

JUDICIAL DEFERENCE TO ACADEMIC DECISIONS: AN OUTMODED CONCEPT?

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I. INTRODUCTION

Judicial deference to academic decisions and actions emerges in many and varied settings and for myriad reasons. The notion that courts should not only respect the judgments of academic councils but should decline to overrule or second-guess such judgments has deep roots. Judicial deference has had its share of champions and critics; some scholars laud the doctrine as a blessing,¹ while others decry it as a curse.² Some observers argue that judicial deference represents an idea whose time has come and gone, and now deserves a decent burial,³ while others view this

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1. See Neil Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 563–64 (2003). The author, who is now Deputy Solicitor General of the United States, wrote from the perspective of writing and filing an amicus brief in the Supreme Court on behalf of deans of private law schools in *Grutter v. Bollinger*, 539 U.S. 306 (2003).

2. See Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 9–10 (2006).

3. This thesis is the focus of a very recent book by Amy Gajda, *The Trials of Academe: The New Era of Campus Litigation*, marshaling both relevant data and

legal doctrine as alive, well, and useful.⁴ An assessment of the current status of so vital a judicial practice is thus timely, if not overdue. This article seeks to identify the historic rationale for judicial deference to academic decisions and the conditions under which it has been invoked, as well as changing circumstances and forces that have raised doubts about the continuing stature of this doctrine.

A quite recent and highly publicized case offers illustrative insight. When former University of Colorado Professor Ward Churchill sought reinstatement following dismissal (on charges of flagrant research misconduct) from his tenured position on the Boulder campus faculty, the state trial judge was troubled by sharply conflicting factors. On one hand, a jury in his courtroom had concluded several months earlier that Churchill's firing had been motivated by official animus against constitutionally protected speech.⁵ Although the University had declined to impose any sanction against Churchill on the basis of highly controversial messages he had posted soon after the terrorist attacks of September 11, 2001, the jury concluded that a subsequent (and ultimately adverse) review of Churchill's published research had been triggered by the contentious postings.⁶ That finding, in the jury's view, entitled the embattled scholar to reinstatement. While the accompanying award of but one dollar in damages undeniably reflected ambivalence or division on the jury's part, there was no doubt they had ruled in Churchill's favor on the merits of his reinstatement claim.

On the other hand, the judge was keenly aware that the dismissal had followed a lengthy, painstaking review by two faculty committees, as well as the ultimate judgment of the Board of Regents.⁷ A special committee charged with addressing research misconduct reached an adverse conclusion, which was later affirmed, after separate review, by the faculty-elected Committee on Privilege and Tenure.⁸ Such review reflected a strong commitment by the University to shared faculty governance and due process in faculty personnel matters. Thus, the judge was torn between the finding in Churchill's favor by a jury he had charged and guided, and his understanding of the process the University had followed in terminating a

analysis. AMY GAJDA, *THE TRIALS OF ACADEME: THE NEW ERA OF CAMPUS LITIGATION* (Harvard University Press 2009). For an extensive interview with the author, highlighting issues of judicial deference to academic judgments, see Amy Gajda and Scott Jaschik, *The Trials of Academe*, *INSIDE HIGHER ED.*, Sept. 22, 2009, <http://www.insidehighered.com/news/2009/09/22/gajda>.

4. Katyal, *supra* note 1.

5. *Churchill v. Univ. of Colo.*, No. 06CV11473, slip op. at 26 (D. Colo. July 7, 2009), available at <http://www.aaup.org/NR/rdonlyres/98F88939-7C2A-4D61-BE8E-0260F62ABFFE/0/ChurchillNavesdecision.pdf>

6. For an analysis of the earlier phases of the Churchill case, see Robert M. O'Neil, *Limits of Freedom: The Churchill Case*, *CHANGE*, Sept.-Oct. 2006, at 34.

7. *Churchill*, No. 06CV11473 at 22.

8. *Id.* at 15.

tenured faculty appointment.

In the end, the court resolved such doubts in the University's favor, though not easily or comfortably. Even if the jury had awarded substantial damages to Professor Churchill, the judge made quite clear that the Regents' dismissal action should remain free from judicial intervention or reversal. Basically, ordering reinstatement in such a case "would entangle the judiciary excessively in matters that are more appropriate for academic professionals."⁹ That conclusion drew support from an earlier Colorado ruling on strikingly similar facts, whereby a federal judge deferred to the challenged academic judgment of a different university, despite a plausible professorial claim of injustice that courts might otherwise redress.¹⁰ The *Churchill* judge went on to note that were he to compel a terminated professor's reinstatement, serious remedial problems would likely follow—not only in regard to the enforcement of such a decree, but, even more seriously, also posing the risk of seriously impairing the University's sensitive and complex academic mission. Recognition of such "potential to harm students and faculty who played no role in the [dismissal] decision," thus, strongly reinforced a judgment based on the "inappropriateness" of judicial intervention.¹¹

The *Churchill* ruling reflects several qualities of judicial deference, and its recency suggests a continuing vitality for this doctrine.¹² Such cases are seldom easy, since the basis for intervention may be appealing, even compelling, and the problem might warrant a more aggressive judicial course should a similar dispute arise in a non-academic setting. Yet the factors that ultimately counseled abstention in cases such as that of Professor Churchill merit special recognition in the academic setting—the complexity of most challenged academic decisions, the relative unfamiliarity of judges with college and university procedures and deliberations, the record of typically elaborate internal review preceding the challenged action, and the daunting task of framing a decree that would avoid seriously disrupting the process of teaching and learning within the college and university setting. Despite such considerations, the doctrine of judicial deference has recently become an increasingly visible target of

9. *Id.* at 36.

10. *Thornton v. Kaplan*, 961 F. Supp. 1433 (D. Colo. 1996).

11. *Churchill*, No. 06CV11473 at 40.

12. An even later decision reinforces this impression. In early December of 2009, the New York Supreme Court's Appellate Division rejected a former professor's claim that New York University had breached its obligation under a settlement agreement, specifically regarding it dispositive that "[c]ourts exercise restraint in applying traditional legal rules to determinations concerning academic qualifications because such determinations generally rest upon the subjective professional judgment of trained educators." *Flomenbaum v. New York Univ.*, 890 N.Y.S.2d 493, 493 (1st Dept Dec. 3, 2009). The Appellate Division specifically relied on *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985), to support their deferential view of this case. *Id.*

concern, even open hostility, in some sectors of the academic community. A brief review of its evolution and application may be helpful in setting the stage for the current controversy.

II. ANTECEDENTS AND APPLICATIONS

Quite clearly judicial deference has a long and distinctive history. Arguably the origins of this doctrine could be traced as far back as the early nineteenth century, conceivably to the *Dartmouth College* case,¹³ despite the very different legal context and terminology. Whether or not the doctrinal roots run that deep, courts unhesitatingly showed respect for academic judgments long before the Supreme Court in 1985 gave a strong endorsement to such deference in *Regents of the University of Michigan v. Ewing*.¹⁴ That case involved a student's challenge to his ouster from a graduate medical program on the basis of a failing grade in an examination integral to the academic program. The justices were unanimous in their declaration that courts had no business second-guessing, much less overturning, such judgments, however appealing the ousted student's plea. In their ruling, moreover, they left not the slightest doubt about the strength of that conviction—or about their view of the distinctive nature of the academic setting to which such deference properly applied:

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.¹⁵

Such a rousing endorsement of judicial deference could hardly have been more welcome to the college and university community at a time of rapidly rising court challenges to a host of actions and decisions. Yet the concept was hardly novel. Indeed, the Supreme Court's *Dartmouth College* decision¹⁶ had arguably established a zone of immunity for academic decisions and actions—albeit for reasons (the sanctity of contract) rather different from those that would later evoke the Justices' solicitude. Although the *Ewing* Court cited remarkably little precedent, Justice Stevens' opinion did recall one relatively recent case in which the

13. *Tr. of Dartmouth Coll. v. Woodward*, 17 U.S. 518 (1819). In this historic case, Dartmouth's trustees sought judicial relief after the New Hampshire legislature increased the size of the board, gave appointive powers to the governor, and created a superior board with powers of oversight. The Supreme Court ruled in the trustees' favor, declaring that the college's charter created contractual rights and obligations that the legislature could not impair under the U.S. Constitution.

14. 474 U.S. 214 (1985).

15. *Id.* at 225.

16. *Woodward*, 17 U.S. at 518.

University of Missouri had prevailed against the court challenge of another dismissed student.¹⁷ There too the basis for the adverse action had been a faculty judgment regarding a student's inadequate academic performance. With equal conviction about the appropriateness of abstention, the Court ruled against judicial intervention, albeit for a reason slightly different from that in *Ewing*—specifically, recognition that such decisions by faculty require “an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decision-making.”¹⁸ The Court in *Bishop* cited the general reluctance of judges to second-guess “the multitude of personnel decisions that are made daily by public agencies,”¹⁹ but then noted nine years later in *Ewing* (with specific reference to the campus setting of the case before them) that “far less is [a federal court] suited to evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions.”²⁰

The *Ewing* Court also offered a strong hint of an additional and rather separate basis for deference, citing the Court's long recognized “responsibility to safeguard [colleges and universities'] academic freedom,”²¹ most clearly evidenced by the Justices in the 1967 *Keyishian* ruling, which invalidated New York's loyalty oath on First Amendment grounds, with a special emphasis on the constitutional stature of academic freedom.²² Although academic freedom would, even in the 1960s, have been deemed mainly a personal or individual interest, the *Ewing* Court added in a puzzling footnote that “academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself.”²³ Professor Judith Areen concludes from this cryptic addendum: “In other words, constitutional academic freedom protects both individual faculty members and institutions.”²⁴ Obviously when the institution seeks immunity for a decision made or an action taken by its faculty—the prototypical judicial deference case—there is no need to arbitrate between contending or conflicting claims advanced by the college or university on one hand and by its professors on the other. Yet such unity of interest is not always present, and in a now far more complex litigation scene, such conflict cannot be avoided; we shall address it in due course.

17. *Bd. of Curators v. Horowitz*, 435 U.S. 78 (1978).

18. *Id.* at 90.

19. *Bishop v. Wood*, 426 U.S. 341, 349 (1976).

20. *Regents of the Univ. of Mich. V. Ewing*, 474 U.S. 214, 226 (1985).

21. *Id.* at 226.

22. *Keyishian v. Bd. of Regents*, 385 U.S. 589 (1967).

23. *Ewing*, 474 U.S. at 226 n. 12.

24. Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 *GEO. L.J.* 945, 979 (2009).

For the moment, the *Ewing* footnote suffices.

The *Ewing* case may in a different way aid understanding of the Court's unambiguous embrace of judicial deference. Almost in passing, and prefatory to a quite different point, Justice Stevens cited "our concern for lack of standards."²⁵ That concern apparently reflected doubts not so much about the competence of courts in unraveling complex matters as it revealed uncertainty about (or even the absence of) meaningful criteria by which to frame remedies that would adequately address the unique circumstances of academic decisions. Such remedial concerns do, as we noted in regard to the recent *Churchill* ruling, occasionally enter the equation—usually more as a makeweight than as a driving force, though often useful to reinforce other grounds for abstention.

III. RATIONALES AND CONDITIONS

Before appraising the current status of judicial deference, a review of its underlying rationale and of conditions under which it is invoked seems appropriate. At the threshold, this doctrine is hardly unique to the campus context. As the *Ewing* Court noted, reluctance to overturn or even to modify academic judgments is really a special application of a much broader concept of abstention—reflected, for example, in the administrative law doctrine of "primary jurisdiction" under which courts regularly defer to agencies with greater and more specialized expertise in a subject area.²⁶ Yet, as Kaplin and Lee observe, abstention here has special force; "issues regarding academic deference can play a vital, sometimes dispositive role in litigation involving higher educational institutions"²⁷. An abiding concern for academic freedom clearly explains many such rulings, as the brief reference in *Ewing* suggested. Indeed, occasionally a court will decline to intervene on academic freedom grounds even on behalf of an aggrieved professor who presses a plausible personal academic freedom claim; as one federal court noted:

[F]or a university to function well, it must be able to decide which members of its faculty are productive scholars and which are not . . . [T]he only way to preserve academic freedom is to keep claims of academic error out of the legal maw.²⁸

Thus, through a curious twist, judicial deference based upon regard for

25. *Ewing*, 474 U.S. at 226.

26. See, e.g., *Barnhart v. Walton*, 535 U.S. 212 (2002), *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); Catherine T. Struve, *Greater or Lesser Powers of Tort Reform: The Primary Jurisdiction Doctrine and State-Law Claims Concerning FDA-Approved Products*, 93 CORNELL L. REV. 1039 (2008).

27. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 127 (4th ed. Jossey-Bass 2006).

28. *Feldman v. Ho*, 171 F.3d 494, 497 (7th Cir. 1999).

academic freedom may incline courts to avoid adjudicating personnel claims of a type that would almost certainly not be spurned in less sensitive contexts.

Deference may also reflect a judicial appreciation for the college or university's uniquely important and sensitive research mission. Finding in favor of Stanford University's challenge to funding agency restrictions on publication of results of sponsored research, a federal district judge recognized a compelling set of interests that would clearly warrant abstention should the question arise in reverse:

Stanford University, a premier academic institution, engaged in significant scientific and medical research for the benefits of the American people, is not ipso facto compelled under the law to surrender its free speech rights and those of its scientific researchers to a "contracting officer" merely because a regulation . . . so directs.²⁹

Although such strongly protective language may work better in a defensive mode than in litigation such as this (where Stanford prevailed against conditions on federal funding), courts have occasionally rebuffed corporate demands for disclosure by college and university scholars of research data in process on quite similar grounds.³⁰ Thus academic-freedom based judicial deference may be reinforced by parallel pleas for abstention derived from the college or university's sensitive research mission and the risks of potentially disruptive or intrusive intervention.

A second and closely related rationale for deference is judicial respect for academic governance. As the *Churchill* court suggested, where critical decisions have been committed to faculty bodies, courts should be unusually reluctant to gainsay or overturn the results of that process. Such reluctance seems to reflect two quite distinct considerations. On one hand, such deference may recognize the unusual degree to which resolution of such disputes has been entrusted to a different but cognate legal system; suggestive here is the analogy to judicial refusal to intervene in internal disputes within religious bodies based on other factors, but reflective in part of the "elsewhere committed" notion.³¹ Also arguably relevant is the deference that the American Association of University Professors has long paid to church-affiliated colleges and universities.³² Thus, it may not be unfair or illogical in effect to tell an aggrieved professor that he or she

29. *Tr. of Leland Stanford Junior Univ. v. Sullivan*, 773 F. Supp. 472, 478 (D.D.C. 1991).

30. *See, e.g., Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *In re American Tobacco Co.*, 880 F.2d 1520 (2d Cir. 1989).

31. *See, e.g., Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

32. *See* JUDITH C. AREEN, *HIGHER EDUCATION AND THE LAW: CASES AND MATERIALS* 369–88 (Thomson/West 2009).

implicitly accepted peer review and judgment by faculty committees upon joining the college or university. Though well short of recognizing binding arbitration as an exclusive remedy, that analogy does invoke the pervasive power of faculty governance.

Judicial deference also invokes a quite different set of practical values. An obvious lack of expertise in the ways of academe surely represents one such barrier to intervention. Even those few judges who have actually been law professors are usually uncomfortable when faced with complex campus disputes. Thus, as Kaplin and Lee observe, “courts are more likely to defer when the judgment or decision being reviewed . . . involves considerations regarding which the postsecondary institution’s competence is superior to that of the courts”³³—an imperative frequently recognized by judges inclined toward abstention.³⁴ Indeed, it is the rare case in which a court could fairly claim comparable competence or familiarity with the ways in which academic decisions develop. For the very reasons that many observers of the academy express frustration, even outrage, at the slow pace of hiring or other key intra-college and university decisions, an outsider who happens to be a judge is seldom better equipped to understand or adjudicate arcane academic disputes or conflicts.

Closely related to the matter of competence or familiarity is that of remedy. Even in a case where ultimate deference did not seem warranted, for example, the Supreme Court recognized that intervention should be resisted or avoided if it would prove “so costly or voluminous that . . . the academic community . . . [would be] unduly burdened.”³⁵ A lower federal court cited as a reason for deference the risk of a ruling or decree that would “necessarily intrude upon the nature of the educational process itself.”³⁶ Similar concerns reinforced that inclination of the Colorado judge in the *Churchill* case to abstain from ordering reinstatement, noting as he did widely expressed concerns of Boulder faculty and academic administrators about the potentially harmful effects of the requested relief.³⁷ Of course, if a state or federal judge orders the reversal of a challenged personnel or other institutional action, the college or university may be forced to comply under threat of a contempt citation. That ultimate reality does not, however, warrant intervention in an academic dispute without careful consideration of possibly harmful effects and consequences. Cases at several levels underscore the importance of careful judicial assessment of the sometimes subtle or hidden risks of unfettered

33. KAPLIN & LEE, *supra* note 27, at 131.

34. *E.g.*, *Kunda v. Muhlenberg Coll.*, 621 F.2d 532, 548 (3d Cir. 1980); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1153 (2d Cir. 1978).

35. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979).

36. *Kunda*, 621 F.2d at 547.

37. *Churchill*, No. 06CV11473 at 38–42.

intervention.³⁸

Consideration of the “why” of the equation leads naturally to the “when”—conditions and circumstances under which academic matters most clearly merit judicial deference. Perhaps the most crucial such condition was implicit in the *Ewing* case and has been made explicit elsewhere—that the action for which insulation is claimed should be a “genuinely academic decision.”³⁹ Deputy Solicitor General Neal Katyal, recalling his success in pressing that claim in the race-based admissions case, insists that such decisions must be “educational judgments”⁴⁰ and that they should clearly reflect “faculty involvement.”⁴¹ Thus deference would be less readily available to a purely administrative action that involved no faculty judgment or expertise—partly because a non-academic judgment would almost surely be more amenable to the expertise that most judges would bring to the process. (Indeed, one could posit as a separate desideratum the accessibility of the challenged decision, and its relative familiarity or unfamiliarity to judges; although this factor would likely parallel so closely the “academic-ness” of the issue that a separate criterion seems unhelpful).

One further caution may be obvious but deserves emphasis: There is no bright or sharp line that cleanly differentiates between “genuinely academic” and other judgments or decisions within the campus community; Some adverse actions against students might, for example, reflect regulations crafted by faculty groups, though applied and enforced by non-faculty administrators. Yet, undoubtedly the most compelling cases for according deference to academic judgments encompass matters where there has been central faculty judgment in shaping the challenged action or policy.

Such an inquiry should not, however, be limited to *whether* faculty were involved, but should also consider *how and what* they contributed; process may be at least as crucial as substance. The adequacy and fairness of internal procedures also represent a familiar desideratum that judges are well equipped to appraise. The *Ewing* Court took specific note that the challenged student dismissal was not only made by the relevant faculty, but that “the faculty’s decision was made conscientiously and with careful deliberation, based on an evaluation of the entirety of Ewing’s academic career.”⁴² Thus the depth and intensity of faculty judgment may be at least as crucial in occasioning deference as its presence. So too, the judge in the *Churchill* case did not simply mention the two faculty committees that had negatively reviewed the impugned scholarship, but detailed the process by

38. See e.g., *Churchill v. Univ. of Colo.*, No. 06CV11473 (D. Colo. July 7, 2009); *Cannon*, 441 U.S. at 710.

39. *Ewing*, 474 U.S. at 225 (1985).

40. Katyal, *supra* note 1, at 569

41. *Id.* at 566.

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

which that review had progressed in support of his conclusion that deference to the adverse outcome was warranted as much by the process that preceded it as by the content of the charges.⁴³ Thus, process may be almost as important as substance—conceivably even more so in certain situations—in defining the appropriate conditions for judicial deference.

A third condition or qualification is potentially far more difficult, yet sufficiently recurrent that it should be addressed. In most of the judicial deference cases we have considered here, the positions of the institution and of its faculty are concurrent or concordant, if not identical. Thus, the institution seeks judicial deference, as in *Ewing*, *Horowitz*, *Churchill* and other cases we have examined, to protect or insulate faculty judgment from court intervention and possible reversal. But what if the institution, by contrast, claims deference to shield from court probe or rebuke a position its faculty opposes? The cases posing such dissonance are relatively few, though likely to become more common and clearly deserving separate analysis.

The Fourth Circuit's ruling in *Urofsky v. Gilmore*,⁴⁴ is illustrative, where en banc review sustained against constitutional challenge a state law barring state employees (including public college and university faculty) from using state-owned or state-leased computers to access sexually explicit material (at least without a supervisor's approval). Six professors at Virginia state colleges and universities filed a First Amendment challenge in federal court. The district judge ruled in the scholars' favor on several grounds.⁴⁵ A three-judge panel of the Court of Appeals, however, proved far more sympathetic to the challenged statute. At the ultimate stage, an en banc ruling soundly rejected the scholars' constitutional challenge, and effectively obliterated any possible individual academic freedom claim in such a situation.⁴⁶ Although no institutional decisions or actions were in dispute—and in that sense the case did not invoke familiar arguments for and against judicial deference—the full court's dismissal of the professorial challengers' academic freedom claims clearly signaled to which set of interests the Fourth Circuit would defer if called upon to do so. In the event of a dispute between a college or university and its professors with regard to matters of teaching or scholarship, the institution's academic freedom claim would prevail since in the majority's view, the Supreme Court had never given primacy to individual faculty in such a dispute.⁴⁷ Of course, because the institutions where the plaintiffs taught were not parties to a suit against the Commonwealth, any comments about relative academic freedom claims were necessarily dicta.

43. *Churchill*, No. 06CV11473 at 4–8.

44. 216 F.3d 401 (4th Cir. 2000).

45. *Urofsky v. Allen*, 995 F. Supp. 634 (E.D. Va. 1998).

46. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

47. *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000).

There have, however, been a few cases that directly juxtaposed institutional and individual claims and yielded results that bear significantly (if perhaps obliquely) on the proper role of judges when asked to review institutional actions that affect academic life. Two federal appeals courts reached diametrically opposed results with regard to a professor's right to grade students as part of the teaching process. In a Tennessee case, the reviewing court sided with the instructor, ruling that "the freedom of the university professor to assign grades according to his own professional judgment is . . . central to the professor's teaching method" and thus protected by academic freedom.⁴⁸

Yet in the other case, filed against a Pennsylvania public university, the court insisted that grading was not an integral part of instruction and thus not within the scope of an individual professor's academic freedom.⁴⁹ Specifically, "because grading is pedagogic, the assignment of the grade is subsumed under the university's freedom to determine how a course is to be taught."⁵⁰ The contrasting lessons for judicial deference seem unavoidable: In the Sixth Circuit the institution's plea for autonomy must yield to an instructor's claim of primacy in grading his or her own students, while in the Third Circuit, the college or university's quest for deference on precisely that issue prevails. Thus by clear implication, should an issue of judicial deference arise in a dispute between teacher and institution over such an issue of academic policy, the result may vary dramatically from one venue to another, and for reasons that relate to broader desiderata shaping judicial deference.

One might consider a quite different case in another federal appeals court, this one pitting an Illinois community college against the chairman of its art department in a bitter dispute over the location of a racially sensitive exhibit that the chairman himself had created.⁵¹ When the case reached Judge Richard Posner in the appellate court, his many years as a law professor undoubtedly sharpened his appreciation of a lurking tension between individual and institutional academic freedom claims—a latent tension that he and his Seventh Circuit colleagues insisted must now be addressed. Academic freedom, observed Judge Posner, was used in an "equivocal" sense both to "denote the freedom of the academy to pursue its ends without interference from government" and "the freedom of the individual teacher . . . to pursue his ends without interference from the academy."⁵² Noting that "these two freedoms are in conflict . . . in this case," Judge Posner wisely warned of the need to recognize such tension

48. *Parate v. Isibor*, 868 F.2d 821, 828 (6th Cir. 1989).

49. *Brown v. Armenti*, 247 F.3d 69 (3d Cir. 2001).

50. *Id.* at 75.

51. *Piarowski v. Ill. Cmty. Coll.*, 759 F.2d 625 (7th Cir. 1985).

52. *Id.* at 629.

and chart a course for potential accommodation.⁵³ Here again, although the facts did not present the court with a conventional plea for institutional autonomy, Judge Posner's characterization of the case and its central issues invited analysis strikingly comparable to what courts do when asked to defer to a challenged academic action or policy. The court of appeals affirmed the dismissal of the artist-professor's suit partly because an alternative exhibit site had been offered and rejected, but also because of a valid concern on the college's part that the targeted images might impair its minority recruitment and community-relations efforts.⁵⁴ The Seventh Circuit's benign resolution of the *Piarowski* case also offered valuable, if analogous, guidance for the disposition of more familiar deference claims.

If both institution and faculty appear in court as adversaries, each invoking academic freedom and urging judicial deference, a couple of simplistic solutions initially suggest themselves. A judge could simply note that whichever party seeks relief—and it could be either in an era when colleges and universities occasionally sue their professors—may not logically seek deference since it has called for judicial interference; or a court could dismiss the case on the ground that considerations, which counsel deference in the more typical case, would likewise justify abstention when the very source of deference is itself in dispute between the parties. But neither option seems at all satisfying, and their inadequacy compels further analysis.

The most difficult case, of course, would be one in which a challenged institutional policy or action directly conflicts with the results of faculty governance—for example, a faculty senate's insistence on autonomy in grading, overridden by a dean's intervention in favor of a student who complains of a failing grade. Superficial analysis might presumably invite deference to the institution, especially since an intrusive administrator could claim that drastic action was vital to preserve a student's learning opportunity. But in such a case, the primary pillar of judicial deference—faculty judgment on a “genuinely academic issue”—would now be found on the other side. A court should not defer to the institution's grading policy if that would mean (as it typically would) disregarding a faculty's judgment to the contrary. Perhaps the wisest course would be simply to treat such a situation as one to which judicial deference does not apply since the rule and its rationale have been separated or divorced. Clearly a decision could be reached in such a case, since neither side would be properly entitled to judicial deference.

IV. JUDICIAL DEFERENCE TODAY: OBSOLETE OR ALIVE AND WELL?

The time has come to assess the current status of judicial deference.

53. *Id.* at 629–30.

54. *Id.* at 630–31.

Observers and commentators fall into three distinct groups. Most familiarly, there are those who still acclaim the doctrine and regularly invoke it in litigation of cases like Professor Churchill's reinstatement suit.⁵⁵ At the other end of the spectrum are skeptics or critics who insist that judicial deference, if ever tenable, has recently served to shield or immunize colleges and universities from legal accountability for decades of discrimination.⁵⁶ Then there are those who, like Professor Amy Gajda, are not partisans in the debate for or against judicial deference, but who nonetheless argue that the doctrine has recently been undermined and made far less relevant by a host of changing conditions.⁵⁷ It is the views of this third group that most clearly merit our attention here, since their objectivity on the merits of judicial deference affords a special credibility.

Observers such as Professor Gajda, who claim that judicial deference has lost favor and force, cite several factors, the existence of most of which is beyond dispute. For example, a half century or less ago, litigation against institutions of higher learning was minimal, involving for the most part claims and disputes common to all non-profit organizations and government agencies. The rapid proliferation of such litigation in the past several decades is an indisputable phenomenon; almost without regard to changes in the subject matter of such litigation, the rapidly rising case load would in any event have made academic decisions more often amenable to court intervention.⁵⁸ But there have been dramatic changes in the sources of such legal claims against institutions of higher learning, and to those changes Professor Gajda and others⁵⁹ quite logically attribute the declining deference of any courts. Aided in part by such dramatic changes in the legal landscape as federal and state civil rights laws, a host of new plaintiffs have gone to court seeking relief from colleges and universities over issues and claimed injustices that simply did not exist a generation earlier. Indeed, the realm of discrimination (mainly on grounds of race and gender) seems to have opened legal gates that historically had appeared to have been closed and locked for higher education plaintiffs.⁶⁰ Bias claims seem also to have emboldened skeptical judges to express more freely their

55. *E.g.*, Katyal, *supra* note 1.

56. *See, e.g.*, Mark Bartholomew, *Judicial Deference and Sexual Discrimination in the University*, 8 *BUFF. WOMEN'S L.J.* 55 (2000).

57. *See* GAJDA, *supra* note 3, at 15–16.

58. Even this factor may, however, merit reconsideration in light of current trends. A very recent study published in the *Education Law Reporter* in late summer 2009, noted that the earlier growth in litigation against institutions of higher learning has slowed significantly, and that faculty members constitute a diminishing share of current legal challenges. *Growth in Litigation Involving Colleges Has Slowed, Study Finds*, *CHRON. HIGHER EDUC.*, Sept. 11, 2009, <http://chronicle.com/blogPost/Growth-in-Litigation-Involving/8008/?s>.

59. *See, e.g.*, Moss, *supra* note 2, at 9–10.

60. *See, e.g.*, *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

doubts about the propriety (much less the necessity) of abstention from campus disputes.⁶¹

A similar broadening of legal recourse seems to have resulted from the dramatic rise in student activism starting in the late 1960s, which brought to the courts a host of novel free speech and due process issues seldom seen on college and university campuses in earlier times.⁶² If only because the claims of student plaintiffs in such cases were familiarly constitutional, based on readily available First and Fifth Amendment precepts, judges were less inclined to defer to academic judgments. As early as the Supreme Court's 1972 ruling in favor of a student political group's claim not to be barred from a public campus because of the controversiality of its views,⁶³ it was clear that deference would not foreclose review of such clearly constitutional interests—that would have been the Court's view even if the institution claimed an “academic” rationale for excluding the student group. And where the challenged sanction involved disciplining a student (or occasionally an outspoken professor) for campus protest or disruption, the historical basis for judicial deference was far less apparent.⁶⁴ Thus, intervention became far more difficult for colleges and universities to resist in cases of this type.

Beyond such newfound statutory remedies as those that protect civil rights, attorneys who represent aggrieved students or professors have fashioned a host of new claims and causes of action such as “educational malpractice” that invite courts to tread paths toward relief that simply never existed in earlier times.⁶⁵ Even traditional causes of action, such as breach of contract, seem to have become more popular as a means by which aggrieved members of the academic community might pierce the veil of institutional autonomy.⁶⁶ Taking all such factors and forces together over the past quarter century or so, Professor Gajda concludes that the legal landscape has changed dramatically:

The important development is that, as far as litigation and the courts are concerned, academia is beginning to resemble other walks of life. Significantly, members of the academic community are increasingly inclined to think about their interactions in legal terms. And, of at least equal significance, judges are increasingly receptive to mediating these campus

61. See GAJDA, *supra* note 3, at 51–81.

62. *E.g.*, Healy v. James, 408 U.S. 169 (1972).

63. *Id.* at 192.

64. See, *e.g.*, Shamloo v. Miss. State Bd. of Tr., 620 F.2d 516 (5th Cir. 1980); Roberts v. Haragan, 346 F. Supp. 2d 853 (N.D. Tex. 2004).

65. See, *e.g.*, Ross v. Creighton Univ., 957 F.2d 410 (7th Cir. 1992); AREEN, *supra* note 32, at 709–10 (noting that “educational malpractice claims have continued to fare badly in the courts”).

66. *E.g.*, Atria v. Vanderbilt Univ., 142 Fed. Appx. 246 (6th Cir. 2005).

conflicts.⁶⁷

Such analysis seems beyond dispute in one respect, yet it invites consideration of a broader question. The growth of litigation against institutions of higher learning, and the erosion of certain historical barriers to legal liability, can hardly be doubted. On the other hand, it is far from clear that judicial deference has ceased to insulate from court intervention the types of actions to which it applies—those “genuinely academic judgments” that a unanimous Supreme Court said should be disturbed only if the decision-maker “did not actually exercise professional judgment.”⁶⁸ Here the situation is far more mixed, as the recent ruling in the *Churchill* case reminds us.⁶⁹ Indeed, one might well conclude that judicial deference still applies where it belongs, while non-academic campus decisions and actions have not surprisingly become increasingly amenable to court intervention.

Several factors may guide us to this somewhat paradoxical conclusion. For one, the legal landscape has always been more confusing on close scrutiny than it may appear to casual observers. Courts have occasionally seemed more deferential to decisions of those public governing boards like the Regents of the Universities of California and Michigan, which enjoy special status under their state constitutions, than to the general run of non-constitutional public boards—and for reasons that are unrelated to the central premise of “judicial deference.”⁷⁰ Although it may be wholly coincidental that the two resounding victories for race-based admissions policies,⁷¹ offering what are probably the strongest declarations of deference, happened to involve those very constitutional governing boards, the parallel is nonetheless striking. Constitutional status is properly a source of deference, both judicial and legislative, though unrelated to the doctrine on which we focus here.

Then there is the contrast between public and private college and university campuses, which also turns out to be more complex than it may appear to the untrained eye. How private colleges and universities actually fare in court varies so widely as to preclude easy generalization. New York courts, for example, have always been more receptive to students and

67. GAJDA, *supra* note 3, at 4.

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

69. *Churchill v. Univ. of Colo.*, No. 06CV11473 (D. Colo. July 7, 2009). http://extras.mnginteractive.com/live/media/site36/2009/0707/20090707_122722_churchill.pdf

70. *E.g.*, *Regents of Univ. of Mich. v. State*, 419 N.W. 2d 773 (Mich. Ct. App. 1988) (invalidating various forms of legislative regulation that would have been virtually unassailable in most non-constitutional states.) *See generally* Karen Petroski, *Lessons for Academic Freedom: The California Approach to University Autonomy and Accountability*, 32 J.C. & U.L. 149 (2005).

71. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003).

faculty on private campuses than the state courts of nearly any other state.⁷² Then there is the curious case of New Jersey, further illustrating the elusive nature of the usually distinct contrast between “public” and “independent” institutions.⁷³ When the state supreme court ruled on “state action” grounds in favor of a political activist who had been removed from Princeton’s clearly private campus, the U.S. Supreme Court granted review of a novel free speech ruling.⁷⁴ The case was eventually dismissed when Princeton’s regulations governing trespass were modified before the high Court rendered judgment, making the core issue moot.⁷⁵

Meanwhile, federal courts seem to have become markedly less willing to find adequate evidence of “state action” as a basis for Section 1983 claims against private institutions than was the case in the 1960s, when as traditionally and functionally private an institution as Washington University in St. Louis was held legally accountable in federal court for a claimed deprivation of constitutional rights.⁷⁶ More recently though, federal judges seem to have insisted on substantially greater evidence of governmental impact or nexus before finding a private college or university to be engaged in “state action;”⁷⁷ such reluctance to intervene could not, however, logically be attributed to anything like “judicial deference,” even though the readiness of federal courts to tackle such cases in earlier times may partly have reflected a lesser measure of just such deference.

A third factor that surely enters the equation is the dramatic change in the subject matter of higher education lawsuits. The rapid rise of student free speech and due process claims, followed by sharp growth in statutorily based claims of race and gender discrimination, are indisputable facts of life for college and university administrators and their attorneys.⁷⁸ The greater readiness (indeed sometimes eagerness) of federal judges to adjudicate such disputes could appear to reflect a lower level of deference toward academic decisions. On the other hand, such trends may equally reflect changes in the focus of litigation. Growing reliance on new statutory remedies and regulatory principles may have allowed even the most sympathetic judges substantially less latitude for deference or abstention than existed in earlier times, when most claims against higher

72. See, e.g., *Carr v. St. John’s Univ.*, 231 N.Y.S.2d 410 (N.Y. App. Div. 1962).

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

74. *Princeton Univ. v. Schmid*, 451 U.S. 982 (1981).

75. *Princeton Univ. v. Schmid*, 455 U.S. 100 (1982).

76. See *Belk v. Chancellor of Wash. Univ.*, 336 F. Supp. 45 (E.D. Mo. 1970) for a characteristically sympathetic federal court view of claims against private educational institutions.

77. See, in contrast, for a later and less receptive view, *Hack v. President of Yale Coll.*, 237 F.3d 81 (2d Cir. 2000), *cert. denied*, 534 U.S. 888 (2001); *Coleman v. Gettysburg Coll.*, 335 F. Supp. 2d 586 (M.D. Pa. 2004).

78. See GAJDA, *supra* note 3, at 5-6.

education institutions reflected more amorphous constitutional and common-law roots.

A fourth and related factor that merits closer attention is several highly relevant changes in legal principles that have opened courts to previously non-justiciable claims. The case of public employee speech offers a striking illustration. Until the late 1960s, government could punish or dismiss its workers almost as readily as could private employers. Justice Oliver Wendell Holmes wrote in the 1890s that a politically active patrolman had no legal recourse against his dismissal because “a man may have a constitutional right to talk politics, but . . . [not] to be a policeman.”⁷⁹ That remained the template until 1968, when the Supreme Court conferred substantial First Amendment protection on public employees.⁸⁰

Although only statements on “matters of public concern” could claim protection, and although a state agency could still invoke such interests as harmony within and confidence without as grounds for disciplining outspoken staffers, government workers would (at least for several decades) enjoy markedly greater freedom of speech than had ever been the case in the past. For state college and university faculty, that standard provided far greater protection. The University of Colorado’s initial decision to spare Professor Ward Churchill from any sanction on the basis of his shocking comments about the 9/11 tragedy reflected precisely that precedent.

Ironically, however, the scope of such protection for outspoken professors has now lessened in a way that might seem to—but in the end does not—imply heightened judicial deference to public colleges and universities. As the result of a 2006 Supreme Court ruling,⁸¹ several lower federal courts have denied First Amendment protection to outspoken professors because their offending speech fell “within their official duties” and, thus, beyond the protective ambit of the Supreme Court’s public employee speech doctrine.⁸² Inferring that courts have become more respectful of state college and university control over professors’ extramural speech would, however, be as misleading as it is superficially plausible. The change in question has undoubtedly resulted in fewer successful suits by outspoken faculty—but not because courts are readier to respect the process by which such sanctions are imposed against offensive professorial speech. And to return briefly to the latest round of the *Churchill* litigation, where the critical issue is research misconduct and not extramural speech, the deference paid to Colorado university officials is

79. *McAuliffe v. Mayor of Aldermen*, 29 N.E. 517, 517 (Mass. 1893).

80. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

81. *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006).

82. *Id.* at 574. *See Hong v. Grant*, 516 F. Supp. 2d 1158, 1165 (C.D. Cal. 2007); *Gorum v. Sessoms*, 561 F.3d 179, 186 (3d Cir. 2009).

neither more nor less than would have occurred in earlier times.

In this regard, as with other changes in the legal landscape of higher education, what might superficially appear to be changing levels of deference to campus judgment are in fact prompted by wholly different forces and factors. A critical distinction should now be noted between a trend that, on one hand, some observers see as a gradual erosion of judicial deference, and the same phenomenon that others, in sharp contrast, view simply as expansion of the types of legal claims against colleges and universities that should not counsel abstention out of respect for the academic decision-making process. We might cast this issue in a slightly different mode: What proof exists that courts have become less ready to defer to campus processes and judgments in “genuinely academic” matters of the sort that the *Ewing* Court exempted from routine judicial review?

The evidence on that point is elusive at best. Several recent cases that Professor Gajda cites to support her claim of diminished deference⁸³ might well in earlier times have been deemed candidates for abstention, though most of these examples would (or should) never have triggered the *Ewing* standard.⁸⁴ Meanwhile, most of the cases on which Gajda and others rely as evidence of reduced respect for academic processes reflect quite different forces, such as greater resort to new types of legal claims to which deference was never logically applicable.

However sanguine one may be about the current status of judicial deference, complacency would be as unwise here as in other areas of higher education law. Even if this legal doctrine is in perfect health—a premise that remains in dispute—there is little doubt that it could be made stronger and more defensible. One commentator who faults traditional deference has recently urged that academic autonomy with regard to truly educational matters could be better reconciled with anti-discrimination claims through a balancing process she describes as “limited deference.”⁸⁵ Relying primarily on several recent Seventh Circuit decisions⁸⁶ that reflect such accommodation, she describes the balancing approach thus:

Unlike the traditional approach, whereby courts defer to universities and avoid evaluating the individual merits of the case, the Seventh Circuit approaches university-employment disputes much like it addresses disputes in other industries, but it continues to defer to the university in matters of academic

83. *E.g.*, *Atria v. Vanderbilt Univ.*, 142 Fed. Appx. 246 (6th Cir. 2005); *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004).

84. See, for example, Amy Gajda & Scott Jaschik, *supra* note 3.

85. Michelle Chase, *Gender Discrimination, Higher Education and the Seventh Circuit: Balancing Academic Freedom with Protections under Title VII Case Note: Farrell vs. Butler University*, 22 WIS. WOMEN’S L.J. 153, 165 (2007).

86. See *Farrell v. Butler Univ.*, 421 F.3d 609 (7th Cir. 2005).

evaluation.⁸⁷

On the basis of his experience representing private law school deans in the *Grutter* litigation, Deputy Solicitor General Katyal has offered a rather different, but equally intriguing formula for balancing institutional autonomy with individual interests. With an eye to the degree of deference courts should pay to such controversial policies as those that include race among the admission factors to highly selective graduate programs, Katyal offers this prospectus:

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. . . . 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 decision-making 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.⁸⁸

While others may disagree with this formulation from either side—finding it either unduly deferential to the academic community in a sensitive and contentious area, or unduly restrictive of the autonomy of a single college or university that wishes and has the resources to craft its own admissions policies—Katyal’s caution seems well worth heeding.

87. Chase, *supra* note 85, at 171–72.

88. Katyal, *supra* note 1, at 571.