

# The Promise and Precondition of Educational Autonomy

by NEAL KUMAR KATYAL<sup>1</sup>

*Grutter* was not a surprise. A close reading of what the Court had said since 1978 strongly suggested that a majority would permit affirmative action in the university admissions setting.<sup>2</sup> But the Court's reasoning, particularly its embrace of educational autonomy, was unexpected. In *Grutter*, Justice O'Connor's majority opinion said that the "long recognized" tradition "of educational autonomy," "grounded in the First Amendment," allows a university to consider race and ethnicity during the admissions process because "attaining a diverse student body is at the heart of the Law School's proper institutional mission."<sup>3</sup> Despite what the critics are saying about it, this autonomy argument stands on solid footing, anchored by both caselaw and good common sense.

Part One of this Essay defends the Court's analysis. The thesis here is a simple one: Universities should have a zone of freedom in which to conduct their academic affairs because they are better at making choices about educational matters than are generalist courts. This is the position I took, both in the Sixth Circuit and in the Supreme Court, as the chief counsel to the *amicus* deans of many of the nation's leading private law schools in *Grutter*. Academic freedom has become something of a pariah concept; indeed, our *amicus* brief contained the only substantial discussion, let alone defense, of

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1. John Carroll Research Professor, Georgetown University Law Center.

2. Neal Kumar Katyal, *Why Affirmative Action in American Colleges and Universities Should be Constitutional*, 39 J. BLACKS IN HIGHER ED. 96 (2003); Akhil Reed Amar & Neal Kumar Katyal, *Bakke's Fate*, 43 UCLA L. REV. 1745, 1753-72 (1996); Neal Kumar Katyal, *Why Affirmative Action in Higher Education is Safe in the Courts*, 9 J. BLACKS IN HIGHER ED. 83 (1995); Akhil Reed Amar & Neal Kumar Katyal, *School Colors*, NEW REPUBLIC, July 17 & 24, 1995, at 24.

3. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003). *See also id.* at 328 ("The Law School's educational judgment that [seeking racial and ethnic] diversity is essential to its educational mission is one to which we defer . . . . Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions . . . . 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.").

educational autonomy among the various briefs filed in the case. *Grutter*'s celebration of such autonomy was by necessity modest, for what was left unmentioned were the many abuses of power in the name of academic freedom.

To construct a viable system of deference to university decisionmaking, one must isolate not only the advantages of autonomy, but also its dangers. Part Two, to that end, sets forth some structural preconditions before academic autonomy claims should be recognized by courts. The Part explains why universities that seek to use educational autonomy to defend their admissions practices must release admissions data to a broader set of people than university administrators. As such, I issue a cautionary note to universities that are tempted to use their autonomy wantonly to carry out policies that cross the constitutional line.

This Essay does not respond to the critics of *Grutter* who think that diversity-based hiring is a smokescreen for crass racial preferences. Rather, it centers around the following question: If universities are to take *Grutter* and *Bakke* at face-value (as I believe they can and should), and implement a policy based on the value of diversity, how should they go about doing it? My claim is that educational autonomy, by itself, cannot become a shield to protect universities from all sorts of questionable practices. Rather, universities must engage in a greater degree of self-governance (including faculty decisionmaking over admissions policies and perhaps even peer review of these policies) before educational autonomy can insulate their practices from judicial review.

### **Part One: The Promise of Educational Autonomy**

The position of the private law deans whom I represented in *Grutter* was that institutions of higher learning should have a zone of freedom to operate with respect to their admissions decisions.<sup>4</sup> This zone of freedom was not, as our brief explained, an unlimited one. It would not, for example, excuse decisions made on the basis of animus.<sup>5</sup> But in close cases, the brief argued, the courts should defer

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4. The brief at the Supreme Court was on behalf of the Deans of law schools at Columbia, Cornell, Duke, Georgetown, New York University, Northwestern, University of Chicago, University of Pennsylvania, Stanford, and Yale. At the Sixth Circuit, the brief was filed on behalf of the Deans of law schools at Columbia, Cornell, Duke, Georgetown, Harvard, University of New York University, Pennsylvania, and Yale.

5. Brief of Judith Areen et al., *Grutter v. Bollinger*, No. 02-241, available at <http://www.law.georgetown.edu/faculty/nkk/publications.html#Chapters> [hereinafter "Brief of Judith Areen"].

to the considered judgments of the academy as to the best learning environment for its students. Academic institutions are better situated than generalist federal courts to evaluate the merits of the competing arguments in these cases.

“Academic autonomy” was not some catchy phrase we tossed into the brief because of its alliterative superiority to “academic freedom.” Rather, we used the term because it reflected a difference in claim.<sup>6</sup> Despite a somewhat noble strain of “academic freedom” that arises when the government persecutes those with unpopular or unconventional ideas,<sup>7</sup> more recently the claim has been associated with holocaust deniers, racists, sexists, and other miscreants.<sup>8</sup> In all of these disputes, the matter is pitted as the individual faculty member against the university, and typically arises in the context of discipline, promotion, or tenure. This face of academic freedom is the “standard” one – one about individual faculty members and their rights of research, writing, and teaching. But there is a second face to academic freedom, one of the university itself, to make educational judgments for the sake of its students. It is this second, institutional, face that has gotten obscured with all of the lurid publicity about the first.

Despite the fact that many institutions of higher learning in Europe have received academic autonomy for centuries,<sup>9</sup> in America

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6. See *id.* at 21 (“Academic autonomy is at the heart of this challenge to the University of Michigan’s admissions process, as Justice Powell’s seminal opinion in *Bakke* makes clear.”).

7. *Barenblatt v. United States*, 360 U.S. 109, 112 (1959) (in a case regarding a conviction of a teacher for failing to answer questions before a hearing of Congress, the Court announced that “[w]hen academic teaching-freedom and its corollary learning-freedom, so essential to the well-being of the Nation, are claimed, this Court will always be on the alert against intrusion . . . into this constitutionally protected domain.”); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (reversing contempt proceeding against professor who refused to answer questions by holding that the liberties associated with academic freedom are clearly “areas in which government should be extremely reticent to tread”).

8. *E.g.*, *Hardy v. Jefferson Cmty. Coll.*, 260 F.3d 671, 672, 682 (6th Cir. 2001) (finding that a school could not fail to renew the contract of a professor who used the words ‘nigger’ and ‘bitch’ because of the professor’s “rights to free speech and academic freedom”); Robert O’Neil, *Symposium: Free Speech and Community: Free Speech in the College Community*, 29 ARIZ. ST. L.J. 537 (1997) (discussing academic freedom claims of holocaust deniers).

9. See Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 851 (1987) (describing British tradition); Walter P. Metzger, *Symposium on Academic Freedom: Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1270 (1988) (“[T]he German concept of academic freedom contained a *tertium quid*: the university’s right, under the direction of its senior professors

the concept of “academic freedom” has largely been associated with the standard view described above. For example, the classic 1915 General Report of the Committee on Academic Freedom and Academic Tenure, a committee of fifteen eminent professors, centered their discussions of academic freedom on the rights and obligations of individual professors.<sup>10</sup> When crafting the brief for the private law school deans, I wanted to use language that captured something that was not necessarily broader, but that was different, from this other face of academic freedom. In short, the goal was to describe a tradition of deference to universities with respect to their educational decisionmaking.

This second face of academic freedom, as my colleague Peter Byrne has shown, flows out of two American nineteenth-century legal phenomena: academic abstention (which “has long specifically preserved university freedom from state regulation. It describes the traditional refusal of courts to extend common law rules of liability to colleges when doing so would interfere with the college administration’s good faith performance of its core functions”)<sup>11</sup> and state constitutional law (which “endow[] state universities with the status of being separate branches of government”).<sup>12</sup> The latter was particularly important as a background fact in *Grutter*, because it turns out that Michigan enacted the first constitutional provision for the separate government of its state university in its 1850 Constitution.<sup>13</sup>

Perhaps the earliest explicit recognition of academic autonomy by members of the Supreme Court can be found in Justice

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organized into separate faculties and a common senate, to control its internal affairs. Academic self-government - the heart of the somewhat cryptic phrase *Freiheit der Wissenschaft* - was acclaimed by German theorists not only for its own sake, but also for the essential protection it accorded to freedom of teaching and research.”); ROBERT K. POCK & JONATHAN D. FIFE, *ACADEMIC FREEDOM IN AMERICAN HIGHER EDUCATION: RIGHTS, RESPONSIBILITIES, AND LIMITATIONS* 6-7 (1993) (“It is certain that German conceptions of academic freedom played a major role in framing modern notions of academic freedom in the United States.”).

10. See General Report of the Committee on Academic Freedom and Academic Tenure (1915), reprinted in 53 L. & CONTEMP. PROBS. 393 (1990) [hereinafter “1915 Committee Report”].

11. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 323 (1989).

12. *Id.* at 327.

13. See MICH. CONST. of 1850, art. XIII, §§ 6-8, amended by MICH. CONST. ART. VIII, § 5. “The Michigan courts have consistently construed the provision as a prohibition against all attempts by the legislature to interfere with the academic management of the university.” Byrne, *supra* note 11, at 327.

Frankfurter and Justice Harlan's concurring opinion in *Sweezy v. New Hampshire*.<sup>14</sup> As those Justices put it, "Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling. . . . This means the exclusion of governmental intervention in the intellectual life of a university."<sup>15</sup> In making this claim, Justices Frankfurter and Harlan echoed a theme of the *Sweezy* majority:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.<sup>16</sup>

These explicit references to academic autonomy were built on several legal developments made over the preceding 150 years. As the historian Walter Metzger has shown:

Institutional autonomy was no Johnny-come-lately to educational law when it cropped up in the *Sweezy* case. Long before it was linked to academic freedom, the idea that educational institutions should be shielded from the clutch of government had been embodied in a constitutional decision prohibiting the revocation of college charters by state legislatures, and had been turned by educators into a political shibboleth that for a century had kept the regulatory power of the central state at bay. Though beset by the manifold involvements of the federal government in education after World War II, this ideational descendant of John Marshall and Thomas Jefferson was too deeply embedded in the American legal culture to be suddenly discovered or laid aside.<sup>17</sup>

It was this second face of academic freedom, as recognized in *Sweezy*, that Justice Powell invoked by name in his *Bakke* concurrence. In discussing the diversity rationale, Justice Powell built on Justices Frankfurter and Harlan's invocation in *Sweezy* of the

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14. 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in the result).

15. *Id.* at 262.

16. *Id.* at 250.

17. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1315 (1988).

“four essential freedoms’ that constitute academic freedom,” one of which is to decide “‘who may be admitted to study.’”<sup>18</sup> And in the years between *Bakke* and *Grutter*, the Supreme Court unanimously invoked this very discussion by Justice Powell to explain that “autonomous decision making by the academy itself” is necessary for such freedom to thrive.<sup>19</sup> Indeed, in a previous case involving the University of Michigan, the Justices analogized academic autonomy to the way it reviewed personnel decision practices by state and local governments, concluding that even greater autonomy here was appropriate due to the comparative expertise of the academy:

Add[ing] to our concern . . . is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, “a special concern of the First Amendment.” *Keyishian v. Board of Regents*. If a “federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies,” *Bishop v. Wood*, far less is it suited to evaluate the substance of 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 decision making.”<sup>20</sup>

In addition, although far more circumscribed, the autonomy universities enjoy shares similarities with the operation of religious institutions.<sup>21</sup> And while this institutional face of academic freedom

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18. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (quoting *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring in the result)); see also *id.* (“The freedom of a university to make its own judgments as to education includes the selection of its student body.”).

19. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985). See also *Widmar v. Vincent*, 454 U.S. 263, 276-77 (1981) (“Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or ‘to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.’”) (citing Justice Frankfurter’s opinion in *Sweezy* and Justice Powell’s opinion in *Bakke*).

20. *Ewing*, 474 U.S. at 226 (citations and footnote omitted). And, in the midst of this very language, the Court’s opinion made clear that “[d]iscretion to determine, on academic grounds, who may be admitted to study, has been described as one of ‘the four essential freedoms,’ of a university.” *Id.* at 226 n.12 (citing *Bakke*).

21. See, e.g., *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976) (holding that the court below “impermissibly substitute[d] its own inquiry into church polity and resolutions based thereon of those disputes,” and that “[t]o permit civil courts to probe deeply enough into the allocation of power within a [hierarchical] church so as to

can be criticized, like its individual-professor-centered counterpart, for being potentially unbounded,<sup>22</sup> that criticism is true of *any* deference-based argument in jurisprudence. Yet federal courts routinely defer to all sorts of bodies: administrative agencies, prison officials, expert witnesses, military officials, state administrators, and the like.<sup>23</sup>

The discussion of academic freedom in *Grutter*, in short, was not some afterthought, shorn of history or precedential support. Rather, the concept was built on a recognition of the First Amendment concerns of government intrusion into higher education, coupled with a healthy skepticism about the ability of generalist federal courts to make decisions for a university with respect to learning. However, by using the singular term “academic freedom” to lump together academic autonomy cases with the standard First Amendment claims of individual professors, the Court’s language since *Sweezy* has obscured the vitality of this second face of academic freedom, institutional autonomy, in the caselaw. In short, *Grutter* recognized a limited principle of comparative academic expertise – a principle that is built on how the Court treats other special institutions in American society. One can disavow the individualist professor-centered claims about academic freedom and still support this circumscribed argument from institutional expertise.

The need for this limited academic autonomy principle becomes quite clear when one turns to the position of the United States Government, as *amicus*, in *Grutter*. The Government argued that universities could eschew for *all* applicants traditional indicia of merit, such as test scores, as a method to increase the diversity of its entering class. Its brief harped repeatedly on the benefits of a geographical solution, like the State of Texas’s 10% plan for its undergraduate body at University of Texas.<sup>24</sup> Of course, such solutions do not work

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decide . . . religious law [governing church polity] . . . would violate the First Amendment” (third & fourth alterations in original) (quotation omitted)).

22. See, e.g., Walter P. Metzger, *Professional and Legal Limits to Academic Freedom*, 20 J.C. & U.L. 1, 1 (1993) (“Academic defenders of academic freedom . . . tend to be disquieted by attempts to define its limits: efforts to pound boundary markers into this fragile terrain have been known to produce slippery slopes.”); Michael A. Olivas, *Reflections on Professorial Academic Freedom: Second Thoughts on the Third ‘Essential Freedom,’* 45 STAN. L. REV. 1835, 1835 (1993) (describing academic freedom as “poorly understood and ill-defined”).

23. See, e.g., *Chevron v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

24. Brief of Amici Curiae United States at 17, *Grutter v. Bollinger*, 539 U.S. 306 (2003) (No. -02-241), available at [http://www.umich.edu/~urel/admissions/legal/gru\\_amicus-ussc/us-gru.pdf](http://www.umich.edu/~urel/admissions/legal/gru_amicus-ussc/us-gru.pdf) (last visited Feb.

for graduate schools or law schools with national and international student bodies. Geographical solutions also happen to be rooted in the historical contingency of residential segregation that is a consequence of past racism. But to the extent that such alternatives ever amount to producing diversity in admissions, they exact a price upon other values such as candor, transparency, merit, and truth.<sup>25</sup> Hypocrisy and subterfuge are inimical to ordinary academic principles. Schools should be free to consider adopting these plans despite their obvious flaws; but to use the Equal Protection Clause as a bludgeon to compel their adoption is a wholesale interference with university decisionmaking.

At the same time, the fact that there is an upside to academic autonomy does not mean that there are not downsides. Consider, for example, how a strong variant of the academic freedom principle could insulate universities from discrimination claims brought by minorities. If the university is free to discriminate against whites, the argument goes, why isn't it free to do the same to African-Americans?<sup>26</sup> But there is quite a difference between these two positions, most particularly because it is harder to envision circumstances in which a majority would discriminate against itself out of animus.<sup>27</sup> In circumstances of clear and purposeful

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1, 2004).

25. See John Yoo, as quoted in Jeffrey Rosen, *Damage Control*, NEW YORKER, Feb. 23, 1998, at 64, 68 (stating that under the California plan, "if you still want to get African-Americans and Hispanics in you have to redefine the central mission of the research university in a way that lowers standards for everybody . . . . Once you start telling people that merit doesn't matter when they're at the formative stages of their careers, I think you do long and lasting damage to America.").

26. See Curt A. Levey, *Symposium on Confronting Realities: The Legal, Moral, and Constitutional Issues Involving Diversity: Panel III: Affirmative Action: Racial Preferences in Admissions: Myths, Harms, and Alternatives*, 66 ALB. L. REV. 489, 498-99 (2003) (stating that the academic freedom argument in *Bakke* is "the least convincing of all because Justice Powell is not even consistent here. . . [T]he idea that universities have the academic freedom to make race-based decisions is a very scary notion. What about a school's academic freedom to decide that an all-White student body is the best thing?"); see also Alan M. Dershowitz & Laura Hanft, *Affirmative Action and the Harvard College - Discretion Model: Paradigm or Pretext?* 1 CARDOZO L. REV. 379, 409 (1979) (stating that *Bakke's* emphasis on academic freedom and diversity "could even allow a university to weigh an applicant's race or religion negatively - as Harvard did under President Lowell - in order to enhance diversity in the face of an overabundance of applicants from a particular racial or religious group").

27. See John H. Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735 ("A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and deserts of Whites relative to those of others; or to overestimate the costs of devising an alternative classification that would extend to certain Whites the advantages generally



discrimination motivated by animus, or perhaps in situations where Congress has spoken clearly about the need for judicial intervention into university affairs in a specific area, it is appropriate for federal courts to substitute their judgment for those of academic administrators.<sup>28</sup> But in the absence of such circumstances, a substantial sphere of autonomy should exist for the university to act in ways that further its educational mission.<sup>29</sup> As such, it is fair to say that Justice O'Connor's invocation of educational autonomy in *Grutter* did not insulate discriminatory practices from judicial review, rather it simply recognized that some decisions are best left to universities when they are made on the basis of educational judgment and not animus. But if that principle acts to condition the exercise of academic autonomy, then it is only fair to ask what other limits to autonomy exist.

### **Part Two: The Preconditions for Educational Autonomy**

As with all forms of deference, the risk with educational autonomy arguments is that the institutions to which deference is shown will use them to hide their abuses. I have argued above that, in general, universities enjoy a greater comparative advantage in structuring educational settings. But this claim, by itself, could give universities enough latitude to adopt policies on the basis of animus and then to cover them up with educational post-hoc justification. And, in a less sinister vein, the claim could permit universities to make substantial errors in judgment based on their good-faith beliefs about the educational benefits of particular decisions. The Supreme Court has already stated that such results are unacceptable – for it struck down the University of Michigan undergraduate admissions policy despite its status as an institution that receives educational autonomy and despite (presumably) a lack of animus.<sup>30</sup> On this

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extended to Blacks.”).

28. See *Washington v. Davis*, 426 U.S. 229, 244-45 (1976); Kathleen M. Sullivan, *After Affirmative Action*, 59 OHIO ST. L.J. 1039 (1998).

29. See *Bd. of Regents v. Southworth*, 529 U.S. 217, 239 (2000) (Souter, J., concurring).

30. *Gratz v. Bollinger*, 539 U.S. 244, 255, 270 (2002) (Rehnquist, C.J.) (recognizing that in *Bakke*, Justice Powell allowed the “consideration of race as a factor in admissions” but holding the undergraduate admissions program unconstitutional because “[t]he current LSA policy does not provide such individualized consideration”); *id.* at 278 (O'Connor, J., concurring) (stating that the university cannot further the diversity of its student body with an admissions policy that “ensures that the diversity contributions of applicants cannot be individually assessed” due to systemic flaws).

narrow tightrope, where the possibility of error is high and where Justice Scalia has warned that the Court's "*Gratz-Grutter* split double header seems perversely designed to prolong the controversy and the litigation,"<sup>31</sup> institutions of higher learning must take particular care to explain why they are capable of self-governance.

The principle of academic autonomy can and must be formulated in a way that recognizes their superior institutional competence but that provides incentives to reduce the likelihood of errors and animus. The impact of errors and animus is compounded by a veil of secrecy around the admissions process at most universities, a secrecy that means that most policies and practices in the admissions office never see the light of day. We must be broadly fearful of any result that gives universities an unreviewable pass, and which allows them to insulate their decisions from any public scrutiny whatsoever due to the confidentiality of the admissions data for all time. The combination of deference and secrecy is a particularly potent one, and instead of eliminating the deference, it is worth asking whether secrecy policies can be modified in ways that would promote better decisionmaking within the university.

Begin with the notion of faculty involvement. Many institutions that may be tempted to plead academic autonomy in admissions challenge cases do not use faculty at all in their processes – the admissions decisions are being made by administrators who may lack understanding about the educational dynamics of the university.<sup>32</sup> And, in some of those universities, the administrators' decisions are not reviewed by faculty after they are made, at any time, to ensure that the choices are consistent with the best education the university can offer. If educational autonomy becomes a license for university administrators to admit who they want when they want without faculty oversight, it's not part of academic freedom at all. Rather, it becomes a lawyer's trick, a way to help a client convert their policy into something that appears and sounds more lofty and principled than it really is. And it will collapse under its own weight if permitted to grow in that way.<sup>33</sup>

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31. *Grutter v. Bollinger*, 539 U.S. 306, 347 (Scalia, J., concurring in part and dissenting in part).

32. It is significant that Justice Thomas' largely dissenting opinion in *Grutter* began with the announcement of his belief that "blacks can achieve in every avenue of American life without the meddling of university administrators." *Grutter*, 539 U.S. at 349 (Thomas, J., concurring in part and dissenting in part).

33. In making this prediction, however, I am reminded that many more erudite than I have failed at predicting even this specific issue. See, e.g., Yudof, *supra* note 9, at 855

Accordingly, I have come to believe that in order to ensure that educational autonomy does not translate into unfettered discretion, institutions that seek to consider race as part of their autonomy in the admissions process cannot keep their admissions data completely confidential. Complete secrecy breeds bad decisionmaking and eliminates crucial restraints.<sup>34</sup> As Justice Brandeis once said, "Sunlight is said to be the best of disinfectants."<sup>35</sup> And yet, universities constantly refuse to release any admissions data, even data that is many years old.

We therefore face the important question: *to whom* should the data be released? There are four obvious entities that could receive the data, in ascending order of scope:

1. University administrators
2. Faculty
3. Courts under seal
4. The public

I have argued that a precondition for educational autonomy is that a University not make admissions choices that prefer certain candidates on the basis of their race unless they disclose admissions data to a broader set of people than university administrators (Option #1). Each of the other types of disclosure produces a range of consequences, only some of which are foreseeable presently. On the positive side, greater disclosure brings with it the possibility of additional checks on erring administrators and faculty. And certainly only the last choice will maximize the goal of popular accountability; each of the other options requires some information to be kept from the public.<sup>36</sup>

On the negative side, however, the release of the data, particularly to the public, can produce ruinous consequences. If the data is released in ways that allow statistical testing by third parties,

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("My own suspicion is that the Powell approach to academic freedom . . . was for that day and trip only and that this face of academic freedom will quickly fade.")

34. Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307 (2003) (discussing how secrecy in groups can breed groupthink and conformity).

35. L. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (National Home Library Foundation ed. 1933).

36. See Terrance Sandalow, *Racial Preferences in Higher Education: Political Responsibility and the Judicial Role*, 42 U. CHI. L. REV. 653, 695 (1975) ("These policies are not the product of a politically responsible legislative body, but of decisional processes internal to the universities that have adopted them.").

then it may reveal the identities of people who are admitted (or rejected) – raising serious privacy concerns *ex post* and reducing the number of applications *ex ante*. Its release may stigmatize particular groups in society – football players, chess players, African-Americans, whites, those from New York or those from Montana. Because all of us lack information about what the numbers actually are, as well as the potential for statistical manipulation and mischief with those numbers, it is difficult to gauge the impact of public release. After all, there is reason to fear that this may be the type of decision that Guido Calabresi and Philip Bobbitt have called a “tragic choice,” one in which there is an appropriate role for “subterfuge” by universities – either because of the facts contained within the data or the way manipulation of those facts might skew public debate.<sup>37</sup> The public revelation of the data could simply be too devastating for some groups in society, as well as some matriculated students. And yet, there is the strong pull towards sunlight, for its obvious reasons.

This is not the first time those concerned with academic freedom wrestled with these competing values. In the standard face of academic freedom, these issues arise all the time: Should the reasons for a colleague’s promotion/tenure denial be released to individuals outside of the university, such as courts, government bodies, or the public?<sup>38</sup> Doing so would ensure a greater amount of scrutiny by outsiders and would minimize groupthink, but it may also produce unfair stigmatization of the professor.

The original 1915 committee on academic freedom devised a classic solution to this problem, one that has become so widespread

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37. GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 195-97 (1978).

38. *Univ. of Pa. v. EEOC*, 493 U.S. 182, 199-202 (1990) (rejecting claim that the university’s First Amendment academic freedom rights could prevent the Equal Employment Opportunity Commissions from subpoenaing peer review materials in tenure discrimination case); *EEOC v. Franklin & Marshall Coll.*, 775 F.2d 110, 114-15 (3d Cir. 1985) (declining “to follow the Seventh and Second Circuits in recognizing either a qualified academic privilege or in adopting a balancing approach,” the court ordered the production of peer review material after finding no evidence that “Congress intended that special treatment be accorded academic institutions *under investigation* for discrimination”); *EEOC v. Univ. of Notre Dame Du Lac*, 715 F.2d 331, 337-38 (7th Cir. 1983) (employing a balancing test to determine when disclosure is proper after finding academic freedom could not serve as a “shield to hide discrimination” but that there existed “a qualified academic freedom privilege protecting academic institutions against the disclosure of the names and identities of persons participating in the peer review process”); *Zaustinsky v. Univ. of Cal.*, 96 F.R.D. 622, 625-26 (N.D. Cal. 1983), *aff’d* without opinion, 782 F.2d 1055 (9th Cir. 1985) (disallowing unfettered discovery in tenure discrimination case but providing for *in camera* inspection of peer review materials to decide what, if any, of the university’s information should be released).

today that we take it for granted. This is the device of peer review, which can help to deflate the tension between the desire for accountability and sunlight on the one hand, and the harms of stigmatization and privacy loss on the other.<sup>39</sup> The idea of peer review is to require a university to make a candidate's writings available to faculty from other schools so that experts who are not directly affiliated with the candidate's school can provide their opinions. By bringing in outsiders, the tendency toward groupthink is reduced. And by bringing in experts from the academy itself, peer review ensures that academics (and not some outside body of generalists like the federal courts) will provide their judgment in, at least, the initial stages of an investigation. Peer review, in short, is a powerful device for the academy to use in furtherance of its self-governance. Yet despite its prominence in resolving standard, individualist, academic freedom disputes, peer review has not been put to use, to my knowledge, as a method for resolving institutional autonomy matters.

A peer-review proposal for academic autonomy would look something like this: Universities that would like to take race into consideration must have their processes reviewed by a national committee of academics devoted to the task. For law schools, for example, the American Bar Association and the American Association of Law Schools could draw on their expertise in creating committees that review the accreditation of each of our nation's law schools, and devise a similar committee that would examine admissions policies. The committee's jurisdiction would only be invoked when a university wants to use race as an admissions factor – for a great many law schools, therefore, the committee would play no role.<sup>40</sup>

The obvious risk exists that members of the committee would apply their own political preferences about affirmative action in lieu of their educational judgments. This is true, naturally, of any

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39. See 1915 Committee Report, *supra* note 10, at 406 (permitting a college teacher, before dismissal or demotion, to have a review “by a committee of his fellow specialists from other institutions”); David M. Rabban, *Does Academic Freedom Limit Faculty Autonomy?*, 66 TEX. L. REV. 1405, 1410 (1988) (“Beginning with the 1915 Declaration, commentators have identified peer review as the primary method of determining whether individual professors have violated, or have engaged in activities unprotected by, academic freedom.”).

40. Quite obviously, the holding in *Grutter* is only that a university *may* adopt an affirmative action policy to augment the diversity of its student body, not that it *must* do so. Those who argue that affirmative action is constitutionally required are, in my judgment, far off base.

decisionmaker, including federal judges. But there are ways to reduce the risk in the peer review context. For example, members of the committee could be required to sign statements attesting to their commitment to apply the precepts of *both* Supreme Court decisions in the Michigan cases. All of the data about the Michigan programs should be made available to potential committee members before signing the statement. If the committee were composed of people who would find the Michigan undergraduate policy unacceptable and the law school policy acceptable, it would reduce the dangers of political bias.

To provide further incentives for good committee decisionmaking, the standard checks on peer review could be brought to bear as well, including the selection of committee members known for divergent political views and the possibility of appointing visiting academics to serve for temporary periods to preclude collusion among members of the committee. The majority of the committee, however, would be composed of long-term repeat players who would garner expertise and would use that expertise to advise universities about ways to stay within constitutional boundaries.<sup>41</sup> The members of the committee, if of sufficient stature, will exert an influence on each other toward responsibility and accountability, in that members do not want to appear weak or prejudicial to each other. Written opinions (with dissents) could be issued by the committee, though if the committee process is working well, then there would not be a need for their broad release. Other details would need to be fleshed out, of course, but the notion here is to create a peer review body of experts who can further the educational goals of the university.

One function of law school accreditation committees, such as the ABA's, is to ensure that the Bar is able to govern its own affairs largely free of government involvement. A similar promise exists for admissions review committees. By permitting experts steeped in the academy to review specific admissions policies, the case for deference to those policies is far stronger. As such, when a federal lawsuit is filed against a policy that the Committee has approved, the generalist courts should evaluate that lawsuit with a very heavy presumption in favor of the policy's constitutionality. Without the Committee's

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41. The results of these reports might possibly be introduced into court as part of an institution's autonomy defense or as part of a constitutional challenge. Until the need squarely arises, however, it could be dangerous to release to the litigants all of the raw data the commission had before it. Doing so would replicate all the problems with public release discussed above.

stamp of approval, however, the case for justifying the policy on the basis of educational autonomy is far weaker.

If universities are to be responsible players in an increasingly multicultural world, they must take care to ensure that their judgments in admissions are not being made with too rough a stroke, such as with specific point awards based on the color of one's skin. That roughness, whether deliberate or unintentional, and whether de facto or de jure, is anathema to the educational mission the university seeks to maintain. The role of the standing admissions committee would be not only to ferret out cases of animus, but also to make sure that admissions choices are being made consistent with the educational goals of the university. A peer review solution, therefore, has the positive byproduct of furthering the process of academic freedom, for it celebrates the university as the locus of decisionmaking and reaffirming its superior institutional competence in resolving disputes.<sup>42</sup> Before adopting more radical solutions to the admissions data problem that could dramatically shift the expectations of students and society, such as the public release of all admissions data, we should give peer review a chance.

### Conclusion

The principle of academic autonomy recognizes that universities often have superior competence at making tough admissions policy choices when compared to federal courts. But university decisionmaking can also be bureaucratic, too rough, not tailored to the educational interests at stake, and possibly even tinged by animus. Without strong procedural limits to the use of academic autonomy, the doctrine can morph into a monster with pernicious consequences.

It is far too convenient to read *Grutter* snidely, as a decision that gives colleges cover to adopt blunt racial preferences, devoid of any connection to true diversity. But *Grutter*, just as with *Bakke* before it, was based on a wonderful, rich idea: that students can learn from those with divergent backgrounds and experiences. Academic autonomy, to retain its meaning, must remain true to that promise in the admissions context. And this means taking both *Grutter* and *Gratz* seriously, recognizing that universities cannot do whatever they

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42. See Rabban, *supra* note 39, at 1410 ("Peer review helps assure that the decision rests on valid professional grounds and thus is itself a contribution to academic freedom. When people without the relevant scholarly background make these judgments, it may become difficult to avoid suspicions that inappropriate, nonprofessional considerations played a significant role.")

want and plead autonomy when the lawyers arrive at the front door. Academic freedom is a sacred concept, but, like most good things in life, it must be properly tended to and cherished. Otherwise, the case for its demise will become too strong. And as powerful a positive force as *Bakke*-style affirmative action has been in our society, the loss of academic autonomy for our nation's universities would be a terrible price to pay for it.