# COMPELLING INTERESTS/COMPELLING INSTITUTIONS: LAW SCHOOLS AS CONSTITUTIONAL LITIGANTS

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*This Article looks at the relationship between constitutional doctrine and institutional context by considering two recent cases in which law schools—perhaps the American institution most personally familiar to the current U.S. Supreme Court—appeared before the Court as litigants. In* Grutter v. Bollinger, *the Supreme Court upheld a law school's use of race-conscious affirmative action in its admission process. In* Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR), *the Court rejected law schools' assertion of their right to exclude military recruiters. I suggest that both cases turned on the extrinsic function that law schools perform—namely, the production of a cadre of professional leaders—rather than their intrinsic function as educational institutions. And I also discuss the ways in which the Justices' familiarity with law schools may have influenced the reframing of constitutional doctrine.*



## INTRODUCTION

Nearly seventy years ago, the great Legal Realist Jerome Frank observed:

> Every man is likely to overemphasize and treat as fundamental those aspects of life which are his peculiar daily concern. To most dentists, you and I are, basically, but teeth surrounded by bodies. To most undertakers we are incipient corpses; to most actors, parts of a potential audience; to most policemen, possible criminals; to most

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> taxi drivers, fares. "The Ethiopians," wrote Xenophon, "say that their gods are snub-nosed and black-skinned, and the Thracians that theirs are blue-eyed and red-haired. If only oxen and horses had hands and wanted to draw with their hands or to make the works of art that men make, then horses would draw the figures of gods like horses and oxen like oxen, and would make their bodies on models of their own." Spinoza suggested that if triangles had a god it would be a triangle. We make life in the image of our own activities.[1]

American constitutional law, by its very nature, is about the regulation of institutions. With only a few notable exceptions, like the Thirteenth Amendment, most provisions of the U.S. Constitution apply of their own force only to governmental actors.[2] At the same time, the range of institutions covered by the Constitution's central commands is sweeping indeed: The canonical cases in modern constitutional law involve institutions as diverse as the U.S. Congress and state legislatures, school boards, police departments, and prisons.

In stark contrast to many of their predecessors, the recent members of the U.S. Supreme Court have had little direct experience with most of these institutions. None of them has ever served in Congress, as Justice Black did.[3] None of them has ever been a state or local executive branch official or prosecutor, as Chief Justice Warren was. None of them has had sustained experience as counsel for a local government grappling with constitutional commands, as Justice Powell had.[4]

And yet, there is one institution—aside from the federal appellate courts—to which all the Justices have had sustained exposure as part of their professional lives: elite law schools. All the members of the Rehnquist and Roberts Courts attended one of only a handful of law schools—Harvard, Yale, Stanford, Northwestern, or Columbia. Three of the Justices spent

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1. Jerome N. Frank, *Accounting for Investors, The Fundamental Importance of Corporate Earning Power*, 68 J. ACCT. 295, 295–96 (1939).

2. This qualification is important because the U.S. Congress and the U.S. Supreme Court have, through the enactment and the interpretation of statutes such as 42 U.S.C. § 1981 (2000) and Titles II, VI, and VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a, 2000d, 2000e (2000), extended constitutional antidiscrimination constraints to a wide variety of nominally private actors.

3. Other than Justice O'Connor, who served as a senator in the Arizona legislature, none of the recent Justices has had real legislative branch service at any level of government. Indeed, only Justice Breyer has had significant experience as a legislative staff member, serving as special counsel to the Senate Judiciary Committee in 1974–75 and chief counsel in 1979–80.

4. *See* JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 131–83 (1994) (recounting Justice Powell's service as head of the Richmond, Virginia school board during the years following *Brown v. Board of Education*).

large chunks of their careers as professors at top-tier schools. And all of them regularly hire the bulk of their law clerks from these same places.

So it is perhaps hardly surprising that constitutional law is inflected in interesting ways when it intersects with the operation of law schools. The Justices are perhaps simultaneously more trusting, and more skeptical, about how such schools operate. They understand, in an almost personal way, the pressures and considerations that law schools confront. In this Article, I discuss two recent cases in which law schools were the litigants before the Court. *Grutter v. Bollinger*[5] involved the University of Michigan Law School's use of race-conscious affirmative action in its admissions process. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*)[6] concerned a federal statute that required law schools to assist in on-campus military recruiting despite the military's noncompliance with schools' nondiscrimination policies regarding sexual orientation. Most cases involving questions of academic freedom focus on the intrinsic mission of educational institutions—that is, on the way they teach their students or produce knowledge. By contrast, both *Grutter* and *FAIR* turned instead on the extrinsic function law schools perform—namely, the production of a cadre of professional leaders—largely setting to the side the question of the values or skills law schools inculcate along the way. The Court's opinions reflect the Justices' sense of both the potential and the limits of law schools' ability to shape their students' points of view. And this sensibility may also have shaped the strikingly different tacks the Court took in the two cases toward the degree of deference to accord law schools' claims of a right to self-determination.

## I. WHAT'S PAST IS PROLOGUE: *SWEATT V. PAINTER*, *REGENTS V. BAKKE*, AND THE INTRINSIC-EXTRINSIC DISTINCTION IN LAW SCHOOLS' MISSIONS

*Grutter* and *FAIR* were not, of course, the first time the Supreme Court has confronted a constitutional case involving a law school litigant. Perhaps the most famous antecedent was *Sweatt v. Painter*.[7] That case, like *Grutter* and *FAIR*, turned on the relationship between what law schools do within their own walls and the role they play in producing members of an elite profession.

5. 539 U.S. 306 (2003).
6. 547 U.S. 47 (2006).
7. 339 U.S. 629 (1950).

*Sweatt* concerned a challenge to the University of Texas Law School's refusal to admit black applicants. In response to Heman Sweatt's lawsuit, the state recognized that its failure to provide an opportunity for black individuals to obtain a legal education violated the Equal Protection Clause, but it proposed to provide that opportunity through the operation of a new, all-black law school.[8] The Supreme Court unanimously rejected that approach. While the Court pointed to objective differences in the number of faculty, the size of the student body, and the variety of courses and extracurricular activities as evidence of the lack of "substantial equality in the educational opportunities offered white and Negro law students by the State,"[9] its decision rested in an important sense not on disparities in the potential content of the education received—what we might call the intrinsic function of law schools in conveying a body of knowledge and set of discrete professional skills to their students—but rather on intangible differences that would play out in the career prospects of the schools' graduates:

> What is more important, the University of Texas Law School possesses to a far greater degree [than the new law school at the Texas State University for Negroes] those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.
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> Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.[10]

8. *Id.* at 631–32.
9. *Id.* at 633.
10. *Id.* at 634.

The differences to which the Court pointed are in large part extrinsic; that is, they concern the disadvantages segregation imposes on a black lawyer's postgraduate opportunities regardless of the knowledge and technical skills he acquires during his three years of law school. And even to the extent that the Court recognized that the composition of a law school's student body may be relevant to a student's education, it did so by looking outward. The Court is thus highly conscious of the fact that the purpose of a legal education—as opposed, for example, to a liberal arts education—is primarily functional. The goal is to produce lawyers rather than to help students lead more self-fulfilling lives. Law schools train and, perhaps almost as significantly, credential lawyers. They control access to a significant social resource.

It is an irony of history that at roughly the same time that *Sweatt* was eliminating de jure exclusion of black applicants, a new de facto barrier—hypercompetitive admissions processes—was emerging.[11] By the 1960s, elite professional schools were committed to two admissions policies that stood in some tension with one another. On the one hand, they sought to enroll members of traditionally underrepresented groups, particularly racial minorities; on the other, they chose to rely on admissions criteria (primarily test scores and undergraduate records) that had a marked disparate impact.[12] They negotiated the difference by taking race into account as an admission criterion.

In *Regents of the University of California v. Bakke*,[13] a deeply fractured Supreme Court considered whether reliance on race was constitutionally permissible in the context of a suit brought by a candidate seeking admission

11. In 1960, for example, Harvard Law School—then probably the most selective school in the nation—admitted nearly half of all students who applied. *See* JOEL SELIGMAN, THE HIGH CITADEL: THE INFLUENCE OF HARVARD LAW SCHOOL 7–8 (1978). Today, by contrast, Harvard admits fewer than 13 percent of its applicants. *See* USNews.com, America's Best Graduate Schools 2008: Harvard University (Law): At a glance, http://www.usnews.com/usnews/edu/grad/directory/dir-law/brief/glanc_03074_brief.php (last visited June 17, 2007). When Heman Sweatt applied to the University of Texas Law School, the school had only just adopted a competitive admissions process. *See* Interview by Bill Brands with Dean W. Page Keeton, University of Texas Law School, Austin, Tx. (June 2, 1986) (transcript available in the Tarlton Law Library of the University of Texas–Austin), *available at* http://www.law.du.edu/russell/lh/sweatt/docs/koh.htm.

12. For a discussion of the rise of affirmative action and its relationship to the use of standardized tests, see NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (1999). For a discussion of the disparate impact of reliance on the Law School Admissions Test (LSAT) and undergraduate grade point averages, see Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admissions Decisions*, 72 N.Y.U. L. REV. 1, 13–14 (1997).

13. 438 U.S. 265 (1978).

to a public medical school.[14] Five Justices would have permitted some forms of race-conscious affirmative action, but they disagreed on the rationale for such plans. Four Justices would have permitted affirmative action to remedy the absence of minorities from the profession: The joint opinion of Justices Brennan, White, Marshall, and Blackmun found that the medical school "had a sound basis for believing that the problem of underrepresentation of minorities was substantial and chronic and that the problem was attributable to handicaps imposed on minority applicants by past and present racial discrimination."[15] These Justices pointed to the widening "gap between the proportion of Negroes in medicine and their proportion in the population" as the ultimate problem to be remedied.[16] Thus, they took a fundamentally extrinsic approach to professional school admissions, focusing on schools' contribution to the population of the profession. By contrast, Justice Powell, who provided the critical fifth vote in favor of permitting race-conscious affirmative action, both required that such plans survive strict scrutiny[17]—rather than the form of intermediate scrutiny the other four Justices would have imposed—and rejected proffered justifications that looked outward to the schools' gatekeeping function.[18] He focused instead on the educational benefits to all students that would flow from having a diverse student body. Nonetheless, his position contained at least an extrinsic element, as he observed that "it is not too much to say that the 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples."[19]

## II. HIGHER DEFERENCE AND HIGHER EDUCATION: *GRUTTER* AND DIVERSITY AS A COMPELLING STATE INTEREST

For twenty-five years after *Regents of the University of California v. Bakke*, the Supreme Court managed to avoid revisiting affirmative action in

14. An earlier lawsuit involving a challenge to affirmative action in admissions to the University of Washington Law School had been dismissed as moot. *See* DeFunis v. Odegaard, 416 U.S. 312 (1974). For an insightful discussion of *Regents of the University of California v. Bakke*, particularly in hindsight after *Grutter*, see John C. Jeffries, Jr., Bakke *Revisited*, 2003 SUP. CT. REV. 1.

15. *Bakke*, 438 U.S. at 369 (Brennan, White, Marshall, & Blackmun, JJ., concurring in part and dissenting in part).

16. *Id.* at 370.

17. *See id.* at 291, 305 (Powell, J.).

18. *See id.* at 305–15.

19. *See id.* at 313 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

higher education. Yet, in the intervening years, the Court manifested a general skepticism towards race-conscious affirmative action, ultimately requiring, in *Adarand Constructors, Inc. v. Pena*,[20] strict scrutiny for *all* uses of race, by "*any* governmental actor subject to the Constitution."[21] In fact, however, the Court's views of race consciousness were more nuanced than this rule suggests, and these nuances played an important role in the Court's revisitation of affirmative action in professional school admissions in *Grutter v. Bollinger*.[22]

The context in which the Court hammered out the principle of strict scrutiny for all racial classifications was far removed from professional school admissions. Cases such as *Adarand* and *Richmond v. J.A. Croson Co.*[23] involved government contracting programs and race-based deviations from what would otherwise have been a highly stylized form of decisionmaking: reliance on formal, sealed bids. Assuming that the bids complied with a variety of articulated specifications provided in advance, they could be ranked against each other along one, entirely quantifiable, dimension: price.

Many government decisions—including, of course, admissions to public professional schools—are quite different. They involve multiple, soft factors. This has important implications for the application of strict scrutiny. Without a formulaic, consensus definition of desert or merit, it becomes harder to justify the legitimacy of a process that produces sharp racial disparities. Even if the Constitution itself has not been construed to forbid the choice of criteria that disproportionately deny benefits to members of historically disadvantaged groups, there may be problems of political legitimacy and institutional discomfort. Thus, to the extent decisionmakers want to rely on criteria that produce such outcomes, there will be a countervailing pressure to modulate their impact. Moreover, once a variety of socioeconomic factors are in play, to exclude consideration of race from the combination of selection criteria threatens to disproportionately exclude traditionally underrepresented minorities.[24]

In fact, less than a month after *Adarand* announced a categorical rule that "*all* racial classifications . . . must be analyzed by a reviewing court under strict scrutiny,"[25] the Court began to back off that position, permitting states

20. 515 U.S. 200 (1995).
21. *Id.* at 224 (emphasis added).
22. 539 U.S. 306 (2003).
23. 488 U.S. 469 (1989).
24. I explore this point more fully in Pamela S. Karlan, *Easing the Spring: Strict Scrutiny and Affirmative Action After the Redistricting Cases*, 43 WM. & MARY L. REV. 1569, 1578, 1594–98 (2002).
25. 515 U.S. at 227 (emphasis added).

to take race into account in the legislative redistricting process as long as the reliance on race did not "subordinate[ ] traditional race-neutral districting principles"—including recognition of even racially identifiable communities.[26] The desire to assure some representation for a state's substantial minority population within governing bodies did not strike the Court as the kind of motive that should strip the state's decisions of their presumption of constitutionality.

To the contrary: The desire to produce integrated governing bodies might itself constitute a compelling state interest, as the redistricting cases also softened the Court's view of what would count as a sufficient justification if strict scrutiny were triggered. There had been language in prior decisions suggesting that only the weightiest concerns of national security (as in the almost immediately discredited internment of Japanese Americans upheld in *Korematsu v. United States*[27]), or the remediation of prior unconstitutional discrimination could justify reliance on race.[28] But in the redistricting cases, the Court held that compliance with sections 2 and 5 of the Voting Rights Act of 1965[29] could also suffice.[30] Those provisions went significantly beyond the constitutional prohibition of purposeful vote dilution to reach practices with a discriminatory impact.[31] Their focus on

26. Miller v. Johnson, 515 U.S. 900, 916 (1995). In a later decision, the Court went further, concluding that even an express statement that a plan was drawn to "'provide[ ] for a fair, geographic, racial and partisan balance throughout the State,'" Easley v. Cromartie, 532 U.S. 234, 235 (2001) (quoting Senator Roy Cooper's testimony to a legislative committee in 1997), was insufficient to trigger strict scrutiny because such words "sa[y] little or nothing about whether race played a *predominant* role comparatively speaking," *id.*

27. 323 U.S. 214 (1944).

28. *See, e.g.*, Richmond v. J.A. Croson Co., 488 U.S. 469, 493–94 (1989) (stating that racial classifications were constitutionally problematic "[u]nless they are strictly reserved for remedial settings").

29. 42 U.S.C. §§ 1973, 1973c (2000).

30. For the most recent example, a particularly striking one given that it marks the first time that Justices Scalia and Thomas—along with the newly appointed Chief Justice and Justice Alito—would have upheld race-conscious government decisionmaking under strict scrutiny, see *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594, 2667–68 (2006) (Scalia, J., concurring in part and dissenting in part). In earlier cases, a majority of the other Justices had concluded that compliance with the Voting Rights Act of 1965 can constitute a compelling state interest that justifies taking race into account in the redistricting process. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 990 (1996) (O'Connor, J., concurring); Shaw v. Reno, 509 U.S. 630, 674 (1993) (White, J., dissenting).

31. Section 2 of the Voting Rights Act of 1965 forbids the use of voting practices or procedures that "result" in minority voters having less opportunity to participate in the political process or to elect representatives of their choice. 42 U.S.C. § 1973. Section 5 forbids particular jurisdictions from implementing any changes in their electoral practices if those changes have either a discriminatory purpose or a discriminatory "effect." *Id.* § 1973c(a).

"'a searching practical evaluation of' the past and present reality"[32] to determine whether the political process is equally open to minority citizens reflected a profound and race-conscious commitment to political integration. They expressly directed courts to consider "the extent to which members of a protected class"—defined in terms of race or specific language-minority status—"have been elected to office in the State or political subdivision."[33] Thus, the voting rights cases reflected a nascent view that having a critical mass of minority elected officials might be important to the legitimacy of political institutions.

*Grutter*, the University of Michigan Law School case, was one of a pair of cases involving the University. The other, *Gratz v. Bollinger*,[34] concerned undergraduate admissions and was decided on the grounds of narrow tailoring, the Court holding that the mechanical assignment of a predetermined and unvarying number of points based on an applicant's membership in a traditionally underrepresented group was an impermissible means of achieving racial diversity among the student body even assuming that such a goal were compelling.[35] As a result, only in *Grutter* did the Justices discuss what constitutes a compelling governmental purpose that can justify the use of race in the admissions process.[36]

Justice O'Connor's opinion for the Court in *Grutter* began its discussion in a fairly conventional vein, announcing that "[t]oday, we hold that the Law School has a compelling interest in attaining a diverse student body."[37] But in the immediately following paragraph, the Court's discussion took a distinctly unusual turn:

> The Law School's educational judgment that such diversity is essential to its educational mission is one to which we defer. The Law School's assessment that diversity will, in fact, yield educational benefits is substantiated by respondents and their *amici*. Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.[38]

32. Thornburg v. Gingles, 478 U.S. 30, 45 (1986) (quoting S. REP. NO. 97-417, at 30 (1982)).
33. 42 U.S.C. § 1973(b).
34. 539 U.S. 244 (2003).
35. *See id.* at 275.
36. *See* Grutter v. Bollinger, 539 U.S. 306, 327–33 (2003).
37. *Id.* at 328.
38. *Id.*

Nowhere in its prior decisions had the Court delegated responsibility for deciding the weight of a governmental interest to some other governmental entity. Indeed, a central idea underpinning strict scrutiny was the Court's belief that race was a sufficiently problematic criterion that its use cannot be "presumed" to reflect "good faith . . . absent a showing to the contrary,"[39] but precisely the reverse. What is striking here is not that the Court thinks racial diversity within the student body of a selective public educational institution can be a compelling governmental purpose, but rather that it declares that racial diversity is compelling because a school thinks it is.[40]

Contrast the Court's presumption of good faith in *Grutter* with its approach only two years later in *Johnson v. California*.[41] That case concerned California's practice of temporarily assigning newly arrived or recently transferred prisoners cellmates of the same race or ethnicity. This time, Justice O'Connor's opinion for the Court declared that deference to institutional administrators—in that case, prison officials to whom a

39. *Id.* at 329. *Grutter* derived this phrase from Justice Powell's opinion in *Bakke*, 438 U.S. 265, 318–19 (1978) (Powell, J.). There, Justice Powell wrote that "a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases." *Id.* In support of this proposition, he cited *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977), *Washington v. Davis*, 426 U.S. 229 (1976), and *Swain v. Alabama*, 380 U.S. 202 (1965). *Bakke*, 438 U.S. at 319. But those three cases all involved the question whether facially neutral government decisions should nonetheless be understood to rest on race. In contemporary parlance, they were all cases involving the question whether strict scrutiny should be triggered in the first place. There is thus a double irony in Justice Powell and the *Grutter* Court using the phrase to explain a presumption of good faith in a case in which the government undeniably relied on race.

40. As this Article was going to press, the Supreme Court announced its decision in *Parents Involved in Community Schools v. Seattle School District No. 1*, 127 S. Ct. 2738 (2007). There, a bitterly divided Court struck down two public school districts' race-conscious student assignment policies—policies that were designed to produce racially integrated schools despite residential segregation.

While a full discussion of *Parents Involved* is beyond the scope of this Article—I intend to discuss the case more fully in a forthcoming work, *see* Pamela S. Karlan, *The Law of Small Numbers: Some Emerging Themes of the Roberts Court* (2007) (unpublished manuscript, on file with author)—it is striking how Chief Justice Roberts's opinion for the Court recast the interest found compelling in *Grutter* as "the interest in diversity in higher education," *Parents Involved*, 127 S. Ct. at 2753, by reemphasizing the "'special niche in our constitutional tradition'" occupied by institutions of higher education due to the "expansive freedoms of speech and thought associated with the university environment," *id.* at 2754 (quoting *Grutter*, 539 U.S. at 329, 334), and downplaying the role of universities (and, more specifically, law schools) in producing citizen-leaders. By contrast, in dissent, Justice Breyer argued that there was a "democratic element: an interest in producing an educational environment that reflects the 'pluralistic society' in which our children will live" that made racial diversity in public schools a compelling state interest. *Id.* at 2821 (Breyer, J., dissenting) (quoting Swann v. Charlotte-Mecklenburgh Bd. of Educ., 402 U.S. 1, 16 (1971)).

41. 543 U.S. 499 (2005).

deferential standard of review generally is warranted under the standard announced in *Turner v. Safley*[42]—was "fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified."[43] As she went on to explain:

> [W]e have refused to defer to state officials' judgments on race in other areas where those officials traditionally exercise substantial discretion. For example, we have held that, despite the broad discretion given to prosecutors when they use their peremptory challenges, using those challenges to strike jurors on the basis of their race is impermissible. See *Batson* [*v. Kentucky*, 476 U.S. 79, 89–96 (1986).] Similarly, in the redistricting context, despite the traditional deference given to States when they design their electoral districts, we have subjected redistricting plans to strict scrutiny when States draw district lines based predominantly on race. Compare generally *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004) (partisan gerrymandering),[44] with *Shaw* v. *Reno*, 509 U.S. 630 (1993) (racial gerrymandering).[45]

Strikingly, though, Justice O'Connor does *not* mention her own opinion for the Court only two years before in *Grutter* among the list of deference-refusing cases.

*Johnson* does at least give a hint, however, as to why the Court adopted the odd locution for recognizing diversity as a compelling interest in *Grutter*. In *Johnson*, the Court "explicitly reaffirm[ed]" what it had "implicitly held" in *Lee v. Washington*[46]—namely, that protecting prisoners from inmate-on-inmate violence constitutes a compelling state interest.[47] This interest, like the

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42. 482 U.S. 78 (1987).

43. *Johnson*, 543 U.S. at 506 n.1.

44. *Vieth v. Jubelirer* was a case in which Justice O'Connor would have held the plaintiffs' claims nonjusticiable altogether, effectively according the plan drawers' decisions unreviewable deference.

45. *Johnson*, 543 U.S. at 512. And just to make the switch in roles complete, Justices Thomas and Scalia, who were scornfully dismissive of the bona fides of the law school and who insisted on applying conventional strict scrutiny to the law school's admissions policies, argued that prisons were a constitutionally distinctive context in which administrators were entitled to exceptional deference. *See id.* at 524, 528–32 (Thomas, J., joined by Scalia, J., dissenting). In his dissenting opinion, Justice Thomas also contrasted the deference the Court gave the University of Michigan with its skepticism toward the California Department of Corrections, noting that "[d]eference would seem all the more warranted in the prison context, for whatever the Court knows of administrating educational institutions, it knows much less about administering penal ones." *Id.* at 543.

Most recently, in *Parents Involved*, Justices Scalia and Thomas joined the two new members of the Court, Chief Justice Roberts and Justice Alito, in relying on *Johnson* to reject any deference to local school boards on questions of racial integration in public schools. 127 S. Ct. 2738.

46. 390 U.S. 333 (1968) (per curiam).

47. *See Johnson*, 543 U.S. at 512.

state interest a government has in remedying its prior unconstitutional discrimination, is "compelling" not only in the normative sense of being morally convincing, but also in the descriptive sense of being legally required. A jurisdiction that fails to protect inmates within its custody from prisoner-on-prisoner violence risks legal liability.[48] Similarly, a jurisdiction that has discriminated unconstitutionally in the past can be compelled to redress the injury to identifiable victims. And a jurisdiction that fails to comply with the Voting Rights Act can be enjoined by a court to bring its election system into compliance.

To be sure, institutions are constitutionally forbidden from adopting policies designed to preclude racially diverse student bodies. Those that maintained such policies in the past can be compelled, under the principle articulated in *Green v. School Board of New Kent County*,[49] to eliminate racially identifiable institutions "root and branch," which may include a variety of affirmative measures.[50] And there is at least a potential argument that as a statutory matter, institutions of higher education that receive federal funds (and virtually all such institutions do) cannot use admissions processes that produce monoracial results regardless of the intent behind them.[51] But nothing in the Court's current jurisprudence suggests that a selective public university's failure to adopt race-conscious affirmative action programs would subject it to constitutional liability.

To return, though, to the Court's discussion in *Grutter* itself, a second striking aspect of the Court's opinion is how it recasts the nature of the diversity interest embraced by Justice Powell in *Bakke*. Justice Powell's articulation, grounded as it was in earlier cases involving academic freedom and autonomy, involved a largely intrinsic perspective in the sense that academic diversity was valuable to the university's distinctive mission of promoting the robust exchange of ideas and the advancement of knowledge. As Justice O'Connor explained, "Justice Powell rejected an interest in 'reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession' as an unlawful interest in racial balancing."[52]

48. *See* Farmer v. Brennan, 511 U.S. 825, 833–34 (1994) (holding that prison officials can be held liable for deliberately failing to protect a prisoner from inmate-on-inmate violence).

49. 391 U.S. 430 (1968).

50. *Id.* at 437–38.

51. *See* Karlan, *supra* note 24, at 1599 (discussing Title VI–related administrative regulations that forbid educational institutions from using admissions criteria that have a discriminatory effect).

52. Grutter v. Bollinger, 539 U.S. 306, 323 (2003) (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306–07 (1978)).

By contrast, a substantial portion of *Grutter*'s discussion of diversity focused on precisely this consideration. As opposed to the brief and notably abstract reference to the way that racially diverse student bodies contribute to "learning outcomes,"[53] consider the concrete nature of the Court's discussion of the way that racially diverse student bodies contribute to the extrinsic function of producing members of leadership professions.

First, the Court described the interplay between race-conscious admissions and the compelling governmental interest in national defense. The Court relied heavily on a brief filed by former high-ranking officers and civilian leaders of the armed forces, including members of the Joint Chiefs of Staff, military academy superintendents, secretaries of defense, and several members of the U.S. Senate with particular expertise in military affairs, for the proposition that "a highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principal mission to provide national security."[54] As the brief explained, "[t]he chasm between the racial composition of the officer corps and the enlisted personnel" that persisted until the military adopted various forms of affirmative action "undermined military effectiveness" by diminishing unit cohesion and perceptions of officer corps legitimacy.[55] Achieving diversity in the officer corps required race-conscious admissions policies both at the service academies themselves (as well as in admission to the selective academy preparatory schools) and at the selective colleges and universities that hosted the Reserve Officers' Training Corps (ROTC) programs that produce nearly half the active officer corps.

More broadly, the Court recognized the interplay between admissions policies and the political legitimacy of constitutional officeholders: "[U]niversities, and in particular, law schools, represent the training ground for a large number of our Nation's leaders."[56] Citing a brief filed by the Association of American Law Schools (AALS),[57] the Court noted that "[i]ndividuals with law degrees occupy roughly half the state governorships, more than half the seats in the United States Senate, and more than a third of the seats in the United States House of Representatives," and that "[t]he pattern is even more striking when it comes to highly selective

53. *Id.* at 330.

54. Brief of Julius W. Becton, Jr. et al. as Amici Curiae Supporting Respondents at 5, *Grutter*, 539 U.S. 306 (No. 02-241, 02-516).

55. *Id.* at 14.

56. *Grutter*, 539 U.S. at 332.

57. *See* Brief of Association of American Law Schools as Amicus Curiae Supporting Respondent at 5–6, *Grutter*, 539 U.S. 320 (No. 02-241). In the interest of full disclosure, I note that I was counsel of record for the Association of American Law Schools (AALS).

law schools. A handful of these schools accounts for 25 of the 100 United States Senators, 74 United States Courts of Appeals judges, and nearly 200 of the more than 600 United States District Court judges."[58] Here, as with the officer corps, "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity."[59] This legitimacy is extrinsic to the question whether any particular leader's perspective was shaped by his or her exposure in law school to the views of classmates of other races or backgrounds.

Thus, *Grutter* marks a significant expansion of the concept of diversity as a compelling interest, as both the military and the constitutional officer rationales explicitly invoke an "interest in reducing the historic deficit of traditionally disfavored minorities"[60] within these two leadership cadres. And neither of these rationales depends to any important degree on the *academy*'s educational judgments. Indeed, the production of a leadership cadre may reflect the network students begin to forge with their talented and ambitious classmates and with alumni, as well as the school's standing and prestige in the community, just as much as it reflects any academic knowledge a student has acquired.[61] Rather, the place where the academy's specialized judgment comes into play is in deciding whether overlaying racial considerations on an admissions process that would otherwise fail to produce a racially diverse student body is an appropriately tailored means of achieving an end whose compelling character is a product of extramural considerations. In short, the *Grutter* Court seems to have accorded institutional deference to the wrong prong of the strict scrutiny inquiry.

In any event, it is worth remembering that only Justice Powell rested his approval of affirmative action on a diversity rationale. The four Justices who would have upheld Davis's program in *Bakke*—and, by extension, the general use of affirmative action in educational admissions—all took an approach far closer in reality, if not in nomenclature, to the societal approach embraced in *Grutter*. That is, they located the importance of the governmental goal at stake not in the autonomy of universities, but precisely in the schools' integral role in the production of professional leaders and in the importance of diverse representation within the leadership class.

58. *Grutter*, 539 U.S. at 332.

59. *Id.*

60. *Id.* at 323 (quoting Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 306–07 (1978) (Powell, J.)).

61. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 520, 523, 551–52 (1996) (discussing this networking effect); Sweatt v. Painter, 339 U.S. 629, 634 (1950).

There were two ways in which the champions of affirmative action effectively packaged the issue in the Michigan affirmative action cases. By getting both the undergraduate and law school plans before the Court at the same time, they gave the Court the psychologically attractive option of saying "this, but not that."[62] Second, by having a *law school*'s plan before the Court, the proponents of affirmative action placed the practice in a familiar, and perhaps uniquely attractive, context. It is probably unsurprising that Justice O'Connor, whose sex discrimination jurisprudence was consistently more liberal than her race discrimination decisions, was more amenable to race-conscious affirmative action in the legal context, where she had experienced firsthand the problems that came from traditional exclusion and absence of a critical mass. She was acutely aware both of her position as the first—and for a long time the sole—woman on the Supreme Court and the special role played by Justice Marshall.[63]

*Grutter* was not the first time the Supreme Court had understood, when it came to lawyers, an important value it had discounted when it came to physicians. Consider, for example, the contrast between the Court's decision in *Rust v. Sullivan*,[64] upholding restrictions on the advice doctors working in federally funded family planning clinics could give their patients regarding abortion, and its decision in *Legal Services Corp. v. Velazquez*,[65] striking down restrictions on the arguments that could be made by attorneys working in federally funded legal services clinics. The Court saw government-funded doctors and lawyers as occupying constitutionally different roles. The former were pure conduits by which the government "'transmit[ted] specific information pertaining to its own program'";[66] they thus had no independent, constitutionally cognizable interest in pursuing their independent professional judgment. By contrast, the lawyers that the government provided to indigent clients retained their distinctive professional identity as agents of their clients who "'work[ ] under canons of professional responsibility that mandate [their] exercise of independent judgment . . . .'"[67] Because "[a]n informed, independent judiciary presumes an informed,

62. Indeed, as John Jeffries points out, this is such a psychologically attractive option that in *Bakke*, Justice Powell "hit upon the brilliant stratagem" of upholding Harvard College's admissions policy, which was not even before the Court, as a counterweight to his opinion striking down Davis's. *See* Jeffries, *supra* note 14, at 8.

63. *See* Sandra Day O'Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217, 1217–18 (1992).

64. 500 U.S. 173 (1991).

65. 531 U.S. 533 (2001).

66. *Id.* at 541 (quoting Rosenberger v. Univ. of Va., 515 U.S. 819, 833 (1995)).

67. *Id.* at 542 (quoting Polk County v. Dodson, 454 U.S. 312, 321–22 (1981)).

independent bar,"[68] the government could not condition the funding of welfare recipients' legal claims on limiting the scope of their lawyers' representation. The Court somehow understood, when it came to lawyers—and to courts—the importance of independent professional judgment in a way that it had not similarly viewed physicians' claims.

## III. LIVE BY THE SWORD, DIE BY THE SWORD: THE SOLOMON AMENDMENT AND LAW SCHOOLS' AUTONOMY

While law schools' and lawyers' judgments about the nature of the profession were accorded great deference in *Grutter v. Bollinger*[69] and *Legal Services Corp. v. Velazquez*,[70] that was decidedly not the case in the legal academy's first appearance before the Roberts Court. In *Rumsfeld v. FAIR*,[71] the Court squarely and unanimously rejected the academy's claim that exclusion of military recruiters, in light of the armed forces' policy of discrimination against openly gay, lesbian, or bisexual students, was central to its educational mission.

Virtually every American law school has a nondiscrimination policy that forbids discrimination on the basis of a variety of protected characteristics ranging from race and sex through age, disability, veteran status, and sexual orientation. These policies forbid not only discrimination in the school's internal academic operations, but also discrimination by potential employers seeking to use the school's placement facilities.[72]

After roughly a decade of sparring, these policies came into conflict with Congress's refinement of the Solomon Amendment,[73] a provision that denies virtually all the important sources of federal funding to institutions that prohibit military recruiters "from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner

68. *Id.* at 545.
69. 539 U.S. 306 (2003).
70. 531 U.S. 533 (2001).
71. 547 U.S. 47 (2006).
72. While many law schools adopted such policies entirely as a voluntary internal matter, such policies are also required by the bylaws of the AALS. *See* ASS'N OF AM. LAW SCH., 2006 HANDBOOK § 6-3(b), at 34 (2006), *available at* http://www.aals.org/about_handbook_requirements.php#6 ("A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.").
73. 10 U.S.C. § 983(b)(1) (Supp. 2004).

that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."[74] While the denial of these funds to law schools themselves might not be that significant, most law schools are part of universities that are utterly dependent on federal funds. Thus, law schools faced the choice between sticking to their nondiscrimination policies and crippling the operations of the universities of which they are subunits.

As it arrived at the Supreme Court, the *FAIR* litigation was framed as a challenge to the government's conditioning of federal funds on a law school's abandonment of its nondiscrimination policies. The challengers' arguments were that the Solomon Amendment placed law schools in an untenable position, forcing them into compelled speech or compelled association (in the course of assisting military recruiters) in violation of their First Amendment rights. The assumption underlying the challenge was that Congress had improperly used its spending power.

The Supreme Court, however, dramatically reframed the issue. Chief Justice Roberts's unanimous opinion for the Court relocated congressional authority away from the Spending Clause and into the clauses conferring upon Congress the power to "provide for the common Defence," to "raise and support Armies," and to "provide and maintain a Navy."[75] Congress, the Court suggested, did not have to offer the universities the carrot of federal funding at all; it could simply have demanded access for military recruiters regardless of whether a school received federal funds—indeed, presumably regardless of whether a school operated placement facilities at all. "[J]udicial deference," the Court declared, "'is at its apogee' when Congress legislates under its authority to raise and support armies."[76] Thus, the government was not required to show that demanding "most favored nation" status for military recruiters was necessary to staff the Judge

74. *Id.* The amendment now provides, in pertinent part, that no funds connected with the Departments of Defense, Education, Health and Human Services, Homeland Security, Labor, or Transportation, or several specified federal agencies

> may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents . . . the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

*Id.* § 983(b).

75. U.S. CONST. art. I, § 8, cls. 1, 12–13.

76. *FAIR*, 547 U.S. at 58 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

Advocate General's (JAG) Corps, or the military more generally; it need only meet the toothless requirement of showing that on-campus interviewing "add[s] to the effectiveness of military recruitment,"[77] which surely it does by reducing transaction costs for the preliminary interview process.

*FAIR* thus decoupled two issues that *Grutter* had linked together—recognition of the extrinsic function law schools perform in serving as a gateway to the legal profession and deference to law schools' determinations of how to organize their internal operations to best create those lawyers. With respect to law schools' role as the producer of lawyers, the Court treated the schools as essentially indifferent as to where the lawyers they produce end up, downplaying any expressive element in law schools' placement operations:

> Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper; its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.[78]

But neither a parade organizer's choice nor a law school's decision is inherently expressive. Some parades accept all comers. Their organizers are expressing nothing other than that orderly participants are welcome to march. Others, like the Boston St. Patrick's Day parade run by the South Boston Allied War Veterans Council,[79] limit participation.[80] What made the Boston St. Patrick's Day parade a sufficiently expressive event to trigger First Amendment protection for its organizers' decision to exclude an organization of gay people was the very decision to exclude. So, too, with law schools. A law school might permit any employer to recruit on its campus. But it might also choose to exclude some employers. Many law schools (including my own, for example) limit access to on-campus recruiting to legal employers—that is, employers seeking to fill positions for which

77. *Id.* at 67.

78. *Id.* at 64.

79. *Compare* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (holding that the parade's organizers were expressing a viewpoint by refusing to allow a gay, lesbian, and bisexual group to march), *with* Katie Zezima, *An Anything-Goes Parade Wins the Day in Maine*, N.Y. TIMES, July 5, 2007, at A10 (describing a Fourth of July parade in which "anyone can show up and participate" as "a cross among a charming, Rockwellian parade, a roast and a political protest").

80. *See Hurley*, 515 U.S. 557.

legal training is either essential or valuable. That decision represents a kind of content restriction. Schools might also manifest a sort of viewpoint restriction in their career services operations, conveying the message that certain forms of legal employment are especially worthy: Consider the message sent by summer stipends, school-funded fellowships, and loan forgiveness programs for public interest and public service jobs. To be sure, law schools facilitate recruiting to assist their students in obtaining jobs. But the way a school operates those services may be designed to channel students towards certain jobs. Schools, in other words, may not be indifferent to the jobs their students take.[81] The Court, however, assumed that law schools maintain placement operations simply to maximize the number of employers who seek to recruit their students.

Moreover, the Court refused to accord any deference to law schools' own sense of the messages their policies are intended to convey either to their students or to outside observers. While commentators have focused on the apparent tension between the Court's decisions in *Boy Scouts of America v. Dale*[82] and *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,[83] recognizing the right of expressive associations to exclude participation by individuals whose messages they dislike, and the Court's decision in *FAIR*, the more striking inconsistency between the earlier cases and *FAIR* involves not the claim of forced association, but rather the Court's refusal to afford any deference to law schools' views of what their expressive values are in the first place. In *Dale*, for example, the Court foreclosed any inquiry into whether exclusion of gay scoutmasters involved expression. The Court's starting point was the view that "[i]t seems indisputable that an association that seeks to transmit . . . a system of values engages

81. Consider, for example, the decision of the Georgetown University Law Center, which provides summer funding for students who work for public interest organizations—and which had funded all 179 students who had applied the previous summer—not to fund an internship for a student to work at Planned Parenthood because it was an "abortion rights organization." *See* Sam Harbourt, *Law Center Divided Over Denial of Funds for Abortion Rights*, HOYA, April 13, 2007, *available at* http://www.thehoya.com/news/041307/news1.cfm (quoting the dean's characterization of Planned Parenthood). Clearly, the school is expressing a message regarding which employment opportunities deserve institutional support.

That being said, none of the schools involved in the *FAIR* litigation suggested that it was trying to dissuade its students from pursuing jobs as military lawyers. But the Court's opinion went significantly beyond holding that law schools' military recruiting bans were not expressive because the bans were not intended to channel students away from the Judge Advocate General's (JAG) Corps. It seems eminently reasonable to view schools' nondiscrimination policies as intended generally to communicate to students that the school thinks a nondiscriminatory employer is more worthy of their talents.

82. 530 U.S. 640 (2000).

83. 515 U.S. 557 (1995).

in expressive activity."[84] The Court then deferred to the Boy Scouts' assertion, apparently made public for the first time during the course of the litigation itself, that the organization sought to express disapproval of homosexuality.[85] Similarly, in *Hurley*, the Court deferred to the parade organizer's claim that it was engaging in expression when it excluded a gay group from participating despite the fact that the organizer was "rather lenient in admitting participants," had "combin[ed] multifarious voices," and had "fail[ed] to edit their themes to isolate an exact message . . . ."[86]

In *FAIR*, however, the Court simply rejected the respondents' claim that their recruiting practices were intended as expressive activity. By contrast, in *Romer v. Evans*,[87] Justice Scalia (joined by Justice Thomas), described the policies at issue in *FAIR* as evidence of what he viewed as a national *Kulturkampf* over gay rights:

> How that class feels about homosexuality will be evident to anyone who wishes to interview job applicants at virtually any of the Nation's law schools. The interviewer may refuse to offer a job because the applicant is a Republican; because he is an adulterer; because he went to the wrong prep school or belongs to the wrong country club; because he eats snails; because he is a womanizer; because she wears real-animal fur; or even because he hates the Chicago Cubs. But if the interviewer should wish not to be an associate or partner of an applicant because he disapproves of the applicant's homosexuality, then he will have violated the pledge which the Association of American Law Schools requires all its member schools to exact from job interviewers: "assurance of the employer's willingness" to hire homosexuals.[88]

Even if placement policies are not "inherently expressive,"[89] to the extent that they are designed to impose "the views and values of the lawyer class" on recalcitrant employers, they take on an expressive role.[90]

Ironically, although the Court treated Congress's decision to rely on the Spending Clause rather than the defense-specific clauses as less intrusive on law schools' autonomy—presumably because this left schools

84. *Dale*, 530 U.S. at 650.
85. *See id.* at 651.
86. 515 U.S. at 569.
87. 517 U.S. 620 (1995).
88. *Id.* at 652–53 (Scalia, J., dissenting) (quoting BYLAWS OF ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. § 6-4(b); EXECUTIVE COMMITTEE REGULATIONS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS § 6.19, *in* 1995 HANDBOOK, ASSOCIATION OF AMERICAN LAW SCHOOLS).
89. Rumsfeld v. FAIR, 547 U.S. 47, 64 (2006).
90. *Romer*, 517 U.S. at 652 (Scalia, J., dissenting).

with the choice of whether to permit military recruiting—reliance on the Spending Clause in fact forced the schools into conveying a message. Under a regime of directly compelled access, after all, schools could truthfully say that they permitted military recruiters onto campus because the only alternative would be civil disobedience. Under the Solomon Amendment, by contrast, the message schools are sending their students is that money is more important than their commitment to nondiscrimination. The Court asserted:

> Nothing about recruiting suggests that law schools agree with any speech by recruiters. . . . We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school.[91]

But that reassurance rings hollow when schools are not "legally required" to permit the discriminatory behavior but do so because of financial considerations.

In the end, the Solomon Amendment was the ironic beneficiary of prior federal funding provisions such as Title VI and Title IX that were enacted to assure equal access to educational institutions for racial minorities and women who had traditionally been excluded from full participation. In *FAIR*, the Court elevated preventing discrimination against military recruiters over preventing discrimination against gay, lesbian, and bisexual students. When both the military and law schools argued for deference to educational institutions' judgments, as they did in *Grutter*, they formed an irresistible combination. But when they came into conflict, as they did over the Solomon Amendment, a Court that had already decided that a central aspect of elite educational institutions' mission was to provide civic leaders, including military officers, went with the big guns.

## CONCLUSION

The Supreme Court's opinions in *Grutter* and *FAIR* reflect the gravitational pull that institutional context can exert on constitutional doctrine. Viewed as cases about judicial deference to educational institutions' judgments about the nature of their mission, the cases stand in some tension with one another: *Grutter* adopted a distinctively respectful stance towards law schools' claims about the importance of racial diversity while *FAIR*

91. *FAIR*, 547 U.S. at 65 (citations omitted).

summarily dismissed law schools' claims about the importance of nondiscriminatory placement policies. But shifting the focus from law schools as educational institutions to law schools as producers of a professional elite critical to the operation of democratic institutions brings the cases into a kind of alignment. Viewed in this light, *Grutter* and *FAIR* are concerned with dismantling barriers in the pipeline between law schools and public service. What makes *FAIR* ironic, then, is not that the Court upheld a law guaranteeing government access to law schools' placement operations, but that the government itself has imposed a barrier—in the form of the "Don't Ask, Don't Tell" policy that excludes gay, lesbian, and bisexual students from participating in military service.