

Unanimously Wrong

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The Supreme Court was unanimously wrong in *Rumsfeld v. FAIR*.¹ Though rare, it is not the first time the Court has been unanimously wrong. Its most notorious such decisions have come, like *FAIR*, in cases where the Court conspicuously failed even to appreciate the importance of the constitutional freedoms under attack from legislative majorities.² In these cases, the Court's very rhetoric exposed its myopic vision in ways that now seem embarrassing. Does *FAIR*, so obviously correct to so many people right now, await the same ignominy decades away?

FAIR was wrong in tone, a dismissive *vox populi*, adopted by a Court seeming to reflect and reinforce popular reactions to the case. But most importantly, *FAIR* was wrong in rationale, which is worse than getting a single result wrong. Not very much of practical significance for the whole country ordinarily hinges on the result in a single case settling the claim of a single litigant or group of litigants.

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¹126 S. Ct. 1297 (2006).

²For examples of decisions that were unanimous but have since been widely criticized either for their results or their rationales, see *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1873) (unanimously upholding state law excluding women from the practice of law); *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) (unanimously upholding state law denying women the right to vote); *Schenck v. United States*, 249 U.S. 47 (1919) (unanimously upholding convictions for anti-war speech under the Espionage Act of 1917); *Debs v. United States*, 249 U.S. 211 (1919) (unanimously upholding conviction of Eugene Debs for political-convention speech praising draft resisters); *Hirabayashi v. United States*, 320 U.S. 81 (1943) (unanimously upholding conviction for violating curfew order applicable only to persons of Japanese ancestry). I emphasize that not all of these decisions were necessarily wrong in result. See, for example, Jim Chen's excellent discussion of why *Minor v. Happersett* was correctly decided on his blog at *Jurisdynamics*, *Totally Mistaken, Never in Doubt*, at <http://jurisdynamics.blogspot.com/2006/07/totally-mistaken-never-in-doubt.html> (last visited July 19, 2006).

Whether law schools may exclude military recruiters who federal “Don’t Ask, Don’t Tell” (DADT) policy discriminates against gay law students does not matter that much to most people. The decision may even have the paradoxical effect of advancing the antidiscrimination cause by forcing conscientious law schools to make plain their opposition to anti-gay discrimination in the military; a decision in the law schools’ favor would have allowed them to relax on the issue.³

But the rationale justifying the result in a single case can have significant consequences because it can affect decisions in the future. In *FAIR*, the Supreme Court botched several doctrines in its ordinarily libertarian free-speech jurisprudence, including the foundational question of what counts as protected speech, and it botched them all in a way that could constrict liberty. Whether *FAIR* has harmful long-term effects for speech awaits future decisions, but Chief Justice John Roberts’ first major constitutional decision gives us some reason to worry.

The fact of unanimity—it was 8-0 and likely would have been 9-0 if Justice Samuel Alito had participated⁴—does not make the decision less wrong. If it is indeed wrong, unanimity only makes its wrongness more egregious, putting in very stark relief the failure of even a single justice on the current Court to overcome the passions of the moment in order to safeguard constitutional freedoms.⁵ Instead of defending liberty, the Court’s conservatives apparently saw a chance to defend military honor against law-school elites. Its liberals apparently saw a chance to defend government power while proving they can be cold-eyed realists on matters of national security.

³Amy Kapczynski, *Queer Brinkmanship: Citizenship and the Solomon Wars*, 112 *Yale L.J.* 673, 674 (2002) (“The military also may have done universities a favor by returning them to their heritage of dissent: Forced to relinquish the accommodations upon which they relied to manage the conflict, universities and law schools now have little choice but simply to confront it.”).

⁴Justice Alito was not confirmed until after oral argument in *FAIR*.

⁵For those who approve the decision, unanimity makes the result more obviously right. “The decision was so obviously right,” observed Professor Tom McCoy, “that it had to be unanimous unless some member of the Court was incapable of reasoning through the well-established doctrines that controlled the case.” David L. Hudson, Jr., *Law Schools Told to Allow Military Recruiters*, 5 *ABA Journal Report* 10 (Mar. 10, 2006). Whether *FAIR* was really the product of “well-established doctrines,” or an amendment to them, is the subject of this article.

Chief Justice Roberts prides himself on striving for “near unanimity” in order to “promote clarity and consistency in the legal community and to decide cases ‘‘on the narrowest possible ground.’”⁶ *FAIR* seems clear in at least one sense: Congress clearly may force schools to admit military recruiters if it chooses to do so. Whether deciding the case on this basis was the “narrowest possible ground” for decision is a different matter. Neither clarity nor narrowness, furthermore, can salvage error.

FAIR was not necessarily wrong in its ultimate result, upholding the constitutionality of the Solomon Amendment.⁷ Perhaps, for example, the government really could show a close connection between recruitment needs and a policy of withdrawing federal funds from entire universities whose law schools defend their anti-discrimination principles by excluding military recruiters. That is a possibility I do not explore here, as the courts in this litigation did not explore it, and Congress has never held a single hearing regarding the alleged recruitment need for the Solomon Amendment.

Let me get one other preliminary issue out of the way. My grandfather served in the Pacific in World War II and lived with the wounds of that conflict for the rest of his life. My father served in the U.S. Army in Germany at the height of Cold War tensions over the building of the Berlin Wall. I have nothing but respect for this country’s armed forces and especially for those who serve. Much as I disagree with DADT as a matter of policy, and much as I abhor its needless cruelty to gay Americans who want to serve their country, I probably could not have voted as a law school faculty member to bar military recruiters from our premises. Nevertheless, I support law schools’ efforts to protest and call attention to DADT, and I believe that law schools should have the option to bar recruiters if they choose to do so. They should have this option free of either direct federal coercion enforced by criminal penalty or indirect coercion enforced by loss of almost all federal funding.

In Part I, I briefly describe some relevant background about the Solomon Amendment and the litigation challenging it. The Solomon Amendment began modestly, involving only Defense Department

⁶James Taranto, *Getting to Yes*, Wall St. J., July 1, 2006, at A11 (quoting Chief Justice Roberts).

⁷10 U.S.C. § 983 (2005).

funds, but quickly metastasized. In Part II, I discuss the **Document hosted at JD SUPRA** <http://www.jdsupra.com/post/document-view.aspx?CID=132813&file=120425026008> constitutional conditions doctrine, an important issue raised by the Solomon Amendment and likely to figure prominently in the future of liberty and federalism but one that is left mostly untouched by *FAIR*. In Part III, I analyze the Court's treatment of free speech and the freedom of association. On free speech, the Court unsuccessfully distinguished its compelled-speech cases and seemingly narrowed the reach of its third-party speech cases. It also minted a test for expressive conduct based on "inherent expressiveness" that is either completely unworkable or extremely narrow. On the freedom of association, the Court narrowed its jurisprudence largely to concerns about membership and seemingly dropped any deference to an association's own judgment about whether compliance with state regulation would significantly impair its message. Both of these holdings are a break with the Court's precedents. There was an abundance of commentary on the Solomon Amendment and its constitutionality before *FAIR*.⁸ It is not my purpose to rehash all of the constitutional arguments here. Instead, my focus is on the decision itself and its possible implications.

I. Background

A. *The Solomon Amendment*

In the 1970s, educational institutions began adding "sexual orientation" to policies prohibiting various forms of discrimination. As

⁸See, e.g., Diane H. Mazur, A Blueprint for Law School Engagement With the Military, 1 J. Nat'l Security L. & Pol'y 473 (2005) (noting the symbolic nature of the arguments for the law and criticizing judicial deference to military judgment); John C. Eastman, Is the Solomon Amendment "F.A.I.R."? Some Thoughts on Congress's Power to Impose this Condition on Federal Spending, 50 Vill. L. Rev. 1171 (2005) (arguing that the Solomon Amendment is within congressional power); Gerald Walpin, The Solomon Amendment is Constitutional and Does Not Violate Academic Freedom, 2 Seton Hall Circuit Rev. 1 (2005) (arguing that the law serves the expressive purpose of getting the military's message to law students); Abigail K. Holland, The High Price of Equality: The Effect of the Solomon Amendment on Law Schools' First Amendment Rights, 38 Suffolk U. L. Rev. 855 (2005) (arguing that the Solomon Amendment is unconstitutional under the First Amendment); Andrew P. Morriss, The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" is Constitutional and Law Schools Are Not Expressive Associations, 14 Wm. & Mary Bill Rts. J. 415 (2005) (arguing that law schools operate primarily as economic cartels, not as expressive associations); Clay Calvert & Robert D. Richards, Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment

part of this expansion of antidiscrimination policies, JD SUPRA⁹ required prospective employers recruiting students in the 1948s to agree not to discriminate on the basis of several criteria, including sexual orientation. They did this both on their own initiative and in compliance with the guidelines of the American Association of Law Schools. The new on-campus recruitment policies meant excluding recruiters from the military, which by longstanding policy barred homosexual servicemembers.

In response to these developments, in 1994 Congress passed the Solomon Amendment, named after its primary sponsor, U.S. Representative Gerald Solomon (R-NY). The legislation arose during a period of heightened attention to the role of gays in the military prompted by President Bill Clinton's proposal to let openly gay people serve. (Congress ultimately codified the ban on gays in the military under DADT that same year.) Congress held no hearings on the need for the Solomon Amendment and the Department of Defense initially opposed it as "unnecessary."⁹

The Solomon Amendment originally mandated only that "[n]o funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses."¹⁰

From that narrow beginning, the Solomon Amendment metastasized. In subsequent years, the funding condition was expanded to include funds available to universities from the Departments of Homeland Security, Health and Human Services, Labor, Education, and Transportation, as well as the National Security Agency and the Central Intelligence Agency. Congress also clarified that the condition applied to an entire university even if only a "subelement" within the university (e.g., a university's law school) denied access

on Campus, 13 Wm. & Mary Bill Rts. J. 205 (2004) (arguing that the speech interests of the law schools outweigh those of the military); Francisco Valdes, Solomon's Shames: Law as Might and Inequality, 23 T. Marshall L. Rev. 351 (1998) (suggesting strategies for law schools to ameliorate the presence of military recruiters before the "equal access" requirement was added to the law).

⁹140 Cong. Rec. 11,440 (1994) (statement of Rep. Underwood).

¹⁰National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

to military recruiters. Finally, in 2004, Congress further ^{Document hosted at JD SUPRA[®]} <http://www.jdsupra.com/post/inducing-college-aspirants-to-recruit-for-the-military-603-2848525906> that, under the funding condition, military recruiters must have equal access to the institution “that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.”¹¹ At no point during this metastasizing process did Congress or anyone else show an actual recruitment need for the law.

As it now stands, the Solomon Amendment puts at risk tens of billions of dollars in funding annually to universities.¹² The money goes to many causes, like important scientific and medical research. Under the current version of the law, even law schools that do not themselves receive federal funds from any of the agencies and departments covered by the Solomon Amendment have reluctantly agreed to allow military recruiters in their facilities.

B. The Litigation

In September 2003, a group of law schools and faculties organized as the Forum for Academic and Institutional Rights (FAIR) brought suit in a New Jersey federal district court against Secretary of Defense Donald Rumsfeld and other department heads whose departmental funding to universities is subject to the recruitment condition. FAIR argued that the Solomon Amendment violated their First Amendment rights. The district court denied FAIR’s request for a preliminary injunction against enforcement.

On appeal, a divided panel of the Third Circuit held that FAIR was likely to prevail on its First Amendment claims, and directed the district court to enjoin enforcement of the Solomon Amendment. However, on January 20, 2005, the Third Circuit granted the government’s request to stay its decision pending appeal to the Supreme Court. The Supreme Court granted the government’s petition for

¹¹Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004).

¹²In fiscal year 2003, the amount of federal funding to universities covered by the Solomon Amendment was almost \$35 billion. See Brief for Amicus Curiae the American Association of University Professors in Support of Respondents at 23, *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006) (No. 04-1152) (hereinafter AAUP Amicus Brief) (calculating amount based on total federal funding for universities (\$57.5 billion) minus non-covered student aid (\$23 billion)). In 2004, the law jeopardized \$351 million in research funding for the University of Minnesota alone.

writ of certiorari on May 2, 2005, and heard oral argument on October 2, 2005. Document hosted at <http://www.jdsupra.com/post/documentViewer.aspx?fid=6af7352e-1bbe-4cdb-a68e-29485b2580e6> JD SUPRA™

C. *The Arguments*

Before the Supreme Court, FAIR argued that an educational institution's decision to bar military recruiters is constitutionally protected, both as an expression of moral and professional disapproval of anti-gay discrimination and as an exercise of associational freedom. These constitutional interests are especially important in a setting, like a university, where academic freedom is paramount.

Central to the arguments was the Court's 2000 decision in *Boy Scouts of America v. Dale*,¹³ in which the Court held that the Boy Scouts had an associational right to exclude an openly gay scoutmaster despite a state law barring discrimination against gays.

The government distinguished *Dale* by noting that the Solomon Amendment does not affect the composition of the schools' membership; the recruiters' presence is only temporary and episodic. Further, the government argued that unlike *Dale*, the case did not involve an attempt by the state to convey any message about service by gays in the military. Everyone understands that recruiters speak only for their employers and not for the schools in which they recruit, argued the government.¹⁴

FAIR responded that the freedom of association recognized in *Dale* was indeed implicated. The Solomon Amendment, FAIR claimed, violates the schools' freedom of association by infringing their "right to choose for themselves which causes to assist or resist." The freedom of association is not limited to the ability to control membership in an organization, FAIR argued, but extends to the full range of associational activities by which a group aids or refuses to aid a cause.¹⁵

The parties also disagreed over whether the Solomon Amendment unconstitutionally compelled speech by the universities. The government argued that it did not, since it simply does not force schools to send the message that they agree with the military's exclusion of

¹³530 U.S. 640 (2000).

¹⁴Brief for Petitioners at 12, *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006) (No. 04-1152) (hereinafter Petitioners' Brief).

¹⁵Brief for the Respondents at 30–35, *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006) (No. 04-1152) (hereinafter "Respondents' Brief").

gays.¹⁶ FAIR countered that the Solomon Amendment, *supra* el
 speech. It requires the schools to serve military recruiters actively through quintessential “speech” activities, like distributing, posting, and printing literature announcing the presence of the recruiters; introducing students to the government; and sponsoring private fora for the exchange of information (the recruiting interview sessions themselves). This, argued FAIR, requires a school “to disseminate, carry, or host a message against its will.”¹⁷

The parties also disagreed over whether the law schools’ prohibition on military recruiters could be considered “speech.” The government argued that the schools’ action is not a form of “expressive conduct” protected under the intermediate scrutiny standard of *United States v. O’Brien*.¹⁸ Refusing to give recruiters equal access to facilities, argued the government, is not inherently expressive. It is merely conduct, and as such does not enjoy any First Amendment speech protection.

FAIR responded that, on the contrary, the schools’ refusal to allow employers who discriminate to recruit is part of their overall message that such discrimination is immoral and unprofessional. Barring recruiters who discriminate is a way to “punctuate” a school’s message by refusing to assist discrimination, FAIR asserted.¹⁹

Finally, the parties disagreed at length over whether the Solomon Amendment violates the “unconstitutional conditions” doctrine, under which the government generally may not condition the receipt of a government benefit on the relinquishment of a constitutional right. FAIR emphasized that the Solomon Amendment places a “penalty” on the exercise of First Amendment rights and thus violates the unconstitutional-conditions doctrine. This is not a case, noted FAIR, where the government has simply required that certain funds be used only for the purpose for which they are provided (e.g., the government may require that education funds be spent on education). Instead, the Solomon Amendment attempts a sweeping denial of almost all federal assistance to an entire educational institution merely because one part of it—a part that might itself receive

¹⁶See Petitioners’ Brief, *supra* note 14, at 20–22.

¹⁷See Respondents’ Brief, *supra* note 15, at 21–28.

¹⁸391 U.S. 367 (1968).

¹⁹See Respondents’ Brief, *supra* note 15, at 28–30.

no federal money—refuses to allow the military to re-
government maintained that since it would be free to
schools to admit military recruiters, and that such a requirement
would not itself violate the First Amendment, it could take the less
drastic step of simply encouraging compliance through a funding
condition.²¹

II. Unconstitutional Conditions After *FAIR*

Before the decision in *FAIR* was announced, constitutional law professors might have been a bit anxious. Law school faculties wanting to enforce their antidiscrimination policies by barring military recruiters had been prominently and widely denounced as out-of-touch and unpatriotic,²² practically mocking the soldiers who guard them while they sleep.²³ A decision against the law schools might be taken as partial vindication of this view. But for myself, I was not anxious because the Court might uphold the law. It always seemed likely that the Court would do so in a time of high national stress and real danger. Even if the Supreme Court ruled unanimously against the law schools challenging the law, that was no cause for anxiety by itself.

No, the fear was that the Supreme Court might actually decide the hardest and most interesting question in the litigation: whether the Solomon Amendment violated the notoriously under-theorized unconstitutional conditions doctrine. The most succinct formulation of the doctrine holds that the “government may not grant a benefit on the condition that the beneficiary surrender a constitutional right,

²⁰*Id.* at 37–38.

²¹See Petitioners’ Brief, *supra* note 14, at 40–43.

²²“While Americans in uniform are engaged around the world in the global war on terror, the idea that academic elites would bar military recruiters from campus runs against the very ethos of patriotism.” Statement of House Armed Services Committee Chairman Duncan Hunter, R-Cal., on U.S. Supreme Court Ruling Allowing Military Recruiters Access to College Campuses, available at <http://www.house.gov/hasc/pressreleases/13-6-06HunterStatementMilitaryRecruiters.pdf> (last visited Aug. 29, 2006).

²³The phrase comes from Rudyard Kipling, via George Orwell: “It would be difficult to hit off the one-eyed pacifism of the English in fewer words than in the phrase, ‘making mock of uniforms that guard you while you sleep.’” George Orwell, *The Orwell Reader* 274 (Harcourt Brace 1984).

even if the government may withhold that benefit altogether. ²⁴ This simple statement of the doctrine masks a huge complexity that has vexed our brightest constitutional theorists.²⁵

Much of the popular reaction to *Rumsfeld v. FAIR* prior to the decision suggested that this part of the case was easy: “If you don’t want to let military recruiters on your campus, don’t take the money. If you want the money, let the military recruit. There can be no constitutional problem putting schools to that choice.” But this part of the case was never as easy as that reaction suggested. I will not, here, offer a theory of unconstitutional conditions. Instead, I will point out some of the difficulties in the doctrine, discuss the Court’s brief treatment of it, and point to some problems it presents for constitutional law in the future.

A. Some Problems in the Unconstitutional Conditions Doctrine

In 1958, the Court held in *Speiser v. Randall* that a state could not require veterans otherwise eligible for property tax exemptions to swear that they did not advocate forcible overthrow of the government.²⁶ Threatening the veterans with this economic loss—to which they had no independent constitutional entitlement—amounted to an unconstitutional “penalty” on the exercise of their First Amendment right not to swear loyalty to the government. The unconstitutional conditions doctrine was born. A tangle of other precedents ensued, with no clear analytical framework emerging.²⁷

In this unstable environment, it is not difficult to imagine cases that test the constitutional line. If the government may deny an

²⁴Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1415, 1415 (1989).

²⁵See, e.g., Richard A. Epstein, The Supreme Court 1987 Term: Unconstitutional Conditions, State Power, and the Limits of Consent, 102 Harv. L. Rev. 5 (1988); Sullivan, *supra* note 24; David Cole, Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech, 67 N.Y.U. L. Rev. 675 (1992).

²⁶*Speiser v. Randall*, 357 U.S. 513, 529 (1958).

²⁷*Regan v. Taxation with Representation of Wash.*, 461 U.S. 540 (1983) (Congress may deny tax deductions for contributions to a lobbying organization); *FCC v. League of Women Voters of Cal.*, 468 U.S. 364 (1984) (Congress may not cut off funding to broadcasting station that engages in on-air editorializing); *Rust v. Sullivan*, 500 U.S. 173 (1991) (Congress may require federal health funding recipients not to counsel patients about abortion); *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533 (2001) (Congress may not deny funding to lawyers in federal legal aid program who counsel clients to challenge existing welfare laws).

entire university all funding (e.g., cancer research funding) or one part of the university exercises a constitutional right to military recruiters, could it similarly leverage its economic power to require the university to allow a military officer on campus to deliver the government's message about the need for high defense spending? Could it threaten to withdraw all university funding unless the university agreed to forgo its right to "ameliorate" the recruiters' presence on campus (e.g., by posting written notices outside the interview room indicating the school's disagreement with the military's exclusion of gays)?

On the one hand, under the Court's precedents the federal government could not decide to distribute food stamps (an elective government benefit) only to people who agree not to criticize the war in Iraq (which they have a constitutional right to do). On the other hand, the government can decide to give money to people to send their children to public schools (an elective government benefit) but not to private schools (which they have a constitutional right to send their children to). Surely this is not unconstitutionally conditioning funds. How would the Court draw the line in a way that did not seem result-oriented and ad hoc?

The problems get thornier the more one thinks about them. If the government cannot condition funding to universities to encourage them to admit military recruiters, as FAIR argued, could it continue to condition funding on a school's agreement not to discriminate against students or employees on the basis of race or sex (as it now does through civil rights laws)? Or is there some way to distinguish the conditional funding embedded in civil rights law from the Solomon Amendment?

This latter issue worried a great many liberal legal commentators who ordinarily oppose state-sponsored anti-gay discrimination, like DADT and the Solomon Amendment, but were afraid that a ruling in FAIR's favor on the unconstitutional conditions issue might endanger civil rights laws involving funding conditions.²⁸ Amicus

²⁸See, e.g., Tobias Barrington Wolff, "Don't Ask, Don't Tell" Harms the Constitution, but So Does This Cure, L.A. Times, May 15, 2005, at M5 (decrying DADT as "irrational" and the Solomon Amendment as "outrageous" but suggesting the case "could undermine decades of progressive legislation" protecting women and minorities from discrimination).

briefs on FAIR's side labored to distinguish the Solomon Amendment from antidiscrimination laws like Titles VI and IX. The purpose here is not to suggest a resolution of these difficulties, but to call attention to them. Their very complexity may lead the Court to avoid the doctrine in ways inhospitable to underlying liberty claims, as I suggest below.

B. *The Step Not Taken in FAIR*

Every unconstitutional-conditions claim, where the government conditions economic benefit x on forgoing or engaging in activity y , involves two steps.

STEP 1: The litigant must establish that the government could not directly require (e.g., through a criminal penalty) the litigant to forgo or engage in activity y .

STEP 2: The litigant must establish that it is unconstitutional to condition the availability of economic benefit x on the litigant's forgoing or engaging in activity y .

The unconstitutional conditions litigant must win on both steps in order to prevail; the government need only win on one.

In *Rumsfeld v. FAIR*, activity y was prohibiting the military to recruit on campus. Economic benefit x was a vast array of government funds and aid otherwise available to every part of a university. Because FAIR lost on step one of the analysis—the government could directly require the schools to allow the military to recruit on campus—the Court did not address step two.

That does not quite mean that the Court said absolutely nothing about the unconstitutional conditions issue. After noting Congress' broad authority on matters of military recruiting, the Court laid out what it evidently regarded as the relevant unconstitutional conditions precedents:

Congress' power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds. In *Grove City College*

²⁹See, e.g., AAUP Amicus Brief, *supra* note 12, at 19, 29–30 (arguing that, unlike the Solomon Amendment, the antidiscrimination conditions of Titles VI and IX are not imposed for the purpose of suppressing expression and academic freedom; that there is a nexus between the condition and the funding; and that there is a compelling interest in antidiscrimination that is actually served by the Civil Rights Act).

<http://www.jdsupra.com/post/documentViewer.aspx?fid=6a77352e-1bbe-4c0b-a68e-20485b2580e6> Document hosted at JDSUPRASM
v. Bell, 465 U.S. 555, 575–76 (1984), we rejected a private college’s claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment. We thought this argument “warrant[ed] only brief consideration” because “Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.” *Id.*, at 575. We concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the Government’s funds. *Id.*, at 575–576.

Other decisions, however, recognize a limit on Congress’ ability to place conditions on the receipt of funds. We recently held that “the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.” *United States v. Am. Library Ass’n*, 539 U.S. 194, 210 (2003) (quoting *Bd. of County Comm’rs, Wabaunsee County v. Umbehr*, 518 U.S. 668, 674 (1996)).³⁰

This is a revealing choice of background precedents. One, *Grove City*, is a case in which the Court did not mention the unconstitutional conditions doctrine and subjected the funding condition to a mere “reasonableness” requirement. The other, *American Library Association*, is a case in which the Court rejected a claim that it was unconstitutional for Congress to require public libraries receiving federal funds to install anti-pornography filters on computers with Internet access. It is an inauspicious discussion for those concerned about Congress’ use of its economic power to curtail the exercise of rights.

However, this part of the Court’s opinion at least acknowledges the possibility of a constitutional problem when Congress conditions funds, something which much of the popular commentary on the case and even a few law professors doubted pre-*FAIR*. It seems there is an unconstitutional conditions doctrine, after all.

The very next sentence in the opinion offers a tantalizing hint at what might have been: “Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities

³⁰*Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1306–07 (2006).

to provide military recruiters equal access to their students. The Court says that FAIR would have been able to do so, which an underlying constitutional right to exclude military recruiters? This seems the implication of the sentence, though we are not told how the Court would have reasoned to that result in the teeth of decisions like *Grove City*.

What the Court almost gives in one sentence, however, it takes away in the very next: "This case does not require us to determine when a condition placed on university funding goes beyond the 'reasonable' choice offered in *Grove City* and becomes an unconstitutional condition."³² Thus, while acknowledging the existence of the unconstitutional conditions beast, the Court extracts its teeth. Where Congress is conditioning funds to achieve what it could not mandate, the Constitution requires only that the condition be "reasonable." We all know what that means.

C. A Future for Unconstitutional Conditions

This entire part of the Court's opinion, however, is dicta since the Court decided the case on the basis of step one of the unconstitutional conditions analysis.³³ The opinion has nothing really valuable to say about this huge area of potential constitutional litigation, an area that has special significance in an era of annual federal budgets approaching \$3 trillion and a Congress eager to use this enormous economic leverage to get individuals, associations, and states to do its bidding.

To see why conditional funding is important, consider the very context in which *FAIR* was decided. By any measure, an economic actor with \$3 trillion to spend every year is a powerhouse. Its decisions shape the whole economy and affect the lives of everyone in the nation. Its power can be used to mold both the marketplace of goods and the marketplace of ideas.

Some industries and some fields of inquiry depend for their existence on the largesse of this powerhouse. Much research in modern universities could not proceed without federal funding. Universities cannot afford to forgo this funding if they are to remain competitive

³¹*Id.* at 1307.

³²*Id.*

³³*Id.*

with their peer institutions.³⁴ Thus, universities will do what they can to keep the money flowing. Congress knows that it can impose almost any condition it wants on the funds. An example is the recently added requirement that universities spend time and resources hosting an annual “Constitution Day” designed to teach students about the Constitution—the very document that protects the academic freedom not to teach about the Constitution.³⁵ Another example is the Solomon Amendment. By themselves, these sorts of restrictions may not threaten First Amendment values like free speech, association, and academic freedom. But cumulatively, they do.

Congress’ economic might combined with its growing willingness to use that might endangers two structural postulates of the Constitution: limited government and federalism. Congress is using its power to coerce private citizens and associations to relinquish or limit the exercise of important constitutional rights, including the right to criticize the policies of the government itself. This is not a hallmark of limited government. In addition, when Congress uses its leverage against state institutions, like state universities, it is forcing them to relinquish large areas of control to its central authority. This growth of the federal government is something the Framers could not have imagined. Translating the Framers’ vision of limited power and federalism into the modern age of a federal behemoth is a challenge for constitutionalism in this century.

Those of us concerned about federalism and liberty in the face of Congress’ willingness to use its economic might to curtail both have perhaps three options. First, we could argue that much of what Congress does to condition funding is unconstitutional as being beyond its spending power. This is almost certainly a losing argument until the Court modifies or reverses the broad congressional spending authority recognized in *South Dakota v. Dole*,³⁶ an unlikely event.

³⁴In fiscal year 2003, almost ten percent of universities’ expenditures were at risk under the Solomon Amendment. See AAUP Amicus Brief, *supra* note 12, at 23.

³⁵For analysis suggesting that Constitution Day may be unconstitutional, see Heidi Kitrosser, *Is Constitution Day Constitutional?* (Sept. 10, 2005), at <http://www.law.umn.edu/uploads/images/2085/IsConstitutionDayConstitutional-draft2.pdf>.

³⁶483 U.S. 203 (1987) (upholding conditional funding for highways).

Second, we could argue for a dramatic reduction in ^{Document hosted at JD SUPRA: h} ~~http://www.cato.org/pose-source/viewer.aspx?article-id=29465&size=6~~ ^{http://www.cato.org/pose-source/viewer.aspx?article-id=29465&size=6} would shrink the size of the federal government and both the dependence on federal funds and the opportunity for mischievous funding conditions. If the first option was unlikely, this second one is impossible. The largest tax reductions in the last fifty years—under Presidents Ronald Reagan and George W. Bush—have not succeeded in reducing the size of the federal budget.

The third option is to accept reality: the federal government will remain a large, growing, and omnipresent force in our lives. We need a realistic understanding of how government power operates today. This power can be reined in, perhaps slightly, through robust substantive protection for speech and association, and through an unconstitutional conditions doctrine that fetters Congress' ability to eat away at federalism and liberty through funding conditions. A constitutional theory unable to account for and deal with this threat cannot be considered very protective of either federalism or liberty in the 21st century.

Two other issues bearing on the unconstitutional conditions issue warrant some mention. First, while Chief Justice Roberts believes that unanimity encourages narrow opinions, it is not clear that the Court's choice was the narrowest ground available for decision. If the Court had decided the case on the basis of step two—the way it did in *Grove City*—it could have avoided any discussion of the substantive First Amendment issues. If one believes that *FAIR* ended up making no new substantive law in the First Amendment area, the Court's opinion does seem a minimalist one. However, if one believes that the Court's opinion actually contracted First Amendment liberties, or at least made them more uncertain,³⁷ it is hardly clear that the Court's decision to resolve the issue on step one was the narrowest one available.

Second, it could be that the Court's reluctance to engage in serious and difficult step two analysis about unconstitutional conditions will increasingly lead it to resolve cases in step one by denying the underlying liberty claims. If that is right, *FAIR* is just one manifestation of a larger problem in future constitutional litigation.

³⁷See discussion *infra* Part III.

III. The Errors of *FAIR*

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I have suggested that *FAIR* may not have been wrong in result but that both its tone and rationale are wrong. Let me explain what I mean.

A. *The Cultural Backdrop and the Court's Tone*

Powerful legal, cultural, and political issues tugged at the justices in *FAIR*. The litigation over the Solomon Amendment lay at the intersection of three great controversies in modern American law and life.

First, there are the needs of the military to recruit the best and brightest in a time of war and uncertainty about national security. The schools' decisions to exclude military recruiters would never be a very popular one—less so in present circumstances. To many, universities' exclusion of the military looks like the action of an elite cast completely disconnected from the needs and ethos of the nation in which they live.

Second, the case was set in the context of the ongoing cultural struggle over whether discrimination against gays is ever acceptable and, if so, under what circumstances. To the schools, the exclusion of the military recruiters is a way to defend their moral view that discrimination against gays in the military is wrong and allowing recruitment by those who discriminate on this basis is contrary to their professional standards. *FAIR's* reliance on *Dale*, which held that gays could be excluded from an association, to justify *excluding those who exclude gays* was an especially ironic note in the litigation.

Third, the case raised questions about the extent of government power over the lives of its citizens and of the continuing vitality of federalism—the relationship between the states and the federal government—both of which I have already discussed. Government power to suppress constitutional rights has historically taken the form of old-fashioned compulsion: for example, a threat of jail for failure to abide by the government's command. However, in an age of vast federal spending, government power to compel conduct is more likely to take the form of conditions placed on that spending. When that form of compulsion affects state institutions, like a state university, the central question ceases to be simply about the relationship between the federal government and the individual citizen (or associations) and begins to be about the relationship between

the federal government and the states. Not surprising, JD SUPRA to
 Institute filed an amicus brief on the side of the law. <http://www.jdsupra.com/post/amicus-brief-on-the-side-of-the-law-04-15-2006>

With such momentous cultural and legal issues at stake, we needed something more than an opinion that treats the liberty claims almost with contempt. The problems with the Court's tone start with its recitation of the facts. In the course of describing the litigation below and the evolution of the Solomon Amendment, the Court included this sentence:

Although the statute required only "entry to campuses," the Government—*after the terrorist attacks on September 11, 2001*—adopted an informal policy of "'requir[ing] universities to provide military recruiters access to students equal in quality and scope to that provided to other recruiters.'"³⁹

This passage might lead the uninformed reader, not familiar with the case, to conclude that the terrorist attacks of September 11, 2001, actually had something to do with the decision of "the Government" to expand the scope of the Solomon Amendment to add an "equal treatment" requirement to the preexisting statutory access requirement. Perhaps, one might speculate, the government foresaw increased personnel needs after 9/11 and, to protect the nation from future attacks, decided it needed to step up its recruitment in law schools. That sounds plausible, but there is one large problem with it. There is no evidence whatsoever that the Solomon Amendment actually addressed any recruitment problem or that it was really intended to do so. There is similarly no evidence that the government was addressing any problem arising from 9/11 when it decided to expand the reach of the Solomon Amendment.

Why does the Court slip this non sequitur about 9/11 into the opinion? It is not simply a factual claim that the new equal-treatment policy chronologically followed 9/11, although it did. It is meant to suggest a causal relationship between the expanded Solomon Amendment and 9/11, a relationship *for which there is no evidence*. References like this to 9/11 are a modern echo of the old World War II quip, "Don't you know there's a war on?" On the one hand, these sorts of statements try to silence serious critics of government

³⁸Amicus Curiae Brief of the Cato Institute in Support of Respondents, *Rumsfeld v. FAIR*, 126 S. Ct. 1297 (2006) (No. 04-1152).

³⁹*FAIR*, 126 S. Ct. at 1303 (emphasis added) (citation omitted).

policy by suggesting ever so lightly that they are either **JDSUPRA** or foolishly oblivious to security needs. On the other hand, the Court reflects the Court's unthinking acceptance of almost any security claim made by the government. While the Court has always been deferential to Congress' judgment about military needs, this deference in cases like *FAIR* becomes almost complete submission.

By contrast, the Court nowhere discusses the enormous financial stakes for universities that bar military recruiters. Instead, the Court adopts the government's misleading description of the money as "specified federal funding."⁴⁰ Yes, specific federal money for research and other things is lost if part of a university bars military recruiters: almost all of it.

The Court also fails to recognize the importance of antidiscrimination norms and policies in universities. The Court believes nothing very important is lost when these norms and policies are eroded, that is, when law students, faculty, and administrators must accept the presence of anti-gay discrimination in their midst. The law schools must make their facilities available to an employer—a representative of the state, no less—that refuses even to consider the merits of some of their students on a ground that the law schools believe is invidious and purposeless.

Yet this affront to the dignity of their students and erosion of their policies barely registers with a Court swooning before the wholly unsubstantiated needs of post-9/11 national security. The Court variously describes the interests and liberty at stake as "minimal,"⁴¹ a "far cry" from recognized interests,⁴² "incidental,"⁴³ "trivializ[ing]" important freedoms,⁴⁴ "plainly overstat[ed],"⁴⁵ and "exaggerat[ed]."⁴⁶ The Court's opinion is an exercise in single-entry bookkeeping. The only interests that count are the government's unsupported ones. On both the insubstantiality of the schools' interests and on

⁴⁰*Id.*

⁴¹*Id.* at 1307 n.4.

⁴²*Id.* at 1308.

⁴³*Id.*

⁴⁴*Id.*

⁴⁵*Id.* at 1313.

⁴⁶*Id.*

the substantiality of the governments', the Court's ton popular reaction to the case. Document hosted at JDSUPRA™
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B. Minimizing Free Speech

On the substantive question of whether the schools enjoyed a constitutional right to exclude military recruiters, the Court rejected three different speech claims raised by FAIR. According to the Court, schools are not “compelled” by the law to say anything very important,⁴⁷ are not objectionably required to host the speech of the government within their own forum,⁴⁸ and are not denied their right to engage in expressive conduct.⁴⁹ In each case, the Court arguably narrowed its precedents, limiting the reach of free-speech rights.

1. Compelled Speech

The First Amendment forbids the government to make citizens its mouthpiece. The most famous case announcing this idea is *West Virginia State Board of Education v. Barnette*,⁵⁰ which upheld the right of schoolchildren to refuse to salute the flag or to recite the Pledge of Allegiance. *Barnette*, it should be remembered, is one of the few cases where the Court actually held its ground in defending liberty, in the middle of World War II no less, against the state’s claims that the needs of national unity are paramount. Canonical now, *Barnette* was controversial in 1943, requiring the Court to overrule one of its own precedents from just three years earlier.⁵¹ A FAIR-minded court might have noted that “West Virginia defends its policy—in the aftermath of the Japanese sneak attack of December 7, 1941—as a way to promote the war effort.”

Next to the forced recitation of a statement of principles drafted by the government, it must be admitted that the degree of compelled speech required by the Solomon Amendment is fairly light. Under it, law schools are required to include in emails and other notices factual statements about the presence and location of military recruiters on campus, just as they do for other recruiters. Here, as elsewhere,

⁴⁷*Id.* at 1308.

⁴⁸*Id.* at 1309–10.

⁴⁹*Id.* at 1310–11.

⁵⁰319 U.S. 624 (1943).

⁵¹*Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

law schools are a lot less sympathetic than Jehovah's Witnesses school children. Document hosted at JDSUPRA's <https://www.jdsupra.com/post/documentViewer.aspx?fid=6af7352e-1bbe-4cdb-a68e-29485b2580e6>

But *Barnette* was extended in *Wooley v. Maynard*⁵² to allow motorists to cover up a state motto on their license plates. The license plates did not literally compel motorists to “say” anything at all. And no reasonable person would understand that a motorist was endorsing the state’s message (“Live Free or Die”) simply because it appeared on a standard state-issued license plate. But the Court concluded that even this amounted to compelled speech since the law “in effect requires that appellees use their private property as a ‘mobile billboard’ for the State’s ideological message—or suffer a penalty”⁵³ The same appears to be the case in *FAIR*. The Solomon Amendment in effect requires the law schools to use their private property for the state’s message—or suffer a penalty. And it does not matter, as the Court acknowledges, that the statements required of the law school are factual rather than ideological.⁵⁴

The Court tries to get around these uncomfortable precedents in a couple of ways. First, it argues that the Solomon Amendment does not dictate the content of the compelled speech, and certainly requires nothing akin to a state-prescribed pledge or state motto. The schools must only communicate for the military the type of matters, if any, that they communicate for other employers.⁵⁵ If a school announces by school-wide email that the law firm of Scrooge & Marley will interview interested students in Room 1 at noon, it must also announce in a school-wide email where and when the military will interview interested students. If the law school makes no such announcement for other employers, it need say nothing for the benefit of military recruiters. The Solomon Amendment thus employs a triggering mechanism for compelled speech, where *Barnette* and *Wooley* actually dictated specific content.

This is a distinction, yes, but one that has previously made no difference in the Court’s precedents. In *Miami Herald Publishing Co.*

⁵²430 U.S. 705 (1977).

⁵³*Id.* at 715.

⁵⁴*FAIR*, 126 S. Ct. at 1308 (“[T]hese compelled statements of fact . . . , like compelled statements of opinion, are subject to First Amendment scrutiny.”)

⁵⁵*Id.*

v. Tornillo,⁵⁶ the state similarly employed a triggering mechanism that required newspapers to publish replies to criticism that appeared in the newspaper. Like the Solomon Amendment, nothing in Florida's right-of-reply law mandated that newspapers engage in any speech at all (absent the trigger), and nothing in the statute required specific content in the compelled speech once triggered. Like the Solomon Amendment, nothing in the Florida law prohibited the newspapers from expressing their own views on any subject. They could "ameliorate" the presence of the unwanted reply from aggrieved politicians. Nevertheless, the *Tornillo* Court held that the law was unconstitutional because it "exact[s] a penalty on the basis of the content of [the] newspaper."⁵⁷ Applying this principle to *Wooley*, does anyone believe that the case would have come out differently had New Hampshire required motorists' license plates to bear the state motto only if they affixed other messages to their car bumpers?

The Court is not obliged to stand by its precedents, and it can of course limit them. *Wooley*, in particular, may be a stretch of the compelled speech doctrine to cover a truly trivial intrusion on private conscience and speech. Perhaps the Court should overrule it. But the logistical and informational speech compelled by the Solomon Amendment is hardly a "far cry" from the appearance of four words on a standard state-issued license plate.

The Court also distinguished *Barnette* and *Wooley* by arguing that "[t]he compelled speech to which the law schools point is plainly incidental to the Solomon Amendment's regulation of conduct[, the admission of military recruiters] . . ."⁵⁸ The Court gives the example of Title VII, which forbids private employers to discriminate on the basis of race and would, therefore, require an employer to remove a "White Applicants Only" sign from its premises.⁵⁹ In both the Solomon Amendment and Title VII, argues the Court, the limitation of speech is incidental to the conduct regulation. But this analogy does not work.

It is true that speech facilitating illegality is not protected simply because it is speech. A perjurer's perjury may be admitted against

⁵⁶418 U.S. 241 (1974).

⁵⁷*Id.* at 256.

⁵⁸FAIR, 126 S. Ct. at 1308.

⁵⁹*Id.*

him as evidence of his crime. But it is equally true that the government cannot suppress protected speech simply because speaking or accompanying conduct can be made illegal. Advocating law violation cannot be made criminal simply because law violation itself can be. Much more is required before speech advocating law violation may be punished⁶⁰

The key distinction between these two truisms of First Amendment law, I think, is whether the suppression of speech really is incidental to the larger purpose and impact of the law. Whether *that* is so depends on (1) what we think of the substantiality of the expressive component of the conduct being regulated—the ban on recruiters who discriminate—and on (2) whether we think the government’s real interest in regulating the conduct is speech-related, that is, an attempt to suppress some message being sent by the conduct. For reasons I explain below, I think both of these considerations cut in favor of the law schools. For now, it is enough to say that these are hard questions not answered by a quick analogy to Title VII.

2. *Third-Party Speech*

Closer than *Barnette* or *Wooley* to the actual facts of *FAIR* are a series of cases in which the Court has “limited the government’s ability to force one speaker to host or accommodate another speaker’s message.”⁶¹ The Solomon Amendment requires law schools to host government speakers—military recruiters—who use space for interviews in the law school to promote the government’s own messages about the desirability of military service, to defend DADT, and to object to the law schools’ views. The interviews themselves are quintessential speech activities in which ideas and information are exchanged.⁶²

⁶⁰*Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969).

⁶¹126 S. Ct. at 1309.

⁶²Prior to *FAIR*, some commentators argued that the Solomon Amendment served First Amendment values by exposing students to views opposing the law schools’ own. See Walpin, *supra* note 8 (arguing that the law serves expressive purpose of getting military’s message to law students). It has never been accepted First Amendment doctrine that the government may compel the presence of speakers contrary to the speakers’ or associations’ own views as a way to encourage debate or diversity. See *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241, 256 (1974). It is for the speaker or association, not the government, to decide what messages it will convey or host.

The Court distinguishes the third-party compelled-speech in a couple of ways. First, it argues that the constitutional principle previously been recognized only where “the complaining speaker’s own message was affected by the speech it was forced to accommodate.”⁶³ But this is not a fair way to distinguish the cases. *Tornillo*, involving the politicians’ right-of-reply in newspapers, “affected” the newspapers only because they could have used the space for some other speech purpose.⁶⁴ The same is true of the law schools, whose interview and other spaces are taken up by military recruiters whose messages they object to.

The Court further argues that the law schools’ speech is not affected by the presence of military recruiters because “the schools are not speaking when they host interviews and recruiting receptions.”⁶⁵ These activities, argues the Court, are not “inherently expressive,” unlike a parade, a newsletter, or a newspaper.⁶⁶ This conclusion is parasitic on the Court’s discussion of expressive conduct, which I address below.⁶⁷ It is enough here to say that the Court’s conclusion betrays how little it appreciates the important expressive nature of antidiscrimination policies that embody a school’s commitment to its vision of morality, ethical conduct, and professionalism. Perhaps the government has non-speech-related interests sufficient to override these expressive interests, but to deny that the expressive interests are even present is blindness.

Finally, the Court rejects FAIR’s argument that the law schools might be perceived as endorsing the government’s message if military recruiters are allowed into their buildings.⁶⁸ The perception of endorsement is indeed unlikely since the law schools have loudly and consistently objected to the presence of recruiters who discriminate. Reasonably informed observers, like law students, will surely understand that the schools are simply complying with the law. This endorsement argument gives the Court the opportunity to make fun of the law schools. High school students can tell the difference

⁶³FAIR, 126 S. Ct. at 1309.

⁶⁴*Tornillo*, 418 U.S. at 256.

⁶⁵FAIR, 126 S. Ct. at 1309.

⁶⁶*Id.* at 1309–10.

⁶⁷See discussion *infra* Part III.B.3.

⁶⁸FAIR, 126 S. Ct. at 1310.

between messages the schools endorse and those they endorse to carry, notes the Court. “Surely students have not lost their way by the time they get to law school,” the Court quips in a passage greeted with much mirth by opponents of FAIR.⁶⁹

No knowledgeable observer will think law schools endorse anti-gay discrimination simply because they must permit military recruiters on campus or even include announcements of their presence in emails and other notices. The confusion will be even less likely if the law schools engage in the sort of ameliorative counter-speech the Court reassures us they are free to engage in.

But this fact should make no difference to the compelled-speech claim. Nobody would understand the motorist in *Wooley* necessarily to endorse any message that appears on his and everybody else’s license plate. Nobody would confuse the politician’s right-of-reply op-ed with a newspaper’s own viewpoint in *Tornillo*. Under the compelled-speech doctrine, the vice of the law is in the requirement that the speaker host a third party’s objectionable message, not necessarily in any confusion this might create about whether the complaining speaker endorses the third party’s message. It is *always* true, even in the context of a parade, that the complaining speaker may distance itself from the third party’s message in various ways. The law schools thus correctly lost what should have been an irrelevant point.

3. Expressive Conduct

Most disconcerting for free speech is the Court’s mistreatment of the “expressive conduct” doctrine. The Court has never had a satisfying theory of what conduct should get free-speech protection. Conduct can be engaged in for essentially expressive purposes; when it does, speech interests are present. At the same time, when the government regulates conduct it is unusually likely to have interests unrelated to the suppression of ideas.

Some conduct, like flag-burning⁷⁰ and nude dancing,⁷¹ does get some level of constitutional protection. Some conduct, like sexual

⁶⁹*Id.*

⁷⁰*Texas v. Johnson*, 491 U.S. 397, 414–20 (1989); *United States v. Eichman*, 496 U.S. 310, 314–15 (1990).

⁷¹*Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565–66 (1991).

cites no precedent for this conclusion or for the phrase “inherently expressive.” No prior majority opinion on the subject has held that in deciding whether conduct is expressive we should look *only* at the conduct itself, rather than at both the conduct and the context in which it occurs. It is notable that in its discussion of expressive conduct, the *FAIR* decision makes no reference to the *Spence/Johnson* or *Arcara* tests for what conduct could count as expressive.

While the words “inherently expressive” appeared in the plurality opinion in a nude dancing case, *City of Erie v. Pap’s A.M.*,⁷⁸ the plurality used it there in a sense opposite what the *FAIR* Court uses it for. In *Pap’s A.M.*, the Court explained that “[b]eing ‘in a state of nudity’ is not an inherently expressive condition” but that, nevertheless, “nude dancing of the type at issue here is expressive conduct”⁷⁹ The *Pap’s A.M.* plurality thought that nude dancing could be protected by the First Amendment as expressive conduct despite the fact that it is *not* inherently expressive. Now we have a unanimous Supreme Court endorsing the opposite and far more restrictive view.

Certainly *Johnson* and *Hurley* considered the context in which conduct occurs. In *Johnson*, the Court observed that the act occurred “as part—indeed, as the culmination—of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President.”⁸⁰ In *Hurley*, the Court found a parade expressive in part because it involves actual speech (e.g., slogans on banners), but also because it involves spectators lining the streets, people marching in costumes and uniforms, marching bands, pipers, and floats.⁸¹

⁷⁸529 U.S. 277 (2000). A search has turned up the term “inherently expressive” and similar phrases in a few concurring and dissenting opinions in First Amendment cases, see, for example, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 581 (1991) (Souter, J., concurring); *id.* at 578 n.4 (Scalia, J., concurring); *id.* at 587 n.1 (White, J., dissenting), and in a couple of majority opinions where the Court obviously did not intend the restrictive sense of the *FAIR* Court, see, for example, *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 568 (1995); *Lehnert v. Ferris Faculty Ass’n*, 500 U.S. 507, 518 (1991); *Ellis v. Bd. of Ry., Airline & S.S. Clerks, Freight Handlers, Express & Station Employees*, 466 U.S. 435, 456 (1984).

⁷⁹*Pap’s A.M.*, 529 U.S. at 289.

⁸⁰*Johnson*, 491 U.S. at 406.

⁸¹*Hurley*, 515 U.S. at 569.

b. What Is “Inherently Expressive” Conduct?

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Beyond the unprecedented nature of the Court's restrictive view, it is difficult to predict what conduct will count as “inherently expressive,” and thus get First Amendment protection, and what conduct will not be deemed “inherently expressive,” and thus get no First Amendment protection. I am not sure the distinction amounts to much more than the old informal obscenity standard, “I know it when I see it,” in which case it has further unsettled an already uncertain area of First Amendment law.

The Court appears to mean that inherently expressive conduct is that conduct for which the expressive component is “‘overwhelmingly apparent,’”⁸² and thus needs no further accompanying speech or consideration of circumstances in which it occurs to signal that it is expressive. Barring military recruiters is “expressive only because the law schools accompanied their conduct with speech explaining it” and thus fails the newly created “inherently expressive” test. The test, the Court thinks, helps us separate flag burning (inherently expressive) from the exclusion of the military from law school recruiting (not inherently expressive). As the Court puts it:

An observer who sees military recruiters interviewing away from the law school has no way of knowing whether the law school is expressing its disapproval of the military, all the law school's interview rooms are full, or the military recruiters decided for reasons of their own that they would rather interview someplace else.⁸³

The Court here mishandles existing doctrine and does so in a way that narrows First Amendment freedom. We do not know much about the message *any* conduct conveys, or whether it conveys any message at all, unless we know the context in which it occurs. Yes, as the Court suggests, a law school's exclusion of the military could signal disagreement with some governmental or military policy, like DADT (expressive), or it could merely reflect that the law school ran out of space for interviews (not expressive).

⁸²FAIR, 126 S. Ct. at 1311 (quoting Johnson, 491 U.S. at 406).

⁸³126 S. Ct. at 1311.

Yet applying this context-free methodology to *Johnson*, Document hosted at JD SUPRA who sees someone burning a flag might think the flag is being burned as expressing disagreement with the nation's foreign policy (expressive), or that he accidentally set it on fire (not expressive), or that he was attempting to generate heat in the cold (not expressive), or that he was simply disposing of a tattered flag in the manner prescribed by the government (not expressive?). Applying the *FAIR* methodology to *Hurley*, the observer might think this group of people walking in the street are doing so because the sidewalks are under repair (not expressive), or because they are from Mars and do not know any better (not expressive), or because they are part of a group celebrating Irish pride on St. Patrick's Day (expressive).

Context, including what the actor says about his conduct, matters. The uninformed observer, unaware of context, could not tell whether *any* particular act was expressive. So it should not matter that a few "listeners" or "observers," who might as well be living on a different planet, cannot appreciate why the law schools want to exclude military recruiters until they are told why. In fact, in the current environment of heightened sensitivity to law school recruitment policies, the reasonably informed observer has a good idea why a law school might want to exclude the military. Even if in principle we could draw a line between protected conduct and unprotected conduct that would leave schools' recruitment policies outside the protected realm, the Court's discussion of this question is troubling.

If Chief Justice Roberts had used the *Spence* two-pronged test (repeated in *Johnson*), for example, he would have asked whether there had been "an intent to convey a message" and whether that message "*in the surrounding circumstances*" would have been understood by those who viewed it. The answer in the context of the law schools' recruitment policies should have been "yes" to both questions. The law schools certainly intended their policies to convey a message to students, to faculty, to the community, and to the government, that they deeply disapprove of DADT. (That is a controversial moral view, but the law schools are entitled to hold and promote it.) Under the circumstances, in which the media, the courts, and numerous critics debated the law schools' policies, and the law schools themselves explained the need for their recruitment policies, this message-sending would be understood by those made aware of it. Using the *Spence/Johnson* test, the Solomon Amendment does

ever produced. The military has so many other methods of recruiting law students that forcing law schools to allow interviews on campus, and forcing them to make announcements about military recruiting, has never been needed.

If not filling recruitment needs, what was the government's interest in the Solomon Amendment? It seems to have been entirely symbolic, arising out of a desire to punish the "starry-eyed idealism" of academic elites who think "they are too good—or too righteous—to treat our Nation's military with the respect it deserves."⁸⁸ Recall that almost two decades passed between the time schools began excluding military recruiters and the time Congress reacted, a fact that undermines (but by itself does not defeat) a claimed recruitment need. Recall also that the Solomon Amendment was passed in the immediate aftermath of the controversy over gays in the military, which brought fresh attention to the issue. In this charged atmosphere, in which Congress had just asserted itself forcefully to codify the gay ban, members of Congress perceived law school policies aimed at anti-gay discrimination by the military as a "backhanded slap at the honor and dignity of service in our Nation's Armed Forces."⁸⁹ Rep. Solomon himself wanted to "tell[] recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies . . . do not expect Federal dollars to support your interference with our military recruiters."⁹⁰ The Solomon Amendment would "send a message over the wall of the ivory tower of higher education."⁹¹

These statements and others, as well as the two-decade delay in reacting to the schools' policies and the context in which the law was adopted, provide objective evidence of an ideological interest in passage of the Solomon Amendment. It is an interest based on hostility toward universities and their faculties and a desire to punish

⁸⁸*Id.* at 11,441 (1994) (statement of Rep. Pombo).

⁸⁹*Id.*

⁹⁰*Id.* at 11,439 (statement of Rep. Solomon). Ironically, Rep. Solomon thought universities had a "first-amendment right[]" to bar military recruiters, but that Congress could condition funds on their choosing not to do so. *Id.* In this, Rep. Solomon had a more expansive view of First Amendment freedom than does the current Supreme Court.

⁹¹*Id.* at 11,441 (statement of Rep. Pombo).

them for their views—an interest deeply at odds with First Amendment principles. Congress's interest was the free speech itself and ought to draw strict scrutiny.

I am not asserting that Congress had a single motive in passing the Solomon Amendment or even that an inquiry into subjective motives is necessary. Some members of Congress undoubtedly genuinely believed that the law would aid recruiting. But in this case, where there is no objective evidence to support Congress' claimed recruitment interest, and there is objective evidence supporting a speech-related interest, the ideological interest is the one that ought to be attributed to Congress. Simply to give Congress a free pass, accepting any interest that its lawyers concoct without any further examination in a case where there is objective evidence of a speech-related interest, would be to seriously weaken the expressive-conduct doctrine. Yet that appears to be what the Court did.

C. *Minimizing the Freedom of Association*

The First Amendment protects a freedom of association that extends to expressive groups.⁹² FAIR, relying heavily on *Dale*, argued that this freedom protects the right of law schools to exclude military recruiters. The government argued for a narrow interpretation of *Dale* and other freedom of association cases as applying only to government control over a group's membership.

There was much irony in the dispute over the meaning of *Dale* as it applied to the Solomon Amendment controversy. Some of the same people who criticized *Dale* as "anti-gay" six years before relied on it to make an aggressive claim about associational rights. Of course, the irony went both ways. Some conservatives who hailed *Dale* as a great victory for freedom six years before now argued for a very narrow interpretation of it.

⁹²Explicit protection for the freedom of association came first in *NAACP v. Alabama*, 357 U.S. 449 (1958), which recognized a right of a civil rights group to keep its membership list confidential from the state of Alabama. The Court has subsequently described the freedom as extending to expressive associations in cases like *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

One reaction to FAIR's claim might have been to note that recruitment interviews facilitate commercial transactions—meeting of employer and prospective employee—these activities are not strongly protected by the freedom of association.⁹³ The Court makes a nod to this possibility when it says that recruiting services lack “expressive quality” because the schools are merely “assist[ing] their students in obtaining jobs.”⁹⁴ If the Court had rejected the freedom of association claim on the ground that recruiting is a commercial activity not protected by the freedom of association, it would have been a defensible interpretation and application of its precedents. Instead, the Court ventured into new territory.

1. *The Freedom of Association and Membership*

Does the freedom of association protect, as the government contended, only the membership decisions a group makes? Or does it encompass, as the schools contended, a broader right that protects many associational activities by which a group promotes its message? If it is the former, the freedom of association is not a very robust doctrine, since it leaves the state free to hobble a group's message in numerous indirect but nevertheless very effective ways. If it is the latter, the freedom of association risks giving expressive groups a broad right to refuse to comply with general regulations backed by important state interests. It would be the freedom that swallowed the law.

While one scholar pre-FAIR questioned whether law schools qualified as expressive associations,⁹⁵ the government did not contest this issue and the Court was not detained by it. Under *Dale*, a group is expressive even if disseminating ideas is not its primary purpose. It simply needs to engage in expressive activity in order to qualify for protection.⁹⁶ Law schools meet that threshold, even if they have

⁹³Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 Minn. L. Rev. 1515, 1576–80 (2001) (quasi-expressive associations should be protected by the freedom of association in their expressive activities, but not in their commercial activities).

⁹⁴*Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1310 (2006).

⁹⁵Morriss, *supra* note 8 (arguing that law schools operate primarily as economic cartels, not as expressive associations).

⁹⁶*Dale*, 530 U.S. at 655 (“[A]ssociations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.”).

other, economic purposes, and even if these other purposes are dominant ones. ⁹⁷ Document hosted at <http://www.jdsupra.com/post/documentViewer.aspx?fid=6af7352e-1bbe-4cdb-a68e-29485b2580e6> JD SUPRA

After deciding that a group is expressive, *Dale* instructs us to ask whether the law or regulation about which it complains would “significantly affect its expression.”⁹⁷ One way to answer this question would be to take a hard-and-fast categorical approach: if the law regulates group membership, as did the antidiscrimination law in *Dale* by requiring the Boy Scouts to admit an openly gay scoutmaster, it “significantly affects” the group’s expression. If the law does not regulate group membership, then it does not “significantly affect” group expression. The government took this categorical position in *FAIR*, arguing that the freedom of expressive association protects only a group’s membership decisions, and that since the Solomon Amendment did not require the schools to admit military recruiters as “members” (presumably, as faculty, students, administrators, or staff) the law did not violate their freedom of association.

The *FAIR* Court correctly rejected that view, agreeing with the law schools that “the freedom of expressive association protects more than just a group’s membership decisions.”⁹⁸ This comports with the Court’s cases, which have extended the freedom of association beyond control of group membership.⁹⁹

A second way to answer whether a law significantly affects an association’s expression would be case-by-case and contextualized, examining the particular ways a regulation might impair a group’s ability to get its message across, no matter whether the law regulated or affected group membership. The Court appears to have eschewed that approach as well.

Instead of these two possible approaches, the *FAIR* decision opts for a third, giving us what we might call a hybrid *categorical-contextual approach*. Laws regulating membership—usually antidiscrimination laws that control the membership criteria a group might want to use—certainly may significantly affect an association’s

⁹⁷*Id.* at 655–59.

⁹⁸126 S. Ct. at 1312.

⁹⁹See, e.g., *NAACP v. Alabama*, 357 U.S. 449 (1958); *Healy v. James*, 408 U.S. 169 (1972); *Brown v. Socialist Workers ’74 Campaign Comm.* (Ohio), 459 U.S. 87 (1982). In *Dale*, the Court observed that unconstitutional restrictions on the freedom of association “may take many forms,” not simply control of a group’s membership. 530 U.S. at 648.

expression.¹⁰⁰ But the Court adds that laws may also affect an association's expression if they make group membership less desirable.¹⁰¹ Laws that impose penalties for group membership or that require the disclosure of secret membership lists are examples falling into this category. They make membership in the expressive association less attractive.

This synthesis of the Court's association jurisprudence has not previously appeared in its decisions. Prior to *FAIR*, the Court had worried primarily about the effect a regulation might have on the group's ability to get across its message, however that impediment operated. Now the focus of associational freedom seems to have been narrowed to concerns about membership or effects on membership that in turn may affect the group's message.

So while the *FAIR* decision states that associational freedom protects more than a group's membership, in substance it has announced a test for protecting associational freedom that is limited to membership concerns. Thus, the Court holds that the schools have failed to show that "the statute affects the composition of the group by making group membership less desirable."¹⁰² The whole point of the schools' claim was that having to host a message they regard as repugnant would impair their own message that discrimination against gay Americans is wrong, regardless of whether compliance had any impact on their "membership." The Court rejects this claim by saying, in effect, "Show us how compliance would affect your message by affecting your group's membership." It concludes this by narrowly reading prior associational-freedom cases as involving laws that "did not directly interfere" with membership, but which "made group membership less attractive."¹⁰³ There is notably no citation or quotation supporting this narrower reading of the scope of associational freedom. Perhaps the Court's attempt to cabin the reach of associational freedom in *FAIR* is defensible, but it does seem a more restrictive view than it has taken in the past.

¹⁰⁰*Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (state law forbidding sex discrimination); *Dale*, 530 U.S. 640 (state law forbidding sexual orientation discrimination).

¹⁰¹*FAIR*, 126 S. Ct. at 1312.

¹⁰²*Id.*

¹⁰³*Id.* at 1312.

Am I being unfair to *FAIR*? Perhaps this new description of freedom of association is more expansive than I am suggesting. Document hosted at <http://www.cato.org/supremecourt/review.asp?id=52&doc=405125004> **JD SUPRA** law or regulation that makes the group less attractive to potential members, much less a law that directly regulates group membership, will potentially infringe its freedom of association. A law school could argue in the next case, for example, that the presence of military recruiters interviewing in its building might make it less attractive to students, staff, administrators, and faculty who prefer a discrimination-free environment.

2. Deference No More

But even if that is factually correct and supportable, I expect the law schools would still lose their claim. The reason they would lose this hypothetical future claim tells us something else significant about *FAIR* that may not be obvious on a first reading. It is not obvious because what is important here is not what the decision says, but what it *does not* say.

Consider that the *Dale* Court explicitly deferred to the Boy Scouts on both the question of the content of the group's message *and the question of what would impair that message*. "As we give deference to an association's assertions regarding the nature of its expression, we must also give deference to an association's view of what would impair its expression," said the *Dale* Court.¹⁰⁴ That deferential posture is completely missing from the *FAIR* decision both in rhetoric and in substance. The omission seems deliberate, since the Court quotes parts of the *very next sentence* from *Dale* about how a group cannot "'erect a shield'" against the law "'simply by asserting'" their expression will be impaired by compliance with it.¹⁰⁵

Rather than deferring to the law schools about what impairs their expression, the Court almost mocks their claims: "The law schools say that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters" ¹⁰⁶ The emphasis on "say" is the Court's own, as if we would be foolish to trust a group's stated judgment about what would impair its expression (the way we trusted the Boy Scouts of America in *Dale*).

¹⁰⁴*Dale*, 530 U.S. at 653.

¹⁰⁵*FAIR*, 126 S. Ct. at 1312 (quoting *Dale*, 530 U.S. at 653).

¹⁰⁶*Id.* (emphasis in original).

While a group must surely do more than *say* compliance with the law would significantly impair its message, the schools did not do that here¹⁰⁷—and still lost. Thus, deference is replaced by skepticism.

An alternative and more hopeful reading of *FAIR* might be this: Perhaps the Court is saying that where a law neither regulates group membership nor affects group composition by making membership less attractive, the Court will not defer to the association's judgment that compliance with the law will significantly affect its expression. Where a law either regulates membership or makes membership less attractive, the Court will continue to defer to the group's judgment that compliance will significantly affect its expression.

If that is the line the Court intends to draw, it is a sensible one. There is, after all, something especially sensitive about control over associational membership that goes directly to the group's ability to control its own message. Deference on the question of message impairment where membership is altered by the government may be the appropriate judicial mechanism by which this sensitivity is registered. Deference outside this especially sensitive question of membership control risks making the freedom of association an exemption from laws that any group simply does not like.

But I doubt this is the line the Court intended to draw. Instead, the opinion makes no reference to deference, mentions only effects on membership, and closes with the bare observation that a recruiter's "mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."¹⁰⁸ The freedom of association, concludes the *FAIR* Court, is untroubled by the government's insistence that its representatives be present on the association's property while delivering a "message" contradicting the association's own.

Conclusion

One could support the Court's result in *FAIR*—that the Solomon Amendment is constitutional—while still being quite concerned about the decision's potential narrowing effects on First Amendment freedoms. The upshot of the Court's view about free speech and

¹⁰⁷Respondents' Brief, *supra* note 15, at 14 (explaining effects of Solomon Amendment at law schools).

¹⁰⁸*FAIR*, 126 S. Ct. at 1313.

associational rights is this: the government could *require* to admit military recruiters under threat of criminals, or merely withdraw funds from schools that bar the recruiters. The state may mandate that its representatives be present, that they be allowed to deliver messages directly contrary to the association's own, and that the association must not only tolerate their presence but affirmatively assist in and facilitate the state's opposing speech. That Congress chose not to do so in the Solomon Amendment is now a matter of legislative grace, not constitutional freedom. Prior to the decision, even many supporters of the Solomon Amendment agreed that the government could not go so far.¹⁰⁹ On this basis alone, the *FAIR* decision should concern anyone devoted to First Amendment freedom.

As a practical matter, the ruling changes nothing in the steps many schools have taken to "ameliorate" the presence of military recruiters by, for example, hosting fora on the military's policy on the day military recruiters are present, or posting notices of opposition to the presence of discrimination on campus, even outside the door where military recruiters are interviewing. In fact, the decision appears to give a bright green light to these efforts that some schools may have avoided until now for fear they would lose funding. From the opinion:

Law schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds. See Tr. of Oral Arg. 25 (Solicitor General acknowledging that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests").¹¹⁰

¹⁰⁹In a debate with me on the constitutionality of the Solomon Amendment held at the University of Minnesota Law School on September 25, 2005, my renowned conservative colleague, Professor Michael Paulsen, agreed that the government could not directly mandate the admission of military recruiters in private universities because such a requirement would violate the First Amendment. Professor Paulsen maintained that the Solomon Amendment was nevertheless constitutional because it involved only conditional funding, not a direct mandate. Very little of the popular commentary supporting the constitutionality of the Solomon Amendment before *FAIR* did so on the ground that the government could enforce a direct mandate.

¹¹⁰126 S. Ct. at 1307.

There was some concern among law school faculties ^{Document hosted at JD SUPRA³} ~~in other ameliorative activities might be considered a violation of the Solomon Amendment because it denied military recruiters access to their facilities that was "equal" to the access given other employers (against whom they do not protest).¹¹¹ As a matter of statutory construction, that worry should be over.~~ ~~amelioration before FAIR that posting these notices on~~ ~~http://www.jdsupra.com/post/yourbookmark/viewer.aspx?fileid=116433&case=294865&page=8~~

On the other hand, while Congress probably could not directly prohibit these amelioration activities, the question remains after *FAIR* whether Congress could condition federal funds on a school's agreement not to ameliorate the presence of military recruiters while they are interviewing. After all, the schools are only losing money, and besides, don't they know there's a war on?

¹¹¹"[T]he military has routinely threatened law schools for any gesture of protest that treats military recruiters differently, even if the difference could have no material effect on recruiting efforts." Respondents' Brief, *supra* note 15, at 8 (giving examples).

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