—but not, I think, the accuracy—of the basic points I have canvassed in this Article: that the judicial view of the mission of universities, and of the trustworthiness of universities and their entitlement to judicial deference, were two major animating issues in *Fisher*. Justice Kennedy is motivated more by judicial *amour propre* than by distrust of—or even, perhaps, concern for—other institutions.¹³⁶ There was little need, and for Kennedy probably no strong impetus, to use *Fisher* to take on the universities’ own *amour propre* and their insistence on academic autonomy. Sufficient unto the day is the evil thereof.

To say these animating impulses were not clearly visible in the Supreme Court’s decision in *Fisher* is not to say they were absent, however. It is often possible to glimpse deeper motives in a judicial decision, motives that are just barely concealed by the patina of doctrine.¹³⁷ It is surely true that in the context of

¹³⁴ *Id.* (quoting *Fisher*, 631 F. 3d at 231).

¹³⁵ Justice Elena Kagan did not take part in the decision.

¹³⁶ For a rather positive statement of this position, see Louis D. Bilionis, *Grand Centrism and the Centrist Judicial Personam*, 83 N.C. L. Rev. 1353 (2005). For a less admiring account, see Richard A. Posner, *Foreword: A Political Court*, 119 Harv. L. Rev. 31, 84-85 (2005). See also, e.g., Neal Devins, *Talk Loudly and Carry a Small Stick: The Supreme Court and Enemy Combatants*, 12 U. Pa. J. Const. L. 491, 527 (2010); Neil S. Siegel, *Dole’s Future: A Strategic Analysis*, 16 Sup. Ct. Econ. Rev. 165, 198 (2008); Stephen G. Bragaw & Barbara A. Perry, *The “Brooding Omnipresence” in Bush v. Gore: Anthony Kennedy, the Equality Principle, and Judicial Supremacy*, 13 Stan. L. & Pol’y Rev. 19, 29-32 (2002).

¹³⁷ See, e.g., Girardeau A. Spann, *Fisher v. Grutter*, 65 Vand. L. Rev. En

affirmative action, the justices care more about race and equal protection than they do about the mission of the university or the judicial implications of academic freedom.¹³⁸ The Court may have meant what it said about academic freedom, university autonomy, and judicial deference in *Grutter*; it is less clear that it *cared* what it said about those topics, compared to the central issue of race.

But the underlying questions about the mission of universities and their entitlement to judicial deference are there nonetheless, and were relevant to *Fisher's* fate in the Supreme Court, just as they clearly were in the Fifth Circuit. Certainly they are doctrinally relevant. The narrower a university's mission as the courts understand it, the less likely it is that courts will defer to the university's claim that it has a compelling interest in matters that stray from that core mission. The more that courts trust or distrust universities, the more likely it is that they will expand or contract the scope of judicial deference. The general doctrinal gloss offered by Justice Kennedy's opinion may have skipped over those issues, but they did not disappear. They remain present and unresolved.

III. THE IMPORTANCE OF DISTRUST OF (ACADEMIC) INSTITUTIONS

If I am right that there is a lack of judicial consensus about the mission of universities, and about the degree to which universities are entitled to deference when they make academic decisions, that should concern universities and those who champion academic freedom, whether as a legal or a professional principle. How they fare in the courts, and in the court of public opinion, will depend considerably on how much they are trusted—and on what, exactly, they are trusted to do.

Although *Fisher* brings these questions to the surface, they are not new. Nor are these questions likely to be confined to the context of race-conscious admissions. Not long after the Supreme Court's decision in *Grutter*, J. Peter Byrne wrote to express concern about a "trend of decisions justifying greater intrusion into academic decision making," decisions that taken together "imperial[] the constitutional autonomy of colleges and universities

Banc 45, 48, 54 (2012); Spann, *supra* note __, at 203-04, 207, 209; Posner, *supra* note __, at 52 ("There is almost no legal outcome that a really skillful legal analyst cannot cover with a professional varnish.").

¹³⁸ See, e.g., Horwitz, *First Amendment Institutions*, *supra* note __, at __; Byrne, *supra* note __, at 117 [Threat].

protected by the First Amendment.”¹³⁹ Similarly, in her book *The Trials of Academe: The New Era of Campus Litigation*, Amy Gajda argued that the era of “courts allow[ing] universities to run their own shop” is over.¹⁴⁰ Judges are increasingly willing to tread on ground they once would have left to the universities to police for themselves. Small wonder that another doyen of academic freedom jurisprudence wondered recently whether judicial deference to academic decisionmaking had become “an outmoded concept.”¹⁴¹

Before asking why things seem to have changed, it is worth emphasizing that there are indeed several questions at work here. Because they are closely related, it is easy to conflate them. That would be a mistake. In surveying the terrain, we should be aware of several distinct questions.

First, what is the mission of the university? Should it be broadly or narrowly understood? Is it confined to traditional actions such as research, teaching, and scholarship? Does it depend on traditional values such as truth-seeking and impartiality? Or has the university’s mission expanded in a way that more directly implicates broader goals, such as ameliorating social inequality and opening a path to leadership?

Second, how deserving are universities of deference, whether from judges or from non-academics in general? Do they continue to possess a level of expertise and authority that deserves and demands deference from outsiders? If not, is it because the very idea that authority and expertise provide sufficient reasons for judges and others to defer has been discredited, in favor of the view that *no* institution should be insulated from democratic control or judicial supervision? Or is it because universities in particular have lost the trust they once enjoyed?

Third, how should judges, in particular, treat universities? Should academic autonomy, or academic freedom, be constitutional principles at all? Should universities continue to enjoy a judicial presumption of good faith and independence? Or are judges as qualified to judge a university’s conduct as they are any other institution?

¹³⁹ Byrne, *supra* note ___, at 79, 82 [Threat].

¹⁴⁰ Amy Gajda, *The Trials of Academe: The New Era of Campus Litigation* 5 (2009).

¹⁴¹ Robert M. O’Neil, *Judicial Deference to Academic Decisions: An Outmoded Concept?*, 36 J.C. & U.L. 729 (2010).

Finally, there is an often-ignored question that may affect how we answer all of the prior questions. This is the question of institutional pluralism.¹⁴² There are several thousand public and private colleges and universities in the United States, ranging from purely teaching-oriented community colleges to flagship doctorate-granting research institutions. Must they all have the same mission? If their missions differ, as they inevitably will, should any legal protection or judicial deference these institutions receive be limited to or depend on their adopting some set of core academic functions or values? How much variation between those functions and values should be acknowledged and protected?¹⁴³ Rather than focusing on core functions and values, should we instead take a cue from the institutions themselves, acknowledging the existence of different missions and holding each institution to its own stated mission, but reducing deference when they depart from those missions?

¹⁴² For discussion, see Horwitz, *First Amendment Institutions*, *supra* note __, at __. See also Brian Z. Tamanaha, *Failing Law Schools* 31 (2012); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 Wash. L. Rev. 445, 491-92 (2012); Jerome Organ, *Missing Missions: Further Reflections on Institutional Pluralism (Or its Absence)*, 60 J. Legal Educ. 157 (2010); Matthew W. Finkin, *On 'Institutional' Academic Freedom*, 61 Tex. L. Rev. 817, 829-40 (1983). For a concerned but, in my view, overheated take on institutional pluralism, see also José Gabilondo, *Institutional Pluralism From the Standpoint of its Victims: Calling the Question on Indiscriminate (In)tolerance*, 21 L. & Lit. 387 (2009).

¹⁴³ Commenting on an earlier draft of this Article, Rick Garnett adds another question: Should we answer these questions differently when *public* rather than private universities are involved? We might accept a good deal of pluralism within the universe of private universities but less—or none—from public universities. I thank him for the reminder. I deal with that question at greater length in Horwitz, *Universities*, *supra* note __, at __, and Horwitz, *First Amendment Institutions*, *supra* note __, at __. In brief, my view is that while the public status of some universities might limit their options, it does so less than we might expect, and their status as universities is more salient for purposes of legal analysis than their status as state entities. As a practical matter, moreover, I suspect that the range of choices that public universities might make in shaping their mission would generally fall within constitutionally acceptable lines.

The question of institutional pluralism has both professional and legal implications. On a professional level, there may be disagreement about the proper function or values of an “academic” institution. That question is compounded when we ask how *courts* should deal with it. Some legal scholars have focused on protecting a particular set of academic values and effectively enshrining them within the definition of constitutional academic freedom.¹⁴⁴ If we take that approach, how fixed should that definition be, and what risk does it present that courts will reify a particular understanding of the academic mission, without acknowledging the possibility that academic missions may evolve, at one institution or across the academy? Another possibility, one I have supported, is that given the existence of institutional pluralism within the universe of higher educational institutions, courts should defer not only to academic decisions made by universities, but should also be deferential about *whether* a particular university’s mission can properly be conceived of as academic, and thus entitled to judicial deference.¹⁴⁵ But if we fail to arrive at a fixed legal understanding of core academic values, will we risk dissipating any legal protection for academic freedom altogether?¹⁴⁶ This tension between institutional pluralism and a more particularized, singular, fixed understanding of the university mission and academic values has been around for some time.¹⁴⁷

It is worth laying out in detail these different issues, and the questions they raise, because one need not have the same answer to all of these questions. One might, for example, believe that there is room for institutional pluralism among universities: that different universities may have different emphases or values and different goals but they all deserve the label “academic.” But someone taking this position, and whatever beliefs about *professional* academic freedom follow from it, might nevertheless

¹⁴⁴ See, e.g., Byrne, *Academic Freedom*, *supra* note __, at __.

¹⁴⁵ See, e.g., Horwitz, *Universities*, *supra* note __, at __. For a related and complementary, but different, take on judicial deference to universities, see Eboni S. Nelson, *In Defense of Deference: The Case for Respecting Educational Autonomy and Expert Judgments in Fisher v. Texas*, 47 U. Rich. L. Rev. 1133 (2013).

¹⁴⁶ See, e.g., Horwitz, *Universities*, *supra* note __, at __.

¹⁴⁷ See generally Finkin, *supra* note __; see also Karen Petroski, *Lessons for Academic Freedom: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149, 151-52, 159-60, 191, 209-12 (2005).

believe that when it comes to *constitutional* academic freedom, we are likely to gain more and risk less if we avoid the thicket of institutional pluralism at the legal level, and instead concentrate on a core set of fixed academic values that merit constitutional protection.

Conversely, one might take a fairly fixed and traditional position on the proper mission of the university. One might conclude, for example, that the core mission of the university is to seek the truth impartially, and that more political or postmodern goals are inconsistent with genuine academic values.¹⁴⁸ But despite taking sides in that conflict, the same person might believe that this is an *academic* debate that should take place between academics. At the level of *constitutional* rather than *professional* academic freedom, one might believe that the appropriate approach, given the limitations of judges, is for courts to take a capacious view of the university mission and the meaning of academic values or academic freedom, deferring substantially to different academic visions while allowing that debate to continue within the academy.

In short, thinking about academics' debates about the nature of the university and the definition of academic decisions or academic freedom, and thinking about the *judicial* resolution of similar questions, may result in one's reaching different answers depending on where the final decisional authority resides: in the universities or in the courts. These distinctions, and the multitude of possible approaches they suggest, are not always appreciated, even by experts on the law of academic freedom. They are certainly not always recognized among the general run of academics, who may simply assume that professional academic freedom and constitutional academic freedom are identical. Unsurprisingly, they are rarely appreciated by judges, who after all are generalists.

That all this matters is evident from a contrasting reading of some of the opinions we have seen so far. Consider, on the one hand, Judge Higginbotham's opinion in *Fisher*, which assumed that different universities may have different goals and suggested that how these institutions fare under strict scrutiny will depend on the particular context facing each institution. Compare this opinion

¹⁴⁸ See, e.g., Rabban, *supra* note __ (laying out the debate between traditional and postmodern conceptions of the university and academic freedom).

with Justice Alito's dissent in *Martinez*, which implied that any university that aligns itself with what he sees as the "prevailing standards of political correctness in our country's institutions of higher learning" is departing from traditional academic values and may be entitled to less deference, or none at all.¹⁴⁹ Once these debates over the role of the university, which are so routine among academics, shift from an academic forum to a judicial forum, they may have a significant and lasting effect on the nature and scope of universities' legal rights.

My own view, which I have offered at much greater length elsewhere,¹⁵⁰ is that our discussions of academic freedom, whether as a professional or a constitutional value, must acknowledge the inevitability of institutional pluralism, and recognize its importance, more than they generally do. Even if one readily grants that some institutional goals and values fall outside *any* reasonable definition of the modern university and its mission, there is still a great deal of room for variety within the crowded environment of American higher educational institutions, public and private. Professional debates about the nature of the university should not be too quick to adopt too monistic or too fixed a definition of the university and its mission.

Similarly, when making their case to courts, universities and academic organizations, especially when acting as *amici*, should point out that few if any universities look and act precisely the same as they did 100 or 50 years ago. Within the current environment, different universities—such as a large public research university and a small religious college—may have different goals, missions, and values, all of them still sheltering comfortably under the umbrella of the academy. Courts should not only defer to academic goals and decisions; they should be at least somewhat deferential about what *constitutes* a proper academic goal or decision.¹⁵¹ If there is no room for professional and legal

¹⁴⁹ *Martinez*, 130 S. Ct. at 3000 (Alito, J., dissenting).

¹⁵⁰ See, e.g., Horwitz, *First Amendment Institutions*, *supra* note __, at __; Horwitz, *Grutter*, *supra* note __, at __.

¹⁵¹ Cf. *Wynne v. Tufts Univ. Sch. of Medicine*, 932 F. 2d 19, 30 (1st Cir. 1991) (Breyer, C.J., dissenting) (insisting that only a "substantial departure from academic norms" can justify judicial second-guessing of an academic decision). The "substantial departure" language comes from *Ewing*, 474 U.S. at 225.

pluralism in a nation with a substantial tradition of pluralism¹⁵² and thousands of public and private colleges and universities, then there is no room for pluralism at all.

In one sense, decisions like *Grutter* or Judge Higginbotham's opinion in *Fisher* offer encouragement for those who champion both judicial deference *and* respect for institutional pluralism. *Grutter*, after all, was at least ostensibly not based on the view that universities *must* pursue student body diversity, including racial diversity. Rather, it was grounded on the view that whether to pursue diversity is an *academic* decision, protected by the constitutional value of academic autonomy and entitled to substantial judicial deference.¹⁵³ Similarly, Judge Higginbotham, in upholding the University of Texas's policy, did not insist that the University of Texas must look and act exactly like the University of Michigan Law School, or that every university must in turn look and act like the University of Texas. Rather, he acknowledged that the constitutionality of different universities' actions required "some consideration of a university's *particular* educational mission and the community it serves."¹⁵⁴

Although the Supreme Court ultimately vacated and remanded the Fifth Circuit's decision, its own opinion in *Fisher*, while narrowing the occasions for judicial deference, did not impose a particular view of which educational goals are proper or improper for universities. Even the Supreme Court's rather mechanical doctrinal decision in the Christian Legal Society case did not insist that all universities must treat student groups exactly the same and that no university may opt *not* to apply non-discrimination policies to student groups. It turned on the view that Hastings College of the Law *could* impose and apply an all-comers policy, not that it *must*.¹⁵⁵

There is thus good reason to think that the legal doctrine of academic freedom and educational autonomy continues to leave a space open for institutional pluralism. Cases like *Grutter* and *Fisher*, taken together, suggest that universities that believe that student body diversity, including racial diversity, is an important

¹⁵² See generally Abner S. Greene, *Against Obligation: The Multiple Sources of Authority in a Liberal Democracy* (2012).

¹⁵³ See *Grutter*, 539 U.S. at 328-29.

¹⁵⁴ *Fisher*, 631 F. 3d at 237.

¹⁵⁵ *Martinez*, 130 S. Ct. 2971.

part of their academic mission, and can provide a “reasoned, principled explanation” for that view,”¹⁵⁶ will be entitled to pursue that educational goal without the goal being second-guessed by the courts. (Although, as *Fisher* now makes clear, they will still have to give strong evidence that they selected the most appropriate means of implementing that goal.) Read properly, however, these cases also suggest that universities may *reject* that goal. They may, for instance, decide that the best way to admit students is through a narrowly grade-oriented focus on the merits of the students, or through a first-come-first-served admissions policy, even if that approach does not result in a racially diverse student body. Institutional pluralism means that there is room for a diversity of academic goals among colleges and universities—including, so to speak, diversity *about* diversity.

There is still ample cause for concern, however. It comes from multiple sources, with varied views. The courts themselves provide some reason for concern. Some justices may pay lip service to academic autonomy in cases like *Grutter* or the Christian Legal Society. In truth, they may be more interested in upholding affirmative action or non-discrimination policies, not in academic autonomy for its own sake.¹⁵⁷ If that is so, then there would be reason to question whether they would be as eager to rhapsodize about academic autonomy if a university pursued academic goals that were contrary to those justices’ own views about social progress.

The concerns may also come from within the university itself. Some academics might insist that there is a single right answer to the question of what constitutes a proper academic mission. It might be the traditional version. This is the version advanced by Judge Garza, Justice Alito, or those judges who have offered jeremiads against “political correctness” and asserted that courts have an obligation to step in to protect the university from itself,¹⁵⁸ and should not defer simply because particular universities see their mission differently. It may come from the other side: from those who reject the notion of institutional pluralism but insist that some non-traditional, largely political, goals must be pursued by *all* universities.¹⁵⁹ Or it may come from those who fall in between,

¹⁵⁶ *Fisher*, 133 S. Ct. at 2419.

¹⁵⁷ See Horwitz, *First Amendment Institutions*, *supra* note __, at __, __.

¹⁵⁸ See notes __, __, and __, *supra*, and accompanying text.

¹⁵⁹ See, e.g., Gabilondo, *supra* note __, at 388-89 (rejecting institutional

insisting on traditional conceptions of the university mission but in a way that is designed to serve what might be crudely termed liberal political goals.¹⁶⁰ All of these positions threaten to undermine institutional pluralism, and may imperil academic autonomy to boot.

Beyond any specific positions, moreover, there is a deeper concern, one that was clearly present at every level of litigation in *Fisher*. This is the question of trust. The existence of a constitutional principle of academic freedom or university autonomy depends on others having trust in the authority and expertise of universities and their faculty and administrators.¹⁶¹ Without that trust, universities stand little chance of success in asserting a right to legal autonomy or judicial deference. And that trust is dissipating.

Some of this is for general reasons. Institutions of all sorts, public and private, increasingly fail to maintain the confidence of the public, and the public shows less and less willingness to defer to experts and authorities.¹⁶² But some of it is specific to universities themselves. Public confidence in colleges and universities, while still high, has dropped in recent years.¹⁶³

pluralism when it “provides a disguise for retrograde values in the legal academy” on such issues as the treatment of sexual minorities).

¹⁶⁰ See, e.g., Lonnie D. Kliever, *Academic Freedom and Church-Affiliated Universities*, 66 Tex. L. Rev. 1477, 1479 (1988) (arguing that traditional principles of academic freedom should apply equally to religious and non-religious universities, and asserting in a distinctly monistic fashion that “[w]hat is at stake is nothing less than *the* meaning and mission of *the* modern university”) (emphasis added).

¹⁶¹ See *supra* notes ___-__ and accompanying text.

¹⁶² See, e.g., Horwitz, *supra* note __, at 491 (discussing this phenomenon and collecting sources) [Wash]; Byrne, *supra* note __, at 132-33 (noting a general loss of confidence in the capacity of professionals to govern themselves) [Threat].

¹⁶³ See, e.g., Chris Panetta, *Colleges and Universities Not Immune From Eroding Public Confidence*, Widmeyer Communications, <http://www.widmeyer.com/blogs/colleges-and-universities-not-immune-eroding-public-confidence> (undated but referring to recent surveys); Pew Research Center for the People & the Press, *Colleges Viewed Positively, But Conservatives Express Doubts*, March 1, 2012, <http://www.people-press.org/2012/03/01/colleges-viewed-positively->

Judicial confidence in university faculty and administrators has also diminished.¹⁶⁴

What is true about universities in general is even truer of university admissions. The oral arguments in *Fisher* were replete with skeptical questions and remarks about universities and their admissions processes.¹⁶⁵ Supporters of affirmative action are sometimes equally distrusting. The entire point of Justice Ginsburg's dissent in *Fisher*, after all, is that we ought to allow universities to be openly race-conscious because they will do so covertly anyway.¹⁶⁶ Academic observers agree.¹⁶⁷ There is a widespread sense that "diversity" itself can be something of a subterfuge: that it vaulted into the top ranks of academic goals and values less because those who invoke it care about it deeply or even know what it means, but because it is the only basis for

[but-conservatives-express-doubts/](http://www.harrisinteractive.com/vault/Harris%20Poll%2044%20-%20Confidence%20Index%205%2021%2012.pdf); Harris Interactive, *Confidence in Congress Stays at Lowest Point in Fifty Years*, May 21, 2012, <http://www.harrisinteractive.com/vault/Harris%20Poll%2044%20-%20Confidence%20Index%205%2021%2012.pdf>.

¹⁶⁴ See Byrne, *supra* note __, at 132 [Threat].

¹⁶⁵ See, e.g., *Fisher* Oral Arg. Tr., *supra* note __, at *11 (Justice Scalia suggesting that the University of Texas "reinstitute[d] racial quotas" more or less reflexively the second the *Grutter* decision was handed down), *32-33 (Chief Justice Roberts probing, and gently mocking, the University of Texas's procedures for identifying the race of applicants), *48 (suggesting that the idea that the Court should defer to universities on the question whether students feel racially isolated if the university amounts to saying, "when you [the university] tell me, that's good enough"), *57-58 (Justice Scalia questioning the size of "the affirmative action department of the University of Texas" and suggesting that "[t]here would be a large number of people . . . out of a job" if the university switched entirely to a top ten percent plan)

¹⁶⁶ See *Fisher*, 133 S. Ct. at 2433 (Ginsburg, J., dissenting) ("[I]f universities cannot explicitly include race as a factor, many may resort to camouflage to maintain their minority enrollment") (quotations and citation omitted).

¹⁶⁷ See, e.g., Clowney, *supra* note __, at 33 (citing Richard Thompson Ford, *Cut Bait: Affirmative Action Will Live on Even if the Supreme Court Kills it*, *Slate* (Oct. 12, 2012, 1:21 P.M.), http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/affirmative_action_at_the_supreme_court_the_future.html).

affirmative action that the Supreme Court has accepted.¹⁶⁸

Nor are university admissions offices and their allies always their own best friends when it comes to reducing judicial or public distrust. Data are often hard to come by, especially when the person seeking those data is a potential critic of university admissions policies and their educational outcomes.¹⁶⁹ To outsiders, it may sometimes seem as if scholars, data collectors, admissions offices, and university officials worry that the full disclosure of information about university admissions and outcomes will imperil those admissions programs and harm the talented students who might benefit from those programs. That is not a legitimate reason to fail to fully disclose all available information.

Justice Kennedy's opinion in *Fisher*, which demands a much more searching judicial evaluation of university admissions policies under the narrow tailoring prong of strict scrutiny, may bring that era of relative opacity to an end.¹⁷⁰ In the meantime, recalcitrance on the part of universities to provide full data to all those who seek it can only have deepened the sense of distrust that those outside the admissions process—including judges—may harbor toward higher educational institutions. Universities' insistence that their admissions policies fall within the scope of

¹⁶⁸ See, e.g., Anita Bernstein, *Diversity May Be Justified*, 64 Hastings L.J. 201, 204-05 (2012) (collecting examples of judges and scholars criticizing diversity rhetoric as something of a sham, or defending it for strategic reasons, not for its own sake).

¹⁶⁹ See, e.g., Richard H. Sander & Stuart Taylor, Jr., *Mismatch: How Affirmative Action Hurts Students It's Intended to Help, and Why Universities Won't Admit it* 175-246 (detailing the authors' difficulties prying loose information about admissions and post-graduation outcomes from universities, educational institutions, and others); Richard H. Sander, *Listening to the Debate on Reforming Law School Admissions Preferences*, 88 *Denv. U.L. Rev.* 889, 951-52 (2011) (same); Richard H. Sander, *A Reply to Critics*, 57 *Stan. L. Rev.* 1963, 1983-84 (2005) (same).

¹⁷⁰ See, e.g., *Fisher*, 133 S. Ct. at 2421 ("Strict scrutiny does not permit a court to accept a school's assertion that its admissions process uses race in a permissible way without a court giving close analysis to the evidence of *how the process works in practice.*") (emphasis added).

“complex educational judgments”¹⁷¹ that lie within their expertise and outside the purview of courts, even if true, will fall on deaf ears if they are distrusted by the courts.¹⁷² That will be especially true if the courts become convinced, rightly or wrongly, that admissions offices are operating as bureaucratic fiefdoms of their own, rather than working under the control and supervision of university faculty.

We may learn something about just how distrustful courts are of universities, and what effects this distrust may have, when the Fifth Circuit takes up the *Fisher* case again on remand. For the truth is that although Judge Higginbotham’s original panel opinion only required the University of Texas to show a good-faith process of working toward the compelling goal of student diversity,¹⁷³ the university did far more than that. The record showed an extraordinary amount of work on the university’s part: substantial review and discussion of its mission, the use of a variety of carefully selected means of achieving the permissible end of student diversity, careful adjustment and re-adjustment in light of both Texas law and intervening judicial decisions, ample empirical research, and serious deliberation about both means and ends. This was no slapdash affair. It was a remarkably full and careful effort on the part of the university. Higginbotham was right to conclude that “the efforts of the University have been studied, serious, and of high purpose, lending support to a constitutionally protected zone of discretion.”¹⁷⁴

Even under a genuinely strict scrutiny review, in my view, the University of Texas met and exceeded its constitutional obligations. It is pointless to try to predict the future or to anticipate the outcome of particular cases. But certainly nothing in Justice Kennedy’s opinion in *Fisher* requires the Fifth Circuit to reject the University of Texas’s admissions policy. If the court nevertheless rejects the university’s policy on remand, we may be

¹⁷¹ *Grutter*, 539 U.S. at __.

¹⁷² Cf. John O. McGinnis, *A Politics of Knowledge*, Nat’l Affairs, Winter 2012, at 59 (warning of a public perception that universities, which were once associated with “expertise and social-scientific knowledge,” are now places of “arrogance and insularity”).

¹⁷³ See *Fisher*, 631 F. 3d at 231.

¹⁷⁴ *Id.*; see also *id.* at 222-31 (detailing the university’s efforts); Gerald Torres, *The Education of an Admissions Office*, 65 Vand. L. Rev. En Banc 211 (2012).

driven back to the question I have asked in this Part: How much—or little—do courts and others trust universities, their good faith and expertise? And is that distrust hampering universities' ability to succeed in the courts and carry out their academic missions at home?

CONCLUSION

In this Article, I have suggested that there are deeper questions lying just beneath the surface of the usual doctrinal wrangling in *Fisher v. University of Texas at Austin*. The Supreme Court's fairly typical focus on doctrinal adjustment obscures but does not conceal a set of underlying conflicts that increasingly characterize the courts' reaction to cases involving universities, academic freedom, and judicial deference. Affirmative action cases like *Fisher* and *Grutter* suggest a deeper debate over several related questions: What is the core mission of the university? Is it a single mission, one that applies to all universities—or is there room for institutional pluralism within the larger universe of higher educational institutions? Should courts defer to universities at all, and when? In answering that question, should courts defer only within the scope of *their* understanding of what constitutes a genuine matter for academic judgment—or should they be deferential about what constitutes an academic judgment as well?¹⁷⁵

Running through many of these questions is a still more basic question. That is the question of institutional allocation of decision-making responsibility between universities and courts.¹⁷⁶

¹⁷⁵ Cf. Gajda, *supra* note __, at 248 (arguing in favor of “a buffer zone in which wrongful action may well have occurred, but not sufficiently clearly to warrant risks of judicial intervention in the intellectual life of the university”); Horwitz, *Universities*, *supra* note __, at __.

¹⁷⁶ For general discussion, see Horwitz, *First Amendment Institutions*, *supra* note __. For a classic discussion of comparative institutional analysis, see Neil K. Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics, and Public Policy* (1994). For a recent statement, see Neil Komesar, *The Logic of the Law and the Essence of Economics: Reflections on Forty Years in the Wilderness*, 2013 Wis. L. Rev. 265. For useful discussions of comparative institutional analysis in the context of constitutional law and judicial deference, see, e.g., Eric Berger, *Deference*

In the heyday of academic abstention doctrine,¹⁷⁷ the assumption was that “colleges and universities are best managed by their own.”¹⁷⁸ Aggressive intervention into the judgments and affairs of a university was beyond the competence of the courts and would “likely destroy something valuable in higher education.”¹⁷⁹

That freedom from judicial intervention did not require universities to satisfy the courts that they met some exacting *judicial* definition of the purpose and nature of higher education. It did not, to recall Justice Alito’s dissent in the Christian Legal Society case, require universities to satisfy the courts that they favored “political correctness”—*or* that they opposed it.¹⁸⁰ Nor did it prevent universities from debating the nature of their mission and, sometimes, changing it.¹⁸¹ The judicial commitment was not to protect the freedom of universities to act as *judges*, moved by a particular notion of liberty or equality or simply by nostalgia for their own college days, would have them act. It was to protect the autonomy of universities and allow them to act and evolve as *the universities* saw fit, exercising their own independent authority and expertise. To be sure, constitutional academic freedom has

Determinations and Stealth Constitutional Decision Making, 98 Iowa L. Rev. 465 (2013); Eric Berger, *Individual Rights, Judicial Deference, and Administrative Law Norms in Constitutional Decision-Making*, 91 B.U. L. Rev. 2029 (2011); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821 (2008).

¹⁷⁷ See, e.g., Gajda, *supra* note __, at 22-50; Burne, *Academic Freedom*, *supra* note __, at 323-27.

¹⁷⁸ Gajda, *supra* note __, at 33.

¹⁷⁹ Byrne, *Academic Freedom*, *supra* note __, at 326.

¹⁸⁰ *Martinez*, 130 S. Ct. at 3000 (Alito, J., dissenting).

¹⁸¹ The Supreme Court’s famous decision in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819), is illustrative. As Amy Gajda reminds us, that case involved the decision of Dartmouth College’s trustees to reorganize the university along more sectarian lines,” as against a state effort “to put Dartmouth on a more ecumenical course.” Gajda, *supra* note __, at 26. By “offer[ing] a significant new measure of protection to the operational independence of colleges and universities,” *id.* at 29, the Supreme Court effectively also gave them the discretion to adopt *differing* missions. Matthew Finkin is right to conclude that “the *Dartmouth College* case has been read correctly to embrace a fundamental [judicial] commitment to institutional pluralism per se.” Finkin, *supra* note __, at 833.

long been associated with a particular—and admirable—vision of the university as an impartial truth-seeker, one that values “knowledge [as] its own end, not merely a means to an end,” and favors “hypothesis” over “dogma.”¹⁸² These values continue to animate most universities, even if they are sometimes honored in the breach. But more important still to constitutional academic freedom than any particular vision of the university is the principle that the university deserves “control over its academic destiny,”¹⁸³ to formulate its own academic goals and policies—for good or ill. There may be some core values from which the university cannot stray too far, but they should be understood broadly and deferentially. The question what a university is and how it should act belongs to the universities, not to the courts.

There is certainly evidence that, despite *Grutter* and despite *Fisher*’s reaffirmation that universities deserve deference on at least some matters, the pendulum has shifted away from university autonomy and toward a greater degree of judicial supervision.¹⁸⁴ The question of how to allocate decision-making authority between universities and courts remains a live one. Whether openly or implicitly, it is a question that underlies all of the various opinions in *Fisher*, both in the Fifth Circuit and the Supreme Court.

The answer to that question, and the other questions raised here, will ultimately depend on trust. Whether and how much courts and others trust universities is a crucial implicit question, not just in *Grutter* and *Fisher* but across a range of cases and controversies that confront the universities inside and outside the courtroom. It may be hidden by Justice Kennedy’s doctrinal gloss in *Fisher*, but the question of trust is very much in evidence in the Fifth Circuit opinions in that case, in the oral argument in the Supreme Court in *Fisher*, and in countless other judicial and public discussions. I think the evidence in *Fisher* suggests that the University of Texas earned a great deal of trust in that case, given its extensive study and deliberation concerning its admissions policies. We will have

¹⁸² *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring in the result). See also Byrne, *Academic Freedom*, *supra* note __, at 333-34 (describing the primary value of the university as one of “[d]isinterested scholarship and research”).

¹⁸³ Byrne, *Academic Freedom*, *supra* note __, at 330.

¹⁸⁴ See, e.g., Gajda, *supra* note __; Byrne, *supra* note __ [Threat].

to wait to see if the Fifth Circuit agrees on remand. But *Fisher*, and the issue of affirmative action in university admissions generally, is far from the only dispute in which public and judicial trust in universities will be at issue and likely to affect the outcome.

If that is so, it is not the fault of the courts or the public alone. Universities bear a significant share of the responsibility. It may be true that in our own time, there is little public trust in *any* institution.¹⁸⁵ But universities have earned some of that distrust on their own. If insulation from public pressure and hot-button disputes is a strength of the university, insularity is one of its greatest weaknesses.

Those of us who argue that universities are entitled to a substantial scope of judicial deference in the exercise of academic judgments, and that what constitutes the subject of a proper academic judgment is itself a question entitled to deference, must work on our own to demonstrate that the trust we ask for is well-placed.¹⁸⁶ We have an obligation to make sure that the “academic judgments” made by universities *are* academic judgments, made or approved by academics. We must supervise, monitor, and criticize the policy judgments made by universities, whether on admissions or on other issues, to make sure that they are genuinely consistent with our stated missions as individual universities. We must, perforce, debate what the mission of each university *is*. And, given some of our most widely shared academic values, we should make sure that our policies on admissions and other issues are based on real data and genuine academic deliberation, and that those data and deliberations are widely and publicly shared, including with critics of those policies.

I still believe that universities, and not courts, ought to have the final word on university policy, even where particular policies might be wrong or misguided. The responsibility for making academic judgments continues to rest primarily if not solely with the academy, not the courts—even, within broad limits, where race and university admissions are concerned. The freedom to make those decisions—and sometimes to make the wrong decision—is what academic autonomy and academic freedom means. But it is

¹⁸⁵ See Horwitz, *supra* note __, at __ [Wash].

¹⁸⁶ See, e.g., Horwitz, *Deference*, *supra* note __, at __. For a similar argument in the context of religious institutions, see Paul Horwitz, *Act III of the Ministerial Exception*, 106 Nw. U. L. Rev. 973 (2012).

as much a responsibility as a right. The universities must not abdicate that responsibility, just as the courts ought not grasp it for themselves.