AMERICAN CONSTITUTIONALISM
VOLUME II: RIGHTS AND LIBERTIES
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Supplementary Material

Chapter 11: The Contemporary Era—Democratic Rights/Free Speech/Public Property/Subsidies, Employees, and Schools

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**Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U.S. 47** (2006)

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*The Forum for Academic and Institutional Rights (FAIR) is association of law schools and law professors that "support educational institutions in opposing discrimination." FAIR members sought to prevent military recruiters on campus as long as openly gay persons were not allowed to serve in the military. In 1996, Congress passed the Solomon Amendment, which, as revised, required law schools and other educational institutions to provide access to military recruiters that was "at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." In 2003, FAIR filed a lawsuit against the Secretary of Defense, Donald Rumsfeld, asking for an injunction against any enforcement of the Solomon Amendment on the ground that the provision quoted above violated the First Amendment. The federal district court dismissed the appeal, but that dismissal was reversed by the Court of Appeals for the Third Circuit. The United States appealed to the Supreme Court of the United States.*

*With an interesting exception, the FAIR litigation pit liberals against conservatives. Liberal legal groups, liberal law professors, elite universities, and the libertarian Cato Institute filed briefs urging the Supreme Court to declare unconstitutional the Solomon Amendment. The brief filed by the Cato Institute stated,*

> *The respondent law schools exclude from their campus hiring a powerful employer who would discriminate against their students. It is a message that speaks without words or the use of force, but is as clear as any commandment of the Old Testament: As you do, you will have done to you. That policy of expressive moderation is, moreover, supported by important educational considerations: chief among them the need to instruct effectively without polarizing the campus and alienating close-minded students who need instruction most. Speech codes and harangues promote resistance and rebellion. Symbolism and subtlety, a respondent might bet, open minds and shape norms.*

*Numerous conservative advocacy groups, conservative law professors, eleven states, and prominent military officers filed amicus briefs urging the Supreme Court to sustain the Solomon Amendment. The brief for the American Legion asserted,*

> *Denying military recruiters equal access to the men and women of our institutions of higher learning would impede the military's ability to ensure an officer corps, including judge advocates, not only of sufficient size, but of quality and diversity as well. Indeed, the officers recruited from colleges and universities serve an important purpose beyond mere manpower: By virtue of having been educated in civilian institutions, these officers bring a perspective and values to military service that complement, and counterbalance, the worldview brought to the service by professional officers graduated from the academies. This need is especially acute in the Judge Advocate General's Corps (the "JAG Corps"), which implements a system of military justice in accordance with the Uniform Code of Military Justice and advises military and civilian leaders on a wide range of legal matters, including the laws of engagement, international law, and, recently, the handling of detainees in the War on Terror.*

*The Supreme Court by an 8–0 vote (Justice Alito did not participate) ruled that the Solomon Amendment was constitutional. Chief Justice Roberts's unanimous opinion asserted that merely permitting the military to recruit on campus did not compel law schools to say anything or violate their freedom of expressive association. Why did Roberts reach this conclusion? The overwhelming majority of liberal law professors in the United States opposed this decision. Why, nevertheless, did every liberal on the Court join the Roberts opinion? Do you detect any evidence that Roberts moderated his opinion to get liberal support? Why might liberal law professors and liberal justices have different perspectives on this issue?*

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Constitution grants Congress the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy." Congress' power in this area "is broad and sweeping," and there is no dispute in this case that it includes the authority to require campus access for military recruiters. . . .

Although Congress has broad authority to legislate on matters of military recruiting, it nonetheless chose to secure campus access for military recruiters indirectly, through its Spending Clause power. The Solomon Amendment gives universities a choice: Either allow military recruiters the same access to students afforded any other recruiter or forgo certain federal funds. Congress' decision to proceed indirectly does not reduce the deference given to Congress in the area of military affairs. Congress' choice to promote its goal by creating a funding condition deserves at least as deferential treatment as if Congress had imposed a mandate on universities.

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

[Past] 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. American Library Assn., Inc.* (2003). Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.

. . . Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.

The Solomon Amendment neither limits what law schools may say nor requires them to say anything. 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. As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must do—afford equal access to military recruiters—not what they may or may not say.

. . .

Some of this Court's leading First Amendment precedents have established the principle that freedom of speech prohibits the government from telling people what they must say. In *West Virginia Bd. of Ed. v. Barnette* (1943), we held unconstitutional a state law requiring schoolchildren to recite the Pledge of Allegiance and to salute the flag. . . .

The Solomon Amendment does not require any similar expression by law schools. Nonetheless, recruiting assistance provided by the schools often includes elements of speech. For example, schools may send e-mails or post notices on bulletin boards on an employer's behalf. Law schools offering such services to other recruiters must also send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. As FAIR points out, these compelled statements of fact, like compelled statements of opinion, are subject to First Amendment scrutiny.

This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette*. . . . The Solomon Amendment, unlike the laws at issue in those cases, does not dictate the content of the speech at all, which is only "compelled" if, and to the extent, the school provides such speech for other

recruiters. There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.

. . . Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance. . . .

. . .

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

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. . . Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies. . . .

Unlike flag burning, the conduct regulated by the Solomon Amendment is not inherently expressive. Prior to the adoption of the Solomon Amendment's equal access requirement, law schools "expressed" their disagreement with the military by treating military recruiters differently from other recruiters.

The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it. The fact that such explanatory speech is necessary is strong evidence that the conduct at issue here is not so inherently expressive that it warrants protection under [*United States v. O'Brien* (1968)]. If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into "speech" simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply O'Brien to determine whether the Tax Code violates the First Amendment. Neither O'Brien nor its progeny supports such a result.

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. . . Military recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers. . . . It suffices that the means chosen by Congress add to the effectiveness of military recruitment. Accordingly, even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under O'Brien.

. . .

The Solomon Amendment does not . . . affect a law school's associational rights. To comply with the statute, law schools must allow military recruiters on campus and assist them in whatever way the school chooses to assist other employers. Law schools therefore "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association. This distinction is critical. Unlike the public accommodations law in [*Boy Scouts of America v. Dale* (2000)], the Solomon Amendment does not force a law school "'to accept members it does not desire.'" . . .

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