DOCTRINAL SIEGE: HIGHER EDUCATION IN JUDICIAL CROSSHAIRS

Jonathan D. Glater†

INTRODUCTION

Institutions of higher education suffered two blows from the conservative justices on the Supreme Court in the 2023 Term, with the prospect of a third soon thereafter. In the affirmative action decision, the conservative supermajority rejected decades of precedent and severely undermined possible use of race in admissions processes at selective institutions,[1] but also undermined the authority and autonomy of selective colleges and universities that had adopted the practice in an effort to achieve a more diverse student body. In the student loan decision, the same conservative supermajority engaged in a strained analysis of standing and statutory meaning in order to conclude that the Secretary of Education did not have the authority to enact mass cancellation of billions of dollars of student debt,[2] but in doing so both undermined accessibility of higher education for students[3] and facilitated attacks on higher education as a poor investment.[4]

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† Professor of Law, University of California, Berkeley. The author is grateful to fellow symposium participants Elizabeth Tandy Shermer and Kimberly West-Faulcon, whose presentations enriched this Article.

1. *See generally* Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181 (2023) (holding that Harvard's asserted compelling interests for race-based admissions programs did not satisfy requirement of being sufficiently measurable to permit strict scrutiny for equal protection violation, which would also be a Title VI violation).

2. *See* Biden v. Nebraska, 600 U.S. 477, 489–506 (2023).

3. Students who were counting on cancellation found themselves facing the resumption of payment obligations that had been suspended over the course of the global COVID-19 pandemic that struck in early 2020. And students considering pursuit of higher education faced the prospect of continued high tuition.

4. These attacks on the value of pursuing higher education are nothing new, but the failure of federal student aid programs to keep pace with steadily increasing

Colleges and universities, especially the nation's most selective colleges and universities, faced more spectacular and direct challenges in the following months, including criticism of excessive "wokeness"[5] and, in the wake of terrorist attacks in Israel, insufficient support of Jewish students.[6] Lawsuits filed against the law school at the University of California, Berkeley,[7] and against Harvard University,[8] both alleging antisemitism, will give courts an opportunity to assess the defendants' policies and decision-making processes, intervening in important institutional operations and potentially undermining autonomy. The cases may present difficult questions about both the scope of protection the First Amendment affords to students and professors on campus, and the obligation of institutions of higher education to support students who say others' speech constitutes an attack and threat to safety. As of this writing, proceedings have just begun.

Further along in litigation are challenges to university personnel policies, in particular requirements that faculty provide statements regarding diversity, equity, and inclusion (DEI) as part of the employment application and promotion process. In one case targeting a requirement at a California community college campus, a magistrate judge concluded that the plaintiff had presented a strong enough case to justify the grant of an injunction against the DEI rule.[9] This and other cases challenging certain university policies specifically and the authority and autonomy of universities generally seem certain to work their way through the judicial branch and force courts to weigh competing claims to academic freedom—institution versus faculty member—and to the power to determine colleges and universities' very meaning and purpose. These challenges will afford the judiciary another opportunity to undermine the credibility and autonomy of institutions of higher education.

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tuition makes them more compelling. *See* Paul Tough, *Americans Are Losing Faith in the Value of College. Whose Fault is That?*, N.Y. TIMES MAG. (Sep. 5, 2023), https://www.nytimes.com/2023/09/05/magazine/college-worth-price.html.

5. *See* Annie Karni, *Questioning University Presidents on Antisemitism, Stefanik Goes Viral*, N.Y. TIMES (Dec. 7, 2023), https://www.nytimes.com/2023/12/07/us/politics/elise-stefanik-antisemitism-congress.html.

6. *See id.*

7. *See* Complaint at 2, Louis D. Brandeis Ctr., Inc. v. Regents of the Univ. of Cal., No. 23-cv-06133 (N.D. Cal. Nov. 28, 2023).

8. *See* Complaint at 1, Kestenbaum v. President and Fellows of Harv. Univ., No. 24-cv-10092 (D. Mass. Jan. 10, 2024).

9. Johnson v. Watkin, 23-cv-00848, 2023 U.S. Dist. LEXIS 203403, at *1 (E.D. Cal., Nov. 14, 2023).

This brief Article is animated by the fear that these attacks on colleges and universities, too often viewed in isolation, are cumulative in effect. Successful, spectacularly public challenges to the collective judgment of some of the nation's most prestigious colleges and universities weaken the institutions' influence in a fraught political and cultural moment. Each challenge reduces the ability of college and university administrators and faculty to offer impactful assessments of current events and trends. At the same time, attacks force colleges and universities to defend not only public pronouncements but also what and how they teach to students. Adverse court decisions pile on by lending a patina of judicial legitimacy to criticisms of college and university practices. While some politicians[10] and jurists[11] in the past have extolled institutions of higher education as bulwarks against tyranny, some politicians[12] and jurists[13] today have expressed considerably more skeptical views. If higher education as an institution promotes democracy through educating students and through expressing expertise that may be at odds with other actors on the national political stage, the weakening of autonomy and authority is cause for concern.

The goal of this Article, then, is to show the harmful effects of the 2023 Supreme Court decisions affecting higher education on institutional authority and autonomy, and to look ahead to likely future cases that will provide the conservative justices with opportunities to continue their attacks. Collectively, decisions of the current Court encroach and portend further encroachment upon on what prior justices recognized as "'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be

10. *See, e.g.,* Presidential Statement Making Public a Report of the Commission on Higher Education, 1 PUB. PAPERS 511 (Dec. 15, 1947) (describing a "carefully developed program to strengthen higher education, taken together with a program for the support of elementary and secondary education, will inevitably strengthen our Nation and enrich the lives of our citizens").

11. *See, e.g.*, Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (noting that "[n]o one should underestimate the vital role in a democracy that is played by those who guide and train our youth.").

12. *See, e.g.*, Nicholas Confessore, *How Ron DeSantis Joined the 'Ruling Class' — and Turned Against It*, N.Y. TIMES (Aug. 22, 2023), https://www.nytimes.com/2023/08/20/us/politics/ron-desantis-education.html (describing the determination of presidential candidate and Florida's governor, Ron DeSantis, to fight liberal bias in higher education and to "uproot what he considers liberal political activism from public schools and universities").

13. *See, e.g.*, Students for Fair Admissions, Inc. v. President and Fellows of Harv. Coll., 600 U.S. 181, 256 (2023) (Thomas, J., concurring) (extolling the majority opinion for "correctly refus[ing] to defer to the universities' own assessments that the alleged benefits of race-conscious admissions programs are compelling.").

taught, how it shall be taught, and who may be admitted to study."[14] Accordingly, the discussion below has three substantive Parts. The first examines the affirmative action decision, the second examines the student loan cancellation decision, and the third considers the cases challenging college and university DEI policies. Part IV concludes.

I. "WHO MAY BE ADMITTED TO STUDY"

In the years leading up to the Supreme Court's decision finding consideration of race in admissions unconstitutional, Harvard College received in the neighborhood of 50,000 applications annually and accepted fewer than 2,000 of them.[15] The University of North Carolina at Chapel Hill (UNC), the target of allegations like those leveled at Harvard, received a comparable number of applicants and enrolled slightly less than one-tenth that number.[16] It is fair to conclude that admission to each institution is much sought after, conferring tangible advantages in employment and intangible yet precious prestige on students and graduates. So even in the absence of institutional efforts to promote accessibility for members of historically excluded racial groups—generally Black and Latinx applicants—it would not be surprising to find admissions procedures and criteria the subject of litigation. But colleges and universities have for decades considered race in admissions, and for nearly as long have had to defend the practice[17] against critics charging that it violates the equal protection clause of the Fourteenth Amendment[18] and the principle of colorblindness they locate both in the Court's seminal desegregation decision, *Brown v.*

14. *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 11–12 (Johannesburg Witwatersrand Univ. Press 1957)).

15. *See 1,968 total accepted to the Class of 2025 as regular-decision letters go out*, HARV. GAZETTE (Apr. 6, 2021), https://news.harvard.edu/gazette/story/2021/04/harvard-college-accepts-1968-to-class-of-2025/.

16. *By the Numbers*, UNIV. OF N.C. AT CHAPEL HILL, https://www.unc.edu/about/by-the-numbers/ (last visited Jan. 13, 2024).

17. *See generally* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (demonstrating the first such challenge to reach the Supreme Court, brought by a White applicant who sued the medical school of the University of California, Davis, after the denial of his application for admission, was resolved in favor of the plaintiff in 1978).

18. U.S. CONST. amend. XIV, § 1 ("No State shall … deny to any person within its jurisdiction the equal protection of the laws.").

Board of Education,[19] and in the famous dissent of Justice Harlan in the infamous pro-segregation decision, *Plessy v. Ferguson*.[20]

The argument offered by the plaintiffs in *Students for Fair Admissions v. President and Fellows of Harvard College* (SFFA)[21] did not differ significantly from that made in prior cases challenging the consideration of race in admissions. The only difference is doctrinally insignificant: in SFFA, the plaintiffs were Asian American applicants, while in prior cases challenging race-conscious admissions, the plaintiffs were White. But just like the plaintiffs in the prior cases, those in SFFA argued that consideration of race favored Black and Latinx applicants unfairly and unconstitutionally disadvantaged other students in the contest for admission.[22] In making this argument, the plaintiffs argued that given other attributes of Asian American applicants—such as test scores—both Harvard[23] and UNC[24] would admit more of them but for consideration of race.

The universities were successful in defending their consideration of race, in reliance on prior Supreme Court decisions, until they reached the current Court. The conservative supermajority ruled against them and found their use of race in admissions decisions unconstitutional.[25] In explaining this outcome, the chief justice, writing

19. *See* Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

20. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (dissent of Justice Harlan) ("[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens.").

21. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 143 S. Ct. 2141, 2154 (2023) (the separate cases against the two undergraduate institutions, Harvard College and the University of North Carolina, were resolved simultaneously by the Supreme Court).

22. *Id.* at 2156–57 (in their complaint, the plaintiffs contend that consideration of race violated the Fourteenth Amendment, and that a violation of the Fourteenth Amendment, enforceable via title VI of the Civil Rights Act of 1964 against Harvard because the university received federal funds).

23. Complaint at 51, Students for Fair Admissions, Inc., v. President and Fellows of Harv. Coll., No. 14-cv-14176 (D. Mass Nov. 17, 2014) ("[n]o non-discriminatory factor justifies the gross disparity in Asian American admissions relative to their presence in Harvard's applicant pool.").

24. Complaint at 4, Students for Fair Admissions, Inc., v. Univ. of N.C., No. 14-cv-954 (M.D. N.C. Nov. 17, 2014) ("[o]nly using race or ethnicity as a dominant factor in admissions decisions could, for example, account for the disparate treatment of high-achieving Asian-American and white applicants and underrepresented minority applicants with inferior academic credentials.").

25. *See Students for Fair Admissions, Inc*., 143 S. Ct. at 2175–76. However, in a striking aside in the majority opinion, Chief Justice Roberts wrote that "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination,

for the majority, stated that undergraduate admissions are "zero-sum" and a "benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter."[26] Chief Justice Roberts proceeded to discount the rationales, all tailored to precedents upholding consideration of race in admissions, proffered by the defendants. The racial categories used in admissions are too "imprecise," the chief justice concluded[27]; taking race into account engages in impermissible stereotyping of applicants[28]; there is no "logical end point" to the admissions regimes that considered race.[29]

The majority opinion does not grapple with the question of whether the judgment of the defendant universities deserves any degree of judicial deference. Justice Thomas states multiple times and conclusively in his concurrence that the answer is no, that "those engaged in racial discrimination do not deserve deference with respect to their reasons for discriminating."[30] And yet the question of the degree of deference due to colleges and universities consumed the Court in the most recent, prior case challenging consideration of race in college admissions, *Fisher v. University of Texas at Austin*, which reached the Supreme Court not once but twice.[31] The first time, the Court remanded the unsuccessful challenge of the White plaintiff denied admission because the Fifth Circuit Court of Appeals had erroneously "presume[d] the University acted in good faith" in upholding the defendant's admissions practices.[32] The appellate panel should have applied strict scrutiny, requiring the defendant to articulate a "compelling-interest" justifying consideration of race, and "narrow-tailoring" of the admissions program to serve that interest.[33] When the case returned to the Supreme Court, again after victory for the defendants in the Court of Appeals, a majority of the Justices affirmed.[34]

To be clear, the Court in *Fisher* rejected the idea of deference to the "good faith" judgment of the University of Texas at Austin about the need to consider race in admissions. Yet the omission of discussion

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inspiration, or otherwise." *Id.* at 2176 (suggesting that race may still influence the admissions decision but not specifying how).

26. *Students for Fair Admissions, Inc*., 143 S. Ct. at 2169.

27. *Id.* at 2167.

28. *Id.* at 2168.

29. *Id.* at 2170.

30. *Id.* at 2188 (concurrence of Justice Thomas).

31. *See generally* Fisher v. Univ. of Tex., 570 U.S. 297 (2013); *see also* Fisher v. Univ. of Tex., 579 U.S. 365 (2016).

32. *Fisher v. Univ of Tex.*, 570 U.S. at 312–13.

33. *Id.* at 313.

34. *See id.* at 389.

of deference in the majority opinion in SFFA is telling: the defendant universities are, and draw upon, experts in the design of their curriculum, faculty hiring, and certainly admissions practices. If the chief justice had grappled with this fact, he might have had to grapple, too, with the fact that the administrators tasked with, and experienced at, running the university, disagreed with his analysis both positively and normatively. Only Justice Thomas took on the defense claims on these terms, criticizing university administrators and quoting his own observation in a prior case, that "if our history has taught us anything, it has taught us to beware of elites bearing racial theories."[35] But Justice Thomas did not seriously engage the question of whether the ideas of the maligned "elites" deserved deference; he simply asserted that they did not.

But the perspective and analysis at Harvard and UNC matter, not only because the institutional justifications for consideration of race matters in the application of strict scrutiny, but also because it matters who the proponents of those justifications are. Experts who study learning make the claims that racial and ethnic diversity in the classroom improves educational outcomes, for example. Admissions professionals concluded that reliance solely on test scores in building an entering class was not effective in achieving institutional objectives—which themselves are the product of decision-making within the university. So, when the Court rejected the admissions regime at UNC and Harvard, the conservative majority also rejected the judgment of UNC and Harvard that consideration of race served an important institutional and, indeed, societal goal. Rejecting such institutional judgment undermines institutional authority and autonomy.

This is worrisome. College and university administrators and faculty make myriad decisions about the educational experience on offer and about every aspect of the operation of the institutions that employ them. In a highly polarized political environment characterized by partisan attacks on college and university policies and curricula, it is difficult to identify which judgments by faculty and administrators are not vulnerable to judicial intervention. This is not at all to argue for some sort of higher education supremacy, entailing impunity for actors in colleges and universities; the claim is not that colleges and universities should be allowed to flout the law. But it is to warn of a shift

35. Students for Fair Admission, Inc. v. Presidents and Fellows of Harv. Coll., 143 S. Ct. 2141, 2197 (2023) (Thomas, J., concurring) (quoting Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701, 780–81 (2007) (Thomas, J., concurring)). I am not sure that this is the signal lesson learned through study of race relations in the United States.

along the continuum of institutional deference toward less autonomy, less authority, and more second-guessing, more oversight. So institutional judgments about the criteria to use in deciding whom to hire and whom to promote, topics examined below in Part III, may also be subject to judicial intervention.

II. WHO WILL PAY

The cost of a traditional, four-year undergraduate program of education for decades rose steadily, usually more quickly than the prices of other goods and services. The cost tripled between 1980 and 2022, according to the White House.[36] After the 2021-2022 academic year, prices have fallen slightly, according to the College Board.[37] On average, at a four-year, private, nonprofit college or university published tuition and fees totaled $41,540 in the 2023-2024 academic year, while at a public, four-year institution, that total was $11,260.[38] These figures do not take into account the cost of living, which makes the actual cost greater, or grant aid received by students, which makes the actual cost lower. But the actual price charged matters far less than who pays it: students and their families use a combination of resources to manage the financial burden, and millions of them every year have turned to federal student loans to make higher education possible.

In the fall of 2022, more than forty-five million student borrowers owed more than $1.6 trillion, collectively, in federal student loans.[39] As the nation stumbled through a global pandemic that year, the Biden Administration announced a plan, promised during the 2020 presidential campaign, to alleviate student debt burdens. Under the plan, the Administration would cancel the obligation to repay $10,000 in loans for every borrower, and $20,000 for borrowers who while in college had greater financial need.[40] This relief of indebtedness followed the suspension of repayment obligations, initiated by the prior presidential

36. *See Fact Sheet: President Biden Announces Student Loan Relief for Borrowers Who Need It Most*, WHITE HOUSE (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ [hereinafter WHITE HOUSE].

37. Jennifer Ma & Matea Pender, *Trends in College Pricing and Student Aid*, COLLEGE BOARD 1, 13 (2023), https://research.collegeboard.org/media/pdf/Trends%20Report%202023%20Updated.pdf.

38. *Id.*

39. WHITE HOUSE, *supra* note 36.

40. *Id.*

administration in response to the pandemic.[41] The total cost of the mass cancellation announced by the Biden Administration would have exceeded $400 billion, the Congressional Budget Office estimated.[42]

The cost "would have," because the conservative majority on the Supreme Court concluded that the plan exceeded the statutory authority of the Secretary of Education[43] and blocked the program. [44] Because it was a signature initiative of the Biden Administration, the effort to cancel student debt had drawn intense partisan attack; the litigation was consolidated in the Supreme Court. The challenge for the plaintiffs was establishing standing, because it is difficult to see how the cancellation of indebtedness causes sufficient tangible, "concrete and particularized"[45] injury. Mere disagreement with a government policy does not confer standing. So the first move by the conservative justices, if they were to deal a setback to a Democratic administration, had to involve a theory of standing. In his opinion for the majority, Chief Justice Roberts concluded that the state of Missouri—one of the plaintiffs—had standing because a state-created entity serviced a portion of the loan portfolio held by the federal Department of Education.[46] The Chief Justice reasoned that the cancellation of indebtedness would mean that the state-created entity would have fewer borrowers' loans to service, which would result in less revenue.[47] He concluded that the financial "harm to [Missouri Higher Education Loan Authority] in the performance of its public function is necessarily a direct injury to Missouri itself."[48]

Having found standing, the conservative majority looked to the statutory text relied upon by the Secretary of Education. The relevant provision provided the secretary with authority to "waive or modify" regulatory and statutory provisions implementing federal student aid

41. *See Memorandum on Continued Student Loan Payment Relief During the COVID-19 Pandemic*, WHITE HOUSE (Aug. 8, 2020), https://trumpwhitehouse.archives.gov/presidential-actions/memorandum-continued-student-loan-payment-relief-covid-19-pandemic/.

42. Philip L. Swagel, CONG. BUDGET OFF., RE: COSTS OF SUSPENDING STUDENT LOAN PAYMENTS AND CANCELING DEBT 1 (2022).

43. Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

44. Adam Liptak, *Supreme Court Rejects Biden's Student Loan Forgiveness Plan*, N.Y. TIMES (June 30, 2023), https://www.nytimes.com/2023/06/30/us/student-loan-forgiveness-supreme-court-biden.html.

45. *See* Lujan v. Def. of Wildlife, 504 U.S. 555, 560 (1992) (citing Allen v. Wright, 468 U.S. 737, 756 (1984)).

46. Biden v. Nebraska, 143 S. Ct. at 2365–66, 2368.

47. *Id.* at 2366.

48. *Id.*

programs "as the Secretary deems necessary in connection with a war or other military operation or national emergency. . . ."[49] The proffered emergency was the global pandemic. However, the Chief Justice found that broad cancellation constituted more than a "modification[]" of federal student loans[50] and that the Secretary's plan "does not identify any provision that he is actually waiving."[51] Further, the sheer size of the cancellation program suggested to the majority that if Congress had wanted to authorize the Secretary of Education to provide such broad relief, lawmakers would have spoken more clearly, and this "major question" of federal aid policy should properly be left to the legislative branch, rather than to the executive.[52]

The Court's decision set back the administration's effort to provide a measure of financial relief to student borrowers.[53] The impact on colleges and universities is less obvious, but pernicious and potentially longer lasting. The failure to address the cost of higher education, which has for years increased more quickly than household incomes,[54] leaves colleges and universities continually vulnerable to charges that what they offer is not worth the cost, that their price point is evidence of how out of touch administrators and faculty are with the lived, economic realities of potential students, and that those same economic realities both deter potential students of lesser means and force student borrowers to focus on managing repayment. The perceptions that underlie these criticisms are so deeply ingrained that they

49. 20 U.S.C. § 1098bb(a)(1) (2024).

50. Biden v. Nebraska, 143 S. Ct. at 2369.

51. *Id*. at 2370.

52. *See id*. at 2374. The "major questions" doctrine invoked by the chief justice is not particularly relevant here, but this tool of interpretation deployed in spectacular fashion by the conservative supermajority in cases decided shortly before *Biden v. Nebraska* has been the target of considerable criticism, including from within the Court itself.

53. It is worth noting the potential impact of the relief: the Biden Administration estimated that as many as twenty million borrowers with relatively low loan balances would have seen their obligations eliminated entirely by the cancellation plan. Lauren Egan, et al., *Biden to cancel up to $10k in federal student loan debt for certain borrowers and up to $20k for Pell Grant recipients*, NBC NEWS (Aug. 24, 2022, 3:56 PM), https://www.nbcnews.com/politics/politics-news/biden-cancel-10k-federal-student-loan-debt-certain-borrowers-20k-pell-rcna42422. And those borrowers with relatively low balances are the people whom researchers have found more likely to struggle with repayment obligations and default. Ben Miller, *Who are Student Loan Defaulters?*, CTR. FOR AM. PROGRESS (Dec. 14, 2017), https://www.americanprogress.org/article/student-loan-defaulters/.

54. Anthony P. Carnevale, et al., *If Not Now, When? The Urgent Need for an All-One-System Approach to Youth Policy*, GEORGETOWN UNIV. 1, 13 (2021), https://cew.georgetown.edu/wp-content/uploads/cew-all_one_system-fr.pdf.

persist notwithstanding recent increases in aid and actual declines, however modest, in cost.[55] Enforcing a status quo in which higher education is perceived as out of reach and out of touch helps make colleges and universities less relevant and less influential in politics and culture, and so less of a potential check on other institutions.

III. "WHO MAY TEACH"

People of color continue to be underrepresented on the faculties of colleges and universities in the United States. One institutional response that some colleges and universities implemented in response was the adoption of a requirement that applicants for positions submit a statement on diversity, equity, and inclusion.[56] In states like California, which has banned public employers' consideration of race, DEI statements enable employers to assess whether an applicant of whatever race will contribute to the diversity of the employer's workspace. The statements also signal institutional commitment to the success of a diverse student body by requiring applicants to talk about how they work with and support students of diverse backgrounds. This helps to explain why some institutions require faculty members to submit DEI statements when seeking tenure or another a promotion.[57]

The practice of requiring these DEI statements has received fierce criticism from a diverse group of scholars and politicians, among others. Some of the critics have sued, arguing that the requirement constitutes an ideological litmus test that violates applicants' free speech rights guaranteed by the First Amendment.[58] In some of these proceedings, the plaintiffs have enjoyed a measure of success.[59] And the law here is complicated: the Supreme Court has prohibited requirements of loyalty oaths and the like, for example.[60] On the other hand, employers, even those that are public and bound by the constitution, may

55. *See* WHITE HOUSE, *supra* note 37.

56. *See* Bryan Soucek, *Diversity Statements*, 55 U.C. DAVIS L. REV. 1989, 1991 (2022).

57. *See id*. at 1999.

58. *See, e.g.*, Complaint at 4, Palsgaard v. Christian, No. 23-cv-01228 (E.D. Cal. Aug. 17, 2023) (arguing that "[u]nder the First Amendment, public colleges and universities can no more mandate conformity on DEIA than on foreign policy or free market economics").

59. *See, e.g.*, Order recommending that Defendants' Motions to Dismiss be denied at 43, Johnson v. Watkin, No. 23-cv-00848 (E.D. Cal. Nov. 13, 2023) (recommending that the defendants be prohibited from enforcing DEI requirements against the plaintiff, who is a faculty member).

60. *See* Sweezy v. New Hampshire, 354 U.S. 234, 247 (1957).

evaluate employee performance using metrics that reflect the employer's priorities for the job.[61] The Supreme Court has both espoused the importance of freedom of inquiry in the context of higher education[62] and the importance to an employer of the power to exercise some control over employee speech when that speech is "pursuant to the employee's official duties."[63]

The job of the university professor entails speech. Such speech may enjoy First Amendment protection directly, depending on the context, as well as the protection of academic freedom specifically, depending on the content.[64] At the same time, academic freedom also extends to colleges and universities, which have enjoyed the autonomy to make decisions about how to operate, including decisions about how to assess students and faculty. The challenges to DEI requirements require courts to determine the limits on that institutional authority and pit the academic freedom enjoyed by colleges and universities against the rights of their employees. If the outcome favors the defendants, the risk of excessive institutional control of scholars' speech increases, and institutions may be vulnerable to governmental intervention to reset their priorities; if the outcome favors members of the faculty, the independence and authority of colleges and universities will suffer, and their vulnerability to excessive government interference in their operations increases. A desirable, stable equilibrium, balancing institutional autonomy and faculty independence, is not obvious.

The challenges to the autonomy of colleges and universities to determine whom to hire and by what criteria are concerning even though the law might appear well-established in favor of the institutions of higher education. Many of the leading Supreme Court cases defining the scope of academic freedom and the extent of employee

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61. Professor Soucek's article on diversity statement requirements provides a detailed and clear explanation of the doctrinal treatment of these potentially conflicting realities. Soucek, *supra* note 6, at 2023-2032. But the Supreme Court opinion addressing the situation of public employers, *Garcetti v. Ceballos*, does not involve facts in the unusual context of the university. *See* Garcetti v. Ceballos, 547 U.S. 410, 438 (2006) (Justice Souter, dissenting) (expressing "hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities . . . .").

62. *See Sweezy*, 354 U.S. at 248–49.

63. *Garcetti*, 547 U.S. at 413.

64. To put a complicated distinction very briefly: Academic freedom extends to the subjects of study and the expression of views informed by the scholar's expertise. *See* Robert Post, *Discipline and Freedom in the Academy*, 65 ARK. L. REV. 203, 205–06 (2012).

free speech rights date back decades, and this would appear to be a generally settled area of law. But the conservative justices on the Supreme Court in the 2022-2023 Term showed their willingness to abandon precedents in multiple cases, including the affirmative action decision discussed above. The conservative justices have been willing to characterize even longstanding prior decisions as wrong when decided and then to change doctrinal course, abandoning those precedents. This readiness, coupled with uncertainty over whether the rules governing employee speech differ for members of college and university faculty,[65] means that reliance on precedent is risky: the current Court could side with individual faculty members challenging their employers or with the colleges and universities seeking to promote support of diverse student body. But a ruling against higher education would give the conservative supermajority an opportunity to undermine or eliminate a tool designed to promote diversity in the academic workforce, reasoning that although the tool is facially neutral, its racial impact was a consideration in its adoption.[66]

As above, an adverse outcome for the defendants in the litigation over DEI requirements would further erode the independence and authority of colleges and universities to set their own standards and use

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65. In *Garcetti*, the Court upheld the authority of the Los Angeles District Attorney's Office to punish a deputy district attorney who raised concerns in the office, and later at trial, that an affidavit used to obtain a search warrant "contained serious misrepresentations." *Garcetti*, 547 U.S. at 414. The majority distinguished the deputy district attorney's speech from that of a private citizen on a matter of public concern:

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.

Id. at 422.

> The possible, chilling implications for employees of public institutions of higher education, who necessarily are "required to speak or write," are clear.

66. Cases in the primary and secondary school context may give the conservative justices another opportunity to take this step, outlawing even facially neutral tactics for promoting racial diversity, if the pursuit of racial diversity operated as a motivating factor. *See* Jonathan D. Glater, *Reflections on Selectivity*, 49 FORDHAM URB. L. J. 1121, 1130–31 (2022).

the criteria of their choice to decide whom to hire and whom to promote. An adverse outcome also might have a negative effect on diversification of the academy. And in the view of the public, an adverse outcome would diminish the credibility of the views and findings of college and university faculty. So challenges to the DEI requirements contribute to the overall weakening of institutions of higher education in politics and culture and reduce their ability to act as a check on other political actors.

CONCLUSION

The cumulative, direct and indirect effects of the Supreme Court's decisions in the 2023 Term and the potential effects of litigation working through court proceedings contribute to weakening of colleges and universities. The three types of challenges briefly described above directly limit important freedoms that the leaders of institutions of higher education may have safely taken for granted for many years: the freedom to determine who shall teach and who may be admitted to study.[67] They indirectly undermine institutional credibility, enabling other political actors either to attack college curricula that they do not like or to ignore scholars' criticisms of the policies that they do like. The contribution of this brief Article has been to connect different doctrinal challenges to universities, aiming at their admissions policies, their financial accessibility, their employment policies, and through these, their overall credibility.

The implications of the affirmative action decision have already received considerable scholarly attention and will no doubt receive more. The student debt cancellation decision has received less scrutiny but given subsequent efforts to provide different forms of relief for borrowers, there may well be more—though likely focused on the reasoning of the conservative supermajority rather than the consequences for colleges and universities. And challenges by faculty members opposed to requirements that they prepare statements on diversity, equity, and inclusion, implicating fiercely debated principles of both academic freedom and freedom of speech, will continue to draw scholarly interest, though again, most likely not because of their implications for institutional autonomy.

But institutional autonomy and credibility matters greatly for colleges and universities. The scholarship that their faculty members produce informs the public generally and policymakers specifically. The

67. *See Sweezy*, 354 U.S. at 263.

moral stances they take can affect government policy and popular perception of pressing problems. And the students they educate will go on to apply and share what they have learned to the benefit of their communities. Undermining the ability of colleges and universities to perform their essential, democracy-enhancing role undermines all these benefits and ultimately leaves our democracy itself less informed and more precarious.