proposed rules for regulating politics insufficiently grounded in a constitutional tradition. In contrast, one who believes that the Constitution's commands are more general and dynamic would see these rules as legitimate instruments for effectuating the Constitution's principles of equality and civic participation. In any event, both approaches are superior to *LULAC*'s ambivalence, which neither addresses the problem of political gerrymandering through the courts nor encourages solutions elsewhere.

### *E. Freedom of Association*

*Freedom of Expressive Association — Campus Access for Military Recruiters*. — Every fall, law schools open their doors to employers intent upon cherry-picking the best and brightest from the second-year classes. A courtship process ensues, facilitated by law schools, during which employers seek to convey their desirability to applicants through receptions, mailings, small gifts, off-campus interviews in hotels, and word-of-mouth.[1] It is a peculiar job-recruiting ceremony, unique to law schools and their vulnerable, inexperienced students. At the end of the process, though many students receive job offers, a large number find themselves with jobs of a less idealistic and public-spirited bent than what they had imagined upon entering law school;[2] somehow, the process strongly influences the result.[3] Last Term, in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*,[4] the Supreme Court upheld the Solomon Amendment against a First Amendment challenge, deciding en route that Congress would not violate the First Amendment if it were to force law schools to extend the same privileges to military recruiters as they extend to any other employer invited onto campus for recruiting purposes. If it is any indication of what is to come from the Roberts Court, this opinion establishes a worrisome precedent. Doctrinally, the opinion cuts back First Amendment protections on a number of fronts. More generally, it exhibits a marked indifference to the subtle forms that expression can

---

[1] *See* Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 606 (1982) ("[E]ach firm puts on, with the tacit or enthusiastically overt participation of the schools, a conspicuous display of its relative status within the bar . . . . This process is most powerful for students who go through the elaborate procedures of firms in the top half of their profession.").

[2] *See id.* at 592 ("A surprisingly large number of law students go to law school with the notion that being a lawyer means something more, something more socially constructive than just doing a highly respectable job.").

[3] *See id.* at 591 ("Because students believe what they are told, explicitly and implicitly, about the world they are entering, they behave in ways that fulfill the prophecies the system makes about them and about that world.").

[4] 126 S. Ct. 1297 (2006).

take, buttressed by an ideologically biased notion of a law school's proper role in the legal world.

Prior to this case, almost every American law school denied access to its career services to any employer who discriminated on the basis of sexual orientation.[5] Many law schools thus gave limited access, if any, to the U.S. military, owing to the military's explicit policy against employing people who have exhibited homosexual conduct.[6] Eventually Congress took note of the law schools' exclusionary policies, and in 1994 Representatives Gerald Solomon and Richard Pombo cosponsored a bill, later named the Solomon Amendment,[7] which conditioned schools' receipt of federal funds[8] upon allowing military recruiters' entry onto campus.[9] Most law schools subsequently chose to allow military recruiters onto their campuses or adjacent undergraduate campuses, while still denying them other services offered to nondiscriminating employers.[10] The Department of Defense (DOD) deemed this practice compliant,[11] but after September 11, 2001, it assumed a new informal policy, according to which law schools were required to "provide military recruiters access to students equal in quality and scope to that provided to other recruiters."[12]

An organization committed to vindicating the rights of law schools, the Forum for Academic and Institutional Rights (FAIR), responded by bringing suit against the DOD in New Jersey federal court.[13] FAIR alleged that the Solomon Amendment as well as the DOD's informal policy were unconstitutional conditions because they conditioned funding upon the law schools' renunciation of their rights to free expression and association.[14] FAIR moved for a preliminary injunction against enforcement of the statute, but the district court denied the motion, holding that FAIR was unlikely to succeed in proving that the Solo-

---

[5] *See* Forum for Academic & Institutional Rights (FAIR) v. Rumsfeld, 390 F.3d 219, 225 (3d Cir. 2004).

[6] *See id.* at 225 & n.3.

[7] 10 U.S.C.A. § 983 (West 2000 & Supp. 2006).

[8] At first this included only Department of Defense funds; eventually, it came to encompass funds from the Departments of Homeland Security, Labor, Health and Human Services, and Education. *See FAIR*, 390 F.3d at 226 & n.4.

[9] *See id.* at 225, 227.

[10] *See id.* at 227.

[11] *Id.*

[12] Letter from William J. Carr, Acting Deputy Under Sec'y for Military Pers. Policy, Dep't of Def., to Richard Levin, President, Yale Univ. (May 29, 2003), *in* Joint Appendix at 128, 129, *FAIR*, 126 S. Ct. 1297 (No. 04-1152), *available at* http://www.usdoj.gov/osg/briefs/2005/3mer/2mer/2004-1152.mer.ja.pdf (letter listed as an excerpt of exhibit 18 to Eskridge Declaration).

[13] *See* Forum for Academic & Institutional Rights, Inc. (FAIR) v. Rumsfeld, 291 F. Supp. 2d 269, 274 (D.N.J. 2003).

[14] *See id.* at 299.

mon Amendment was unconstitutional as applied.[15] The court saw neither sufficient expressive conduct in the schools' exclusion of recruiters nor a sufficient intrusion by military recruiters upon the schools' organizational integrity.[16]

A divided panel of the Third Circuit reversed, holding that on its face[17] the Solomon Amendment abridged freedom of both expression and association.[18] The court recognized that the Solomon Amendment did not force law schools to accept military recruiters as school members but still found that the recruiters' intrusion significantly interfered with the law schools' ability to express their viewpoints.[19] It also found that recruiting, like soliciting funds or proselytizing, could be characterized as both "economic and functional" *and* "expressive,"[20] and thus the forced accommodation of recruiters was similarly unconstitutional.[21]

The Supreme Court reversed. Writing for a unanimous Court, Chief Justice Roberts concluded that the Solomon Amendment was not an unconstitutional condition.[22] At the outset, the Court noted that in addressing a clear congressional prerogative like the raising of armies, "judicial deference . . . is at its apogee."[23] It then proceeded to address FAIR's claims as if the Solomon Amendment's requirements had been imposed directly upon law schools, rather than through the Spending Clause, on the theory that an unconstitutional condition cannot arise when no constitutionally protected right is at stake.[24]

The Court first disposed of FAIR's compelled speech claims. FAIR objected to law schools' being compelled to engage in the speech associated with recruiting, such as bulletin board and e-mail postings advertising the military's presence on campus.[25] The Court responded that such speech was merely "incidental to the Solomon Amendment's regulation of conduct" and described FAIR's complaint as "trivi-

---

15 *See id.* at 322. The court reasoned that, since the Solomon Amendment was constitutional as applied, it must also be constitutional on its face. *Id.* at 298.

16 *See id.* at 304, 308.

17 In the interim between the district court and Third Circuit opinions, Congress codified the DOD's interpretation. *See* Forum for Academic & Institutional Rights (FAIR) v. Rumsfeld, 390 F.3d 219, 228 (3d Cir. 2004); *see also* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004) (amending 10 U.S.C. § 983). Thus, the facial and as-applied challenges merged.

18 *See FAIR*, 390 F.3d at 230.

19 *See id.* at 232–34.

20 *See id.* at 237.

21 *See id.* at 240.

22 *See FAIR*, 126 S. Ct. at 1306.

23 *Id.* (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)) (internal quotation marks omitted).

24 *See id.* at 1307.

25 *See id.* at 1308.

aliz[ing] the freedom protected" in its other compelled speech cases.[26] The Court then moved on to the claims of forced accommodation of speech. First, it dismissed the idea that the schools had been forced to accommodate *explicit* speech "because the schools are not speaking when they host interviews and recruiting receptions."[27] It next refused to equate the forced accommodation of the military to the forced accommodation of a parade contingent,[28] an action held unconstitutional in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[29] In contrast to a parade organizer's decision to include a contingent, "a law school's decision to allow recruiters on campus is not inherently expressive."[30] Furthermore, the Court reasoned that the law schools could disassociate themselves from the military recruiters through demonstrations or protests and that students would thus not misconstrue the military's presence on campus as an institutional endorsement.[31]

The Court also declined to characterize the law schools' actions as symbolic speech, from which it followed that the test established in *United States v. O'Brien*[32] did not apply.[33] In support of this finding, the Court again described the law schools' conduct as "not inherently expressive."[34] The Court noted that someone who observed a military recruiter interviewing on an undergraduate campus would not from that impression alone be able to discern why the recruiter was there rather than on the law school's campus; to that hypothetical observer, the message expressed by the law school's exclusionary policy would not be "overwhelmingly apparent."[35] According to the Court, the law schools' actions only became expressive when accompanied by words; however, this fact itself was strong evidence that the conduct was not actually inherently expressive.[36]

---

[26] *Id.*

[27] *Id.* at 1309.

[28] *Id.* at 1309–10.

[29] 515 U.S. 557 (1995). *Hurley* involved a public accommodations law that forced the organizer of the Boston St. Patrick's Day parade to include a contingent of gay, lesbian, and bisexual activists in the procession. *See id.* at 561. The *Hurley* Court struck down the law as applied, ruling that parades are a form of expression and thus deserving of First Amendment protection from the forced accommodation of unwanted messages. *See id.* at 580.

[30] *FAIR*, 126 S. Ct. at 1310.

[31] *See id.* The Court noted that under the Solomon Amendment schools "could put signs on the bulletin board next to the door, they could engage in speech, [and] they could help organize student protests" without putting their federal funding at risk. *Id.* at 1307 (quoting Transcript of Oral Argument at 25, *FAIR*, 126 S. Ct. 1297 (No. 04-1152)) (internal quotation marks omitted).

[32] 391 U.S. 367 (1968).

[33] *See FAIR*, 126 S. Ct. at 1310–11 (citing *O'Brien*, 391 U.S. at 376).

[34] *Id.* at 1310.

[35] *See id.* at 1310–11 (quoting Texas v. Johnson, 491 U.S. 397, 406 (1989)) (internal quotation marks omitted).

[36] *Id.* at 1311.

Finally, the Court dismissed FAIR's claims regarding associational freedom.[37] FAIR argued that, by forcing law schools to interact with military recruiters, the Solomon Amendment significantly impeded their ability to express opposition to the military's employment practices.[38] The Court, however, categorically rejected this argument. It distinguished the authority upon which FAIR relied, *Boy Scouts of America v. Dale*,[39] by noting that the Boy Scouts had been forced to accept Dale as a member; in contrast, the Solomon Amendment merely forced law schools to "associate" with the recruiters.[40] The Court also dismissed as irrelevant the law schools' belief that accommodating the recruiters would harm their associational freedom. According to the Court, law schools "cannot 'erect a shield' against laws requiring access 'simply by asserting'" such facts.[41] The Court concluded by explaining that, though in the past it had struck down laws because they made membership in a group "less attractive," it would sustain the Solomon Amendment because the law did nothing to make membership in a law school less desirable.[42]

*FAIR* should arouse anxiety in those who value a protected sphere for self-expression, especially insofar as it indicates the Roberts Court's future approach to the First Amendment. The decision evinces a robust indifference to the subtleties of self-expression in American life, while also cutting back on existing First Amendment protections against compelled speech and association. Additionally, in certain instances the Court's analysis relies upon ideologically biased assumptions about law schools' proper role within the legal system — namely, that of apolitical trade schools — assumptions without which its analysis becomes yet more implausible. As self-fulfilling prophecies, those assumptions should be critically examined if law schools are to remain something more and better than mere trade schools.

The first indication of the *FAIR* Court's insensitivity toward self-expression came in its analysis of *Hurley*. While purportedly following *Hurley*, the *FAIR* Court overlooked the subtlety in *Hurley*'s analysis of expressive conduct. The *Hurley* Court had carefully distinguished between marches and parades, finding only the latter to be expressive.[43] The *FAIR* Court made no similar attempt at differentiation, stating in essentialist fashion that law schools' recruiting services have

---

[37] *See id.* at 1311–13.
[38] *See id.* at 1312.
[39] 530 U.S. 640 (2000).
[40] *FAIR*, 126 S. Ct. at 1312.
[41] *Id.* (quoting *Dale*, 530 U.S. at 653).
[42] *Id.* at 1312–13.
[43] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 568–69 (1995).

as their purpose "assist[ing] their students in obtaining jobs."[44] The Court's reasoning indicates its belief that, if an activity does not have expression as its primary goal, it cannot be inherently expressive. Besides being based on a misuse of the word "inherently,"[45] such reasoning ignores the possibility that an activity might have a multifaceted nature. Had the Court attempted to establish a distinction analogous to that of the *Hurley* Court, it might have avoided this oversight and oversimplification. Just as the category of "marches" encompasses but is not equal to that of "parades," so the "facilitation of recruiting" encompasses but is not equivalent to a "job fair." Like the term "parade," "job fair" more precisely conveys the activity's expressive character: namely, showcasing particular jobs to attract students' attention.

A lack of precision in analyzing expression recurs throughout *FAIR*. In order to show that the law schools' conduct was not inherently expressive, the Court postulated a hypothetical observer who would be unable to divine any message or endorsement from merely seeing a military recruiter interviewing at the nearby undergraduate campus. The inadequacy of this hypothetical is clear. First, it fails to address the other activities that the Solomon Amendment forces law schools to perform on behalf of recruiters.[46] Second, it fails to consider the flip side of the issue: what student or other hypothetical observer, upon seeing a military recruiter comfortably settled in a law school building, would not from that sight infer the law school's imprimatur?

The Court's approach to FAIR's claims of compelled association further showcases the recurring bluntness of its analysis, as well as novel, regressive doctrinal shifts. *Dale*, the touchstone case for claims of compelled association, had stated that the Court must defer to the Boy Scouts' own interpretation of what would compromise its expressive association.[47] On that basis, the Court held that a state public ac-

---

[44] *FAIR*, 126 S. Ct. at 1310.

[45] "Inherent" does not mean "primary," nor does it connote any hierarchical ordering amongst an entity's properties. *See* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1163 (1981) (defining "inherent" as "involved in the constitution or essential character of something[;] belonging by nature or settled habit[;] intrinsic"). The Court misused the word in the same way later in its opinion, when it implied that something can be more or less "inherently expressive." *See FAIR*, 126 S. Ct. at 1311 ("[T]he conduct at issue here is not *so* inherently expressive that it warrants protection . . . ." (emphasis added)).

[46] Throughout its opinion, the Court consistently downplayed the scope of the Solomon Amendment's forced accommodation, as if law schools merely have to tolerate recruiters' presence on campus, *see FAIR*, 126 S. Ct. at 1313, and not also "disseminate literature in student mailboxes; post job announcements on bulletin boards; maintain leaflets in binders for reference by students; publish job précis in printed catalogs; e-mail students about interview possibilities; arrange appointments for students; supply private meeting rooms for discussions with candidates; and reserve spots where Judge Advocate General's Corps banners can be posted." Erwin Chemerinsky, *The First Amendment and Military Recruiting*, TRIAL, May 2006, at 78, 78–79.

[47] Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

commodations law could not compel the Boy Scouts to accept a gay man as a scout leader because this would constitute an "intrusion into the internal structure or affairs of an association."[48]

*FAIR* represents a retreat from the high-water mark of *Dale* in two ways. First, an association's privilege of self-interpretation seemingly disappeared, either erased from the law books entirely or merely overwhelmed by the deference owed to Congress's war powers.[49] Second, in holding that the law schools' mere "interact[ion]"[50] with military recruiters did not raise First Amendment concerns, the Court accomplished an unprecedented narrowing of *Dale*'s broad language, which had held out to libertarians the promise of expansive associational autonomy.[51]

As a general matter, the Court's analysis was also blind to context. Describing the forced intrusion as a mere forced "interact[ion]," for example, ignored the importance of recruiting for a professional school. Professional schools aim at preparing students for professions, and the actual job selection and performance of students on the job are all for which such schools can ultimately claim credit. In encroaching upon law schools' ability to guide students' job decisions, the Solomon Amendment compromises one of the schools' core prerogatives. The Court was also confident that a school's ability to protest would prevent recruiters from distorting the school's message,[52] but this confidence is only an outgrowth of the Court's failure to acknowledge that its reasoning applies more widely than only to recruiters. Further ignoring the context in which recruiting occurs, the Court even described as irrelevant the specific content of a recruiter's policies: a law school would have to tolerate recruiters "regardless of how repugnant the law school considers" their hiring policies.[53]

In keeping with this heavy-handed treatment of issues of expression, the Court failed to compare the facts of *Dale* against those of *FAIR* so as to determine whether the law schools' expression was hindered more or less than the Boy Scouts'. The *Dale* Court had found it

---

[48] *Id.* at 648 (quoting Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984)).

[49] For some, this might signal a significant cutback on *Dale*'s holding. *See, e.g.*, Charles Fried, *The Nature and Importance of Liberty*, 29 HARV. J.L. & PUB. POL'Y 3, 7 (2005) ("What was at stake in *Dale* was the ability of the Boy Scouts to define for themselves what . . . their particular association meant: not for Aristotle, and not for Professor Sandel, and not for Justice Stevens.").

[50] *FAIR*, 126 S. Ct. at 1312.

[51] *See, e.g.*, Richard A. Epstein, *Free Association: The Incoherence of Antidiscrimination Laws*, NAT'L REV., Oct. 9, 2000, at 38, 40 ("All organizations can be masters of their own fate. That's the true meaning of *Dale*, once we liberate it from Chief Justice Rehnquist's excessively narrow application to 'expressive organizations.'").

[52] *See FAIR*, 126 S. Ct. at 1310. The Court's ruling effected another doctrinal shift by holding for the first time that "the government can compel speech as long as the speaker can disavow the compelled message later." Chemerinsky, *supra* note 46, at 79.

[53] *FAIR*, 126 S. Ct. at 1313.

sufficient that Dale was a readily recognized gay activist whose mere presence would indicate to the world that the Boy Scouts "accept[] homosexual conduct as a legitimate form of behavior."[54] The *FAIR* Court thus broke with the spirit if not the letter of *Dale* when it failed even to consider the prominence and recognizability that the military possesses as a discriminator against gays. In American culture, the phrase "don't ask, don't tell" has become a veritable byword for anti-gay discrimination; indeed, it is hard to name any other institution in American life that has an explicit policy on this issue that is as well-known or brazen. Yet in its analysis the Court instead dwelled at length on the recruiters' obvious but insignificant *physical* presence.

These omissions might have been excusable had the Court explicitly set out to curtail existing protections for expression; however, the Court chose instead to sweep such expression under the rug, as if it did not even register as expression. Thus, the Court baldly stated that "[*n*]*othing* about recruiting suggests that law schools agree with any speech by recruiters"[55] and that "*nothing* about the statute affects the composition of [law schools] by making group membership less desirable."[56] According to the Court, FAIR had "'simply . . . assert[ed]' that mere association 'would impair [the law schools'] message,'"[57] and its attempts to analogize the law schools' situation to *Hurley* and *Dale* "plainly overstate[d] the expressive nature of their activity."[58] Such reasoning recurred throughout the opinion: in order to dismiss FAIR's claims outright, the Court repeatedly relied upon blunt and commonsense assumptions about what constitutes expression and implied that FAIR's complaints could not match the gravity of those raised by religious objectors. If expression did not take the traditional form of written or spoken assertions of belief, or the extreme form of blaring parades, the Court was deaf to it. *FAIR* thus contributes very little to establishing the contours of the category of protected speech.

The Court's blunt reasoning also raises a series of unanswered and perplexing questions. First, the Court's conclusion that the law schools' conduct is not meaningfully expressive leaves the schools' motives inexplicable. Surely, the Court cannot assume that the law schools wish to hinder the war effort through their recruiting policies: not only has the Court traditionally accorded universities a presump-

---

54 Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000).

55 *FAIR*, 126 S. Ct. at 1310 (emphasis added).

56 *Id.* at 1313 (emphasis added).

57 *Id.* at 1312 (quoting *Dale*, 530 U.S. at 653).

58 *Id.* at 1313 (emphasis added). The Court also stated that FAIR's claims "trivialize[d]" the right of free speech established by *Wooley v. Maynard,* 430 U.S. 705 (1977), in which a Jehovah's Witness had objected to the indignity of being forced to carry a New Hampshire license plate that bore the motto "Live Free or Die." *FAIR*, 126 S. Ct. at 1301 (citing *Wooley*, 430 U.S. at 717).

tion of good faith,[59] but no law school could have rationally believed that forcing recruiters several hundred yards away from campus would significantly hinder their efforts.[60] Yet in light of the schools' efforts in litigating the issue, a strong motive must exist — and if not free expression, then what? The second problem stems from the Solomon Amendment's exception for schools with "a longstanding policy of pacifism based on historical religious affiliation."[61] If the statute itself implies that the accommodation of military recruiters can be extremely offensive to people's deeply held beliefs, how can the Court credibly advance any sort of de minimis reasoning with respect to law schools?

Even the Solomon Amendment's strongest supporters belie the conclusion that the law schools' recruiting policies were not inherently expressive. Representative Pombo specifically recommended the Solomon Amendment as a means of counteracting the disrespectful message expressed by law schools' recruiting policies:

> These colleges and universities need to know that their starry-eyed idealism comes with a price. If they are too good — or too righteous — to treat our Nation's military with the respect it deserves, then they may also be too good to receive the current generous level of DOD dollars. For our young men and women who train to defend the freedoms of all Americans . . . I urge my colleagues to support the Pombo-Solomon amendment, and send a message over the wall of the academic ivory tower.[62]

However, the Court's obliviousness to the charged and expressive context surrounding the Solomon Amendment appears somewhat more reasonable in light of its conception of law schools as trade schools. The Court revealed this conception when it stated that law schools merely "facilitate recruiting to assist their students in obtaining jobs,"[63] and that "nothing about the [Solomon Amendment] affects the composition of the [law school] by making group membership less desirable."[64] In these statements, and in the Court's general lack of solicitude toward the law schools' claims of expression, the Court revealed its skepticism toward the possibility that a law school's mission might

---

[59] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 318–19 (1978) (opinion of Powell, J.).

[60] The Court's opinion also neither analyzed nor demanded any evidence from the Government that the denial of equal access, as defined under the Solomon Amendment, actually impeded its recruiting efforts.

[61] 10 U.S.C. § 983(c)(2) (West 2000 & Supp. 2006).

[62] 141 CONG. REC. 15,949 (1995) (statement of Rep. Pombo). On-campus military recruiters made the same point, albeit less floridly, by stating that the law schools' policies "send[] the *message* that employment in the Armed Forces of the United States is less honorable or desirable than employment with the other organizations" invited on campus. Brief for Amicus Curiae Am. Assoc. of Univ. Professors in Support of Respondents at 5, *FAIR*, 126 S. Ct. 1297 (No. 04-1152) [hereinafter AAUP Amicus Brief] (internal quotation marks omitted).

[63] *FAIR*, 126 S. Ct. at 1310.

[64] *Id.* at 1313.

aim at something more than merely passing along a set of job skills and legal doctrines. According to this scheme, the technical demands of legal practice determine the goals of legal education, and law schools' attempts to substantively shape their students' professional choices are ancillary and apt to be disregarded.

Within this framework, law schools have no independent role and thus no duty to foster in their students ideals contrary to the dominant norms of the legal profession; and though ideals[65] might seem inherently impractical, here the opposite is the case. As was straightforwardly put by then-Professor Felix Frankfurter, "the law and lawyers are what the law schools make them."[66] In other contexts, such as school desegregation and affirmative action, the Court has been willing to acknowledge the influence of educational institutions upon governmental ones.[67]

Furthermore, as that influence is inevitable,[68] ignoring it only leads to unintended consequences. Specifically, treating law schools as mere vocational institutions denies their inevitably political character;[69] inculcates a passive approach to the law;[70] and robs law schools of their potential to become dynamic and beneficial shapers of coming generations of legal practitioners and, with time, of the law. Of course, this does not mean that all law schools need to or even should ban military recruiters. Law schools merely need to be given the freedom to express to the fullest *some* conception of what the law should be.

In contrast, the Court's conception of the essential structure of law schools assumes that their purpose is merely to service and perpetuate

---

[65] In fact, it might be incorrect to classify an institution's desire to ban discrimination against homosexuals as an "ideal." According to a poll conducted by the Pew Research Center in March 2006, only thirty-two percent of all Americans oppose gays openly serving in the military. Wyatt Buchanan, *Poll Finds U.S. Warming to Gay Marriage*, S.F. CHRON., Mar. 23, 2006, at A5. Such a desire sounds much more like a baseline norm than an ideal.

[66] RAND JACK & DANA CROWLEY JACK, MORAL VISION AND PROFESSIONAL DECISIONS: THE CHANGING VALUES OF WOMEN AND MEN LAWYERS 156 (1989) (quoting Letter from Professor Felix Frankfurter, Harvard Law School, to Julius Rosenwald (May 13, 1927)).

[67] Grutter v. Bollinger, 539 U.S. 306, 332 (2003) (warning that, if educational institutions are to produce legitimate leaders, "[a]ll members of our heterogeneous society must have confidence in the openness and integrity" of those institutions); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("[E]ducation . . . is the very foundation of good citizenship.").

[68] *Cf.* Kennedy, *supra* note 1, at 608 ("Since actors in the two systems consciously adjust to one another, and also consciously attempt to influence one another, legal education is as much a product of legal hierarchy as a cause of it.").

[69] *See id.* at 591 ("Law schools are intensely political places despite the fact that they seem intellectually unpretentious, barren of theoretical ambition or practical vision of what social life might be.").

[70] *See id.* at 594 ("[In the classroom, the] actual intellectual content of the law seems to consist of learning rules, what they are and why they have to be the way they are . . . . The basic experience is of double surrender: to a passivizing classroom experience and to a passive attitude toward the content of the legal system.").

the existing legal profession. This is perhaps to foreclose the possibility that law schools will ever accomplish anything more. Unable to fully embody any ideal of what the law should be, law schools will have difficulty attracting a critical mass of inspired students or teachers. In turn, the law will lose a crucial source of impetus for change. Given universities' continuing and massive dependence upon federal funds,[71] as well as the Court's failure to delineate the bounds of protected expression, only the future will show whether law schools and the law will become even more beholden to the status quo.

### *F. Freedom of Speech and Expression*

*1. Application to Incarcerated Persons — Inmate Access to Print Media.* — The Supreme Court's steady retreat over the years from the high-water mark of protecting prisoners' constitutional rights has been well documented.[1] In *Turner v. Safley*,[2] the Court directed federal courts to take a deferential stance toward prison practices, ostensibly in recognition of prison officials' expertise and the courts' relative inability to understand the problems of prison administration.[3] Yet less than two years ago, the Court suggested that lower courts should defer to prison officials on policies that infringe on constitutional rights only after determining, as a threshold matter, that the asserted right is inconsistent with proper prison administration.[4] This move potentially signaled to lower courts that they should more vigorously protect prisoners' constitutional rights.[5] Last Term, in *Beard v. Banks*,[6] the Court rejected the Third Circuit's attempt to do so, reinstating summary judgment for Pennsylvania's prison system in a challenge to its practice of denying the worst prisoners access to nearly all books, newspapers, magazines, and photographs.[7] Though not an express doctrinal shift, the Court's reasoning reduced the protections offered prisoners and failed to resolve a tension in the doctrine on judicial review of prison practices. Developing a justification for judicial intervention to

---

[71] *See* AAUP Amicus Brief, *supra* note 62, at 23–24 (noting that in fiscal year 2003, post-secondary institutions received an estimated $57.5 billion in federal funds, accounting for 19.2% of their expenditures).

[1] *See, e.g.*, 1 MICHAEL B. MUSHLIN, RIGHTS OF PRISONERS § 1:7, at 25 (3d ed. 2002) ("Perhaps most telling is the complaint that the Court has been inching the law back to the now thoroughly discredited hands-off doctrine."); Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 699–700 (1993) ("The Supreme Court has dramatically narrowed the scope of judicial intervention in First Amendment . . . cases [involving prisoners].").

[2] 482 U.S. 78 (1987) (striking down a prison regulation requiring superintendent approval for all inmate marriages as not reasonably related to legitimate penological interests).

[3] *See id.* at 84–85.

[4] *See* Johnson v. California, 125 S. Ct. 1141, 1148–49 (2005).

[5] *See The Supreme Court, 2004 Term—Leading Cases*, 119 HARV. L. REV. 169, 229 (2005).

[6] 126 S. Ct. 2572 (2006).

[7] *Id.* at 2575–76 (plurality opinion).