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Constitutional Law: Speaking with your Mouth Shut? Exploring the Outer Limits of First Amendment Protection in the Context of Military Recruiting on Law School Campuses

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CONSTITUTIONAL LAW: SPEAKING WITH YOUR MOUTH SHUT? EXPLORING THE OUTER LIMITS OF FIRST AMENDMENT PROTECTION IN THE CONTEXT OF MILITARY RECRUITING ON LAW SCHOOL CAMPUSES

Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297 (2006)

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In response to the increasing refusal of law schools and other institutions of higher education to allow the U.S. military to engage in on-campus recruiting, Congress passed the Solomon Amendment.[1] The Solomon Amendment mandates a denial of federal funds to any school that refuses to allow the military to recruit on campus.[2] Many law schools

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* J.D. anticipated 2008, University of Florida Levin College of Law; B.A. 2003, University of Florida. This Comment is dedicated to my parents, Bonnie and Billy Wilbanks, and to Matthew Sherlock. Your love and support has allowed me to chase my dreams, and your constant encouragement has reminded me to set my expectations high. I will always be grateful that you are all a part of my life.

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1. Forum for Academic and Institutional Rights, Inc. v. Rumsfeld (*FAIR I*), 291 F. Supp. 2d 269, 278 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006). Congress framed the law as an attempt to facilitate recruitment of qualified candidates and to curb the distribution of tax dollars to institutions that interfered with the government's duty to raise a military. *Id.* at 279 n.2. The discontent of some Congressmen over the hindrance of military recruiting on American campuses was obvious. *See id.* For example, co-sponsor of the law Rep. Richard Pombo opined that the institutions "need to know that their starry-eyed idealism comes with a price" and that the Solomon Amendment should be supported by Congress in order to "send a message over the wall of the ivory tower of higher education." *Id.* (citation omitted). Undoubtedly, law schools became more pressured by the demands for equal treatment of military recruiters following the terrorist attacks of September 11, 2001, which created an increased need for more recruits. Stephen Henderson, *Case Pits Military Against Colleges; Supreme Court to Decide if Schools Can Ban Recruiters, Yet Keep Funding*, HOUS. CHRON., May 3, 2005, at A5.

2. 10 U.S.C.A. § 983 (West 2007). The Solomon Amendment reads in relevant part:

> (b) Denial of funds for preventing military recruiting on campus. —No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—
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> (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

sought to exclude military recruiters on the basis that the military's policy regarding homosexuality[3] was a violation of the schools' antidiscrimination policies.[4] The Forum for Academic and Institutional Rights (FAIR),[5] Respondent, alleged that the Solomon Amendment infringed upon the schools' First Amendment freedoms of speech and association.[6] FAIR filed suit in the United States District Court for the

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(2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(A) Names, addresses, and telephone listings.

(B) Date and place of birth, levels of education, academic majors, degrees received, and the most recent educational institution enrolled in by the student.

Id.

3. The pertinent part of the military's policy on homosexuality is codified as follows:

(b) Policy. —A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

10 U.S.C.A. § 654.

4. Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (*FAIR III*), 126 S. Ct. 1297, 1302 (2006).

5. FAIR is an association of law schools and faculty members whose mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *Id.*

6. *Id.* at 1303. The Solomon Amendment allegedly forced the schools to choose between losing federal funding or disseminating a message with which they strongly disagreed. *Id.* The

District of New Jersey challenging the constitutionality of the Solomon Amendment.[7] The district court held that the Solomon Amendment was constitutional because it neither compelled speech nor significantly affected the schools' ability to express their own messages.[8] On appeal, the Third Circuit Court of Appeals reversed and found that the Solomon Amendment was unconstitutional because it violated the schools' rights of association and impermissibly compelled them to participate in the expressive act of recruiting.[9] The United States Supreme Court unanimously reversed and HELD that the Solomon Amendment was not a violation of the law schools' First Amendment freedoms of speech or association and thus was a constitutionally permissible act of the legislature.[10]

The United States Supreme Court had previously found compelled speech to be a violation of the First Amendment.[11] In *West Virginia Board of Education v. Barnette*,[12] the Court reviewed a state law that required school children to recite the Pledge of Allegiance (Pledge) and to salute the flag daily.[13] Plaintiffs, a group of Jehovah's Witnesses, challenged the constitutionality of the law.[14] The Court held that requiring children to recite the Pledge or salute the flag violated the children's freedom of speech.[15]

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federal funding at issue was a significant figure, approximately $35 billion annually provided by the government to American colleges and universities. Sarah Schweitzer, *High Court Hears Campus Recruiting Case*, BOSTON GLOBE, Dec. 7, 2005, at A2. The Solomon Amendment mandated that even if only the law school denied access to the military recruiters, federal funding would be withheld from the entire university. *Id.*

7. *See* Forum for Academic and Institutional Rights, Inc. v. Rumsfeld (*FAIR I*), 291 F. Supp. 2d 269 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

8. *Id.* at 309-10.

9. Forum for Academic and Institutional Rights, Inc. v. Rumsfeld (*FAIR II*), 390 F.3d 219, 230 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006). The appellate court was convinced by FAIR's analogy to *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000), on the association issue. *Fair II*, 390 F.3d at 232. The court determined that just as Dale's presence in the Boy Scouts would force the Scouts to send the message that it accepted homosexuality, the presence of military recruiters on campus would force the law schools to send the message that the schools accepted discrimination on the basis of sexual orientation. *Id.* The appellate court also found that recruiting was an expressive activity because it entailed oral and written communication and had the purpose of convincing students that working for a specific employer is worthwhile. *Id.* at 236-37. Furthermore, the court determined that the Solomon Amendment compelled speech by forcing schools to disseminate the military's message by distributing newsletters, scheduling receptions and interviews, sending e-mails, and posting flyers to notify students of the military's recruiting activities. *Id.* at 240.

10. *FAIR III*, 126 S. Ct. at 1313.

11. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

12. 319 U.S. 624 (1943).

13. *Id.* at 626.

14. *Id.* at 629-30.

15. *Id.* at 642.

In rendering its decision, the *Barnette* Court emphasized the inappropriateness of compelling the students to verbally declare a belief[16] and of requiring them to engage in the expressive, albeit silent, act of saluting the flag.[17] It opined that to uphold the state law requiring all students to salute the flag would be tantamount to saying that the "Bill of Rights[,] which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."[18] In *Barnette*, the Court expressly overruled a prior case permitting similarly compelled speech[19] and took on a decidedly more protective role in its application of the First Amendment.[20] The Court firmly espoused its commitment to preventing speakers from being told what to say, either verbally or symbolically.[21]

More than fifty years later, a unanimous Court continued in its protective role by proscribing the application of a state law that would have forced a group of parade organizers to alter their desired message.[22] In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[23] parade organizers refused to allow a particular group of openly

16. *Id.* at 631.

17. *Id.* at 632. The Court noted that "the flag salute is a form of utterance" and that "[s]ymbolism is a primitive but effective way of communicating ideas." *Id.* Therefore, the Court found that the symbolic act of the salute was itself a form of speech and, even absent the Pledge, was a required affirmation of a state of mind or belief. *Id.* at 633. The dissent, on the other hand, argued that the salute in no way expressed or suppressed a particular belief. *Id.* at 664 (Frankfurter, J., dissenting). Justice Frankfurter explained that requiring a child to stand and salute the flag in no way restricted a full opportunity for the child or his parents to publicly express their disapproval of the meaning of the gesture. *Id.*

18. *Id.* at 634 (majority opinion).

19. *Id.* at 642. The Court expressly overruled *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). *Barnette*, 319 U.S. at 642. In *Gobitis*, the Court held that it was constitutional for the school board to expel students who refused to participate in the Pledge and salute the flag. *See Gobitis*, 310 U.S. at 599-600.

20. *See Barnette*, 319 U.S. at 642. The *Gobitis* Court determined that allowing special treatment for a minority of students that wished not to comply undermined the legislature's judgment that such allowances would weaken the effect of the whole exercise. *Gobitis*, 310 U.S. at 599-600. The *Barnette* Court, on the other hand, emphasized the importance of protecting an individual's right to freely express his or her views regardless of whether such views are in conformity with the majority. *Barnette*, 319 U.S. at 641. The *Barnette* majority sternly cautioned against compelling those with differing viewpoints to express mainstream beliefs, explaining that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard." *Id.* In taking on a more protective role, the majority in *Barnette* called freedom to express one's own ideas or opinions a "fixed star in our constitutional constellation" and made it clear that exceptions to unbridled free speech would indeed be rare. *Id.* at 642.

21. *Barnette*, 319 U.S. at 642.

22. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 566 (1995).

23. 515 U.S. 557 (1995).

homosexual individuals to participate in a St. Patrick's Day parade.[24] The group sued, claiming violation of a state public accommodations law prohibiting discrimination based on sexual orientation.[25] Parade organizers countered that the application of the state law was unconstitutional because it infringed on their First Amendment freedoms of speech and expressive association.[26] The state trial court and the Supreme Judicial Court of Massachusetts, on appeal, both held that the application of the statute did not unconstitutionally impair the parade organizers' First Amendment rights because the parade had no discernable expressive purpose.[27] The United States Supreme Court disagreed and reversed.[28]

In finding that the parade organizers were entitled to First Amendment protection, the Court determined that parades are inherently expressive.[29] Once it established the expressive nature of the parade, the Court reasoned that each participant in the parade affected the parade's overall message.[30] Thus, use of the state law to force inclusion of a group with a contrary message would require the parade organizers to alter their own message.[31] Continuing the protective trend begun in *Barnette*, the Court held that such a result was a violation of the First Amendment rule that "a speaker has the autonomy to choose the content of his own message."[32]

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24. *Id.* at 561.

25. *Id.*

26. *Id.* at 563. The parade organizers claimed that the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB) was excluded because the organizers determined that the message expressed by GLIB regarding homosexuality was contradictory to the parade's general message supporting traditional social and religious values. *Id.* at 562.

27. *Id.* at 563-64.

28. *Id.* at 566.

29. *Id.* at 568. The Court noted that a "parade" is more than a group of people moving from one place to another. *Id.* In a parade, marchers make a "collective point, not just to each other but to bystanders along the way." *Id.* Therefore, the Court reasoned, parades are "a form of expression, not just motion." *Id.* It further noted that a narrowly articulated message is not necessary to trigger First Amendment protection. *Id.* at 569. The Court stated, "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech." *Id.* at 569-70.

30. *Id.* at 572.

31. *Id.* at 572-73.

32. *Id.* at 573. In its determination that the parade's message was impermissibly altered, the *Hurley* Court distinguished *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), in which the Court rejected the cable company's claim that regulations requiring cable operators to reserve certain channels for designated broadcast signals violated its First Amendment right to choose its own message. *Hurley*, 515 U.S. at 576. As discussed by the Court, the key distinction between *Hurley* and *Turner Broadcasting* was the practicability of disclaimer. *Id.* The cable companies in *Turner Broadcasting* commonly disclaimed any relationship between their viewpoints and those expressed by those using the broadcast facility, and therefore there was no danger of viewers mistaking broadcasted messages as those of the host cable company. *Id.* In *Hurley*, however, the parade organizers could not easily disclaim GLIB's message as contrary to their own.

Five years after the *Hurley* decision, the Court again applied the First Amendment to prevent an organization's message from being compromised by the forced inclusion of an unwanted member.[33] In *Boy Scouts of America v. Dale*,[34] an assistant scoutmaster's adult membership was revoked when the Boy Scouts became aware that he was a homosexual.[35] Dale sued, alleging violation of a state public accommodations statute.[36] The Boy Scouts, much like the parade organizers in *Hurley*, contended that application of the state statute would infringe upon its First Amendment rights by altering its message.[37] The New Jersey Supreme Court held that the law was constitutional and that *Hurley* was inapplicable because Dale's reinstatement as a scoutmaster would not require the Boy Scouts to express any particular message.[38] In a five-four decision, the United States Supreme Court reversed and held that the application of the statute was an unconstitutional violation of the First Amendment.[39]

In *Dale*, the Court focused on the Boy Scouts' First Amendment right of expressive association.[40] Notably, the Court stated that "forced inclusion of an unwanted person in a group infringes the group's freedom of expressive association if the presence of that person affects in a significant way the group's ability to advocate public or private viewpoints."[41] Deferring to the Boy Scouts' view of its own message,[42] the Court found that Dale's presence would force the organization to send a message that

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Id. The *Hurley* Court opined that "such disclaimers would be quite curious in a moving parade." *Id.* at 576-77.

33. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000).

34. 530 U.S. 640 (2000).

35. *Id.* at 644-45. The Boy Scouts learned of Dale's sexual orientation when a newspaper printed an interview with Dale concerning his advocacy of the need for role models for gay and lesbian teenagers. *See id.* at 645.

36. *Id.*

37. *Id.* at 645-46. The Boy Scouts declared that its mission is to "instill values in young people." *Id.* at 649. It further asserted that homosexuality is not "morally straight" or "clean" within the meaning of those terms in the Scout Oath and Law, which defines the values the organization seeks to instill in its members. *Id.* at 649-50.

38. *Id.* at 647.

39. *Id.* at 644.

40. *Id.*

41. *Id.* at 648 (citing N.Y. State Club Ass'n v. New York, 487 U.S. 1, 13 (1988)).

42. *Id.* at 653. The majority stated that the Court must give deference both to an organization's "assertions regarding the nature of its expression" and to its "view of what would impair its expression." *Id.* Interestingly, the dissent found the approach quite novel and denounced giving such deference. *Id.* at 686 (Stevens, J., dissenting). Justice Stevens stated, "This is an astounding view of the law. I am unaware of any previous instance in which our analysis of the scope of a constitutional right was determined by looking at what a litigant asserts in his or her brief and inquiring no further." *Id.*

it accepts homosexual conduct as a legitimate form of behavior.[43] Analogizing *Dale* to *Hurley*, the Court determined that in both cases the inclusion of the unwanted member interfered with the speaker's choice "not to propound a point of view contrary to its beliefs."[44]

Moreover, *Dale* seemingly expanded the decision in *Hurley*.[45] In *Dale*, the Boy Scouts did not contend that Dale used or intended to use his position as assistant scoutmaster to advocate homosexuality or to send a particular message.[46] The Court extended the reach of First Amendment protection to prevent the government from requiring inclusion of a group member whose *mere presence* would alter the speaker's message, regardless of any intended message by the excluded member.[47] The trend toward expansive protection continued.

The instant case, however, attempted to corral the broadening scope of freedoms of speech, expression, and association by refusing to extend First Amendment protection to Respondents. Following a trend of expansive First Amendment protection, Respondents argued the similarities between their situation and those of prior free speech cases.[48] The instant Court obligingly analyzed the facts in light of *Barnette*, *Hurley*, and *Dale*[49] and concluded that the law schools were neither limited in what they may say nor required to say anything under the Solomon Amendment.[50] Distinguishing the precedent cases from the instant case, the Court drew a line indicating how far it would expand First Amendment protection and then refused to cross it.[51]

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43. *Id.* at 653 (majority opinion).

44. *Id.* at 654.

45. In *Hurley*, the Court noted that GLIB's act of marching as an individual unit was itself expressive conduct that was intended to convey a particular message, and GLIB was permissibly excluded on those grounds. Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 570 (1995). GLIB was formed for the purpose of marching in the parade and its goal was to convey the message that its members are openly gay, lesbian, and bisexual individuals in the Irish-American community in Boston, and that they deserve support. *Id.* The parade organizers in *Hurley* did not purport to exclude homosexuals from participating in the parade generally, but excluded GLIB because they disagreed with the particular message expressed by the group as a distinct parade unit. *Id.* at 572.

46. *Dale*, 530 U.S. at 689 (Stevens, J., dissenting).

47. *See id.* at 648 (majority opinion).

48. *See* Brief for the Respondents in Opposition at 18-19, Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 126 S. Ct. 1297 (2006) (*FAIR III*) (No. 04-1152), 2005 WL 754128, at *18-19 (pointing out factual similarities among the instant case, *Hurley*, and *Dale*: In each case an organization excluded a group or individual because inclusion of that person or group would alter the intended message of the organization).

49. *FAIR III*, 126 S. Ct. 1297, 1313 (2006).

50. *Id.* at 1307.

51. *See id.* at 1313.

First, the Court distinguished *Barnette* from the instant case, finding that the Solomon Amendment did not tell Respondents what to say.[52] Although the schools might be required to send recruiting information on the military's behalf, and that communication would likely include elements of speech,[53] the Court reasoned that such recruiting assistance would be "a far cry from the compelled speech in *Barnette*."[54] Not only would the content of any recruiting-related speech be unaffected by the Solomon Amendment,[55] but the dissemination of such speech would be required only if the school chose to provide similar speech on behalf of other recruiters.[56] Moreover, the Court opined that equivocating the instant case to the compelled speech in *Barnette* "trivializes" the First Amendment freedom protected therein.[57]

Second, the instant Court distinguished *Hurley* by determining that the law schools' messages in the instant case were not affected by the inclusion of the military recruiters.[58] The Court found that providing recruiting services, unlike a parade, is not inherently expressive.[59] The Court reasoned that no one would have reason to believe that the schools agreed with ideas expressed by the recruiters allowed on campus,[60] and it noted that the schools were welcome to say whatever they pleased regarding the military's policies without repercussion under the Solomon Amendment.[61] Furthermore, the Court found it extremely relevant that the conduct of excluding military recruiters expressed the school's intended

52. *Id.* at 1308.

53. *Id.* (recognizing that e-mails and notices are speech subject to First Amendment scrutiny); *see also FAIR II*, 390 F.3d 219, 230-32 (3d Cir. 2004) (discussing modes of communication that schools may be required to undertake in connection with recruiting), *rev'd*, 126 S. Ct. 1297 (2006).

54. *FAIR III*, 126 S. Ct. at 1308.

55. *Id.*

56. *Id.* at 1305 (discussing the instant Court's interpretation of the Solomon Amendment as a requirement that law schools offer the same recruiting assistance to the military that they *provide* to other recruiters). Perhaps more importantly, the instant Court noted that in *Barnette* students were not given a choice to remain silent because the government directly mandated their participation. *See id.* at 1308. In the instant case, however, the schools could avoid participating in recruiting assistance for the military if they chose not to offer it to other employers. *See id.*

57. *Id.*

58. *Id.* at 1309-10.

59. *Id.*; *cf.* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 568-70 (1995) (noting that parades are inherently expressive).

60. *FAIR III*, 126 S. Ct. at 1310. In its reasoning, the instant Court cited a prior First Amendment case, *Board of Education of Westside Community School v. Mergens*, 496 U.S. 226 (1990), which held that high school students were capable of appreciating the difference between speech sponsored by their school and speech that their school was legally required to allow because of an equal access policy. *Id.* (citing *Mergens*, 496 U.S. at 250). The instant Court then noted its doubt that students lose the ability to tell the difference by the time they reach law school. *Id.*

61. *Id.* at 1310.

message only when accompanied by an explanation.[62] Their conduct lacking inherent expression,[63] Respondents were not, in the instant Court's opinion, analogous to the parade organizers in *Hurley*.[64]

Finally, the instant Court distinguished *Dale*, finding that extending temporary access to a person or group is quite different from forcing an organization to permanently admit an unwanted group member.[65] The instant Court recognized that law schools "associate" with military recruiters to the extent that they must interact with them during the visit to campus, but it noted that the military recruiter never becomes part of the law school.[66] Accordingly, the instant Court held that the presence of a military recruiter on campus did not violate Respondents' right to associate, no matter how repugnant the school finds the recruiter's message.[67]

By distinguishing prior cases that triggered First Amendment protection, the instant Court truncated the trend expanding its protective role.[68] Coming only six years after the *Dale* decision, it might not have been unthinkable that the instant Court would afford protection to Respondents.[69] Clearly it seemed feasible to at least several constitutional law scholars.[70] However, the instant Court refused to "stretch . . . First

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62. *Id.* at 1311.

63. *See id.*

64. *Id.* at 1309.

65. *Id.* at 1312.

66. *Id.*

67. *Id.* at 1313.

68. *See* Erwin Chemerinsky, *The First Amendment and Military Recruiting*, TRIAL, May 2006, at 78, 79 (calling the *FAIR III* decision a departure from precedent and a narrowing of First Amendment protections); *cf.* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (protecting organization from required inclusion of a member whose presence would alter its message); Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995) (protecting parade organizers from being forced to include a parade unit with an objectionable message); Riley v. Nat'l Fed'n of the Blind, Inc., 487 U.S. 781 (1988) (holding North Carolina Charitable Solicitations Act unconstitutional because it impermissibly mandated speech the speaker would not ordinarily make); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1 (1986) (protecting utility company from being required to include objectionable newsletter in bill sent to customer); Wooley v. Maynard, 430 U.S. 705 (1977) (protecting motorists from being forced to display objectionable state motto on license plate); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (protecting newspaper editors' right to choose content of their own newspaper); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (extending protection to prevent students from being forced to recite the Pledge against their beliefs).

69. *See* First Amendment Center, *High Court Hears Case of Military Recruiters on Campus*, Dec. 6, 2005, http://www.firstamendmentcenter.org/news.aspx?id=16158 (indicating that free speech cases often generate divided Supreme Court decisions and predicting a tie-breaker vote in the instant case).

70. Professors at some of the nation's prominent law schools participated in the suit either as plaintiffs or by submitting briefs in support of FAIR's position. *FAIR I*, 291 F. Supp. 2d 269,

Amendment doctrines well beyond the sort of activities these doctrines protect."[71]

Importantly, the Court briefly discussed alternative grounds for its decision in the instant case,[72] yet chose to elaborate on the First Amendment issue.[73] The Court noted that the Solomon Amendment would be permissible even if it restricted Respondents' speech because it promoted a "substantial Government interest in raising and supporting the Armed Forces" and that interest could not be achieved as effectively absent the statute.[74] Acknowledging that the constitutionality of the Solomon Amendment could be sustained without exploring its actual effect on freedom of speech,[75] the instant Court made a purposeful statement about the reach of the First Amendment by deciding the case on those grounds.[76]

The Court clarified that the First Amendment protects conduct only if it is inherently expressive[77] and went on to state that activity requiring

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275-76 (D.N.J. 2003). For example, two of the named plaintiffs in the instant case were well known constitutional law professors: Erwin Chemerinsky of Duke University School of Law, and Sylvia Law of New York University Law School. *See id.*

71. *FAIR III*, 126 S. Ct. at 1313.

72. *See id.* at 1306-07 (recognizing Congress's constitutional power to raise and support a military).

73. *Id.* at 1307-13; *see also* Linda Greenhouse, *U.S. Wins Ruling over Recruiting at Universities*, N.Y. TIMES, Mar. 7, 2006, at A1 (identifying the lack of infringement on Respondents' freedom of speech as the "heart of the court's analysis," but recognizing the significance of the Court's discussion of Congress's constitutional power to raise an army).

74. *FAIR III*, 126 S. Ct. at 1311; *see also* Major Anita J. Fitch, *The Solomon Amendment: A War on Campus*, ARMY LAW., May 2006, at 12, 19 (noting the important role played by judge advocates in the armed forces and the chilling effect on recruiting of judge advocates that would have been likely had the Court held the Solomon Amendment unconstitutional).

75. *FAIR III*, 126 S. Ct. at 1311.

76. *See id.* at 1313. It is noteworthy that the opinion was unanimous. The *New York Times* called the decision a "Supreme Court Smackdown" and noted that the opinion packed a particularly devastating punch for Respondents because the law professors challenging the Solomon Amendment failed to "produce so much as a sympathetic word from liberal justices like Ruth Bader Ginsburg, David H. Souter and John Paul Stevens." Adam Liptak, *Supreme Court Smackdown!*, N.Y. TIMES, Mar. 12, 2006, § 4, at 5. It seems that delivery of such a forceful opinion by way of a unanimous decision indicates the instant Court's desire to make a point about the state of First Amendment jurisprudence. A bewildered attorney for Respondents found it difficult to believe that "three dozen law schools, 900 law professors, the court of appeals, and a dozen top law firms are all inept at connecting the dots of Supreme Court precedents." *Id.* Obviously, however, the Court wanted to make it clear that the First Amendment does not reach the situation addressed in the instant case, and the Court never intended its First Amendment precedent to lead to the conclusion that Respondents suggested. *See id.*

77. *FAIR III*, 126 S. Ct. at 1310; *cf.* Texas v. Johnson, 491 U.S. 397, 399, 406 (1989) (finding that flag burning was sufficiently communicative of a particularized message to be expressive conduct entitled to First Amendment protection); Spence v. Washington, 418 U.S. 405, 409 (1974) (declaring the necessity of determining whether "activity was sufficiently imbued with elements

explanatory speech to convey a message is not inherently expressive.[78] The effect is that activity will not be deemed expressive just because the speaker says it is.[79] This is certainly a logical limit. The instant Court noted that any other conclusion would absurdly allow a regulated speaker to transform any conduct into protected speech simply by talking about it.[80] This express limit on First Amendment protection conforms to precedent[81] and maintains the integrity of the Constitution.[82]

Furthermore, the Court implied that the practicability of disclaimer could remove certain compelled speech or expressive conduct from First Amendment protection.[83] Such a notion follows logically from past cases,[84]

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of communication to fall within the scope of the First . . . Amendment[]"); United States v. O'Brien, 391 U.S. 367, 376 (1968) (reserving First Amendment protection for expressive conduct and refusing to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea"); Greenhouse, *supra* note 73 (identifying the importance of Court's finding in *FAIR III* that allowing recruiters on campus was not "inherently expressive").

78. *See FAIR III*, 126 S. Ct. at 1311. While a parade is inherently expressive, regardless of whether a delineated message has been announced, Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 568-70 (1995), a ban of recruiting activities is not. *FAIR III*, 126 S. Ct. at 1311. Despite Respondents' assertion that the motive for exclusion of military recruiters from campus was solely to express a message that the schools disagreed with the military's policies, their conduct was not expressive. *Id.* at 1310-11.

79. This rule raises questions about the validity of the majority's contested assertion in *Dale* that a speaker should be given deference in defining the meaning of his or her message. *See supra* note 42 and accompanying text. If the Court refuses to allow a speaker to declare that certain conduct is expressive if it is not inherently so, then why should it allow a speaker to declare what its message is if that message is not apparent? The Court was not required to address this issue in the instant case because it determined that banning recruiting is not expressive conduct, and therefore Respondents sent no message at all. *FAIR III*, 126 S. Ct. at 1309.

80. *FAIR III*, 126 S. Ct. at 1311. The Court gave an illustrative example where, under Respondents' definition of expressive conduct, an individual who announces that he intends to express disapproval of the IRS by refusing to pay taxes could trigger First Amendment analysis of the Tax Code simply because he verbally claims that his conduct of not paying taxes is expressive. *Id.*

81. *See, e.g.*, *Hurley*, 515 U.S. at 568 (finding that parades are inherently expressive and therefore subject to First Amendment scrutiny); *Johnson*, 491 U.S. at 399, 406 (finding that flag burning was sufficiently communicative of a particularized message to be expressive conduct entitled to First Amendment protection); *Spence*, 418 U.S. at 409; *O'Brien*, 391 U.S. at 376.

82. *See FAIR III*, 126 S. Ct. at 1308 (discussing trivialization of First Amendment precedent by extending protection in the instant case); Linda Greenhouse, *Justices Weigh Military's Access to Law Schools*, N.Y. TIMES, Dec. 7, 2005, at A1 (reporting that Justice Breyer expressed concern in oral arguments that a victory for Respondents could provide a constitutional basis for the challenge of other antidiscrimination laws by speakers who wanted to circumvent compliance with federal law); *supra* note 80 and accompanying text (discussing potential abuses of extending protection in this case).

83. *See FAIR III*, 126 S. Ct. at 1310 (finding that extending recruiting access in no way indicates that the school agrees with the recruiters' message, especially since the school is free to say what they like about military policy). In the instant case, Respondents claimed that disclaimers

although it raises two possible issues. First, speech (or expressive conduct) might be more difficult to protect from unwilling accommodation of a contrary message if the speaker, via disclaimer, can easily thwart dilution of its intended message.[85] However, this issue is not as troubling as it might seem. The First Amendment is best served by countering a contrary expression with more speech rather than less.[86] Moreover, availability of disclaimer is not conclusive, but only a factor weighing in favor of finding danger of attribution unlikely.[87]

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were insufficient to make clear to students and the public that the school opposed the military's policy on homosexuality. Schweitzer, *supra* note 6, at A2. Respondents argued that students simply would not believe the disclaimers; but Chief Justice Roberts focused on the feasibility of disclaimers and pointed out that if the schools found disclaimers insufficient, they were free to decline federal funding and turn away the military recruiters in order to make their opposition clear. *Id.*

84. *See supra* note 32 and accompanying text (finding First Amendment infringement where the speaker could not employ a disclaimer to distinguish its viewpoint from that of a parade participant and distinguishing prior case where disclaimer was available).

85. *See FAIR III*, 126 S. Ct. at 1310 (discussing relevance of students' ability to recognize disclaimer and distinguish schools' opinions from that of recruiter); Greenhouse, *supra* note 82, at A1 (noting that Justice O'Connor found it important that the schools could easily inform the students that the school disagreed with the military's policy). *But see FAIR II*, 390 F.3d 219, 241 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006) (claiming that "the Supreme Court has never held that compelled speech concerns evaporate if a speaker can ameliorate the risk of misattribution by disclaiming the message it is being compelled to propagate."); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal., 475 U.S. 1, 15 n.11 (1986) ("The presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure . . . to respond to [compelled] speech.") (plurality opinion); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 99 (1980) ("The mere fact that he is free to dissociate himself from the views expressed on his property [through use of disclaimers] cannot restore his 'right to refrain from speaking at all.'" (citations omitted)); Chemerinsky, *supra* note 68, at 79 (describing the Court's decision in *FAIR III* as a departure from precedent because the Court had never before found that compelled speech was acceptable if the speaker could later disavow the compelled message).

86. *See* Greenhouse, *supra* note 82, at A1 (reiterating a comment by Justice Breyer opining that the normal First Amendment "remedy for speech you don't like is not less speech, it is more speech").

87. First Amendment protection was rarely available if there was little danger of the contrary message being attributed to the speaker claiming infringement. *See supra* note 60 and accompanying text (explaining that there was little danger in the instant case of recruiters' message being attributed to school and thus no infringement); *see also* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 841-42 (1995) (finding no infringement where fear of attribution of message was not plausible); *Pruneyard*, 447 U.S. at 87 (refusing First Amendment protection where there was little likelihood that the message of demonstrators would be identified with owner of shopping center where demonstrations took place). It is likely that a disclaimer only adds to the evidence that the danger of attribution is minimal, and therefore the instant Court's focus on disclaimer really does little to change the state of the law. *See, e.g.*, *Pruneyard*, 447 U.S. at 87 (considering store owner's ability to post signs to disclaim any sponsorship of the handbillers' message as a factor indicating minimal danger of attribution).

Second, certain future disclaimers might violate the Solomon Amendment.[88] The Court encouraged law schools to express their disapproval of the military's failure to comply with their antidiscrimination policy by other means.[89] The Court, however, neglected to define fully how protests would square with the Solomon Amendment[90] as interpreted by the Court.[91] Surely protesting outside of a military recruiter's interview room on campus could run afoul of the Solomon Amendment's mandate to provide the military the same access that is provided to any other employer.[92] It is unlikely that other favored employers would receive a similarly cold welcome to campus. The Court left the legal analysis of limits on disclaimers to be resolved another day, and further litigation seems likely, as plans to push the limits are well under way.[93]

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88. The instant Court raised this question during oral argument and probed Petitioners about what exactly the schools could do to disclaim their objection to the military's policy, but no discussion of how far the schools could go appeared in the Court's opinion. *See* Transcript of Oral Argument at 25, *FAIR III*, 126 S. Ct. 1297 (2006) (No. 04-1152), 2005 WL 3387694, at *25.

89. *FAIR III*, 126 S. Ct. at 1310, 1313.

90. During oral arguments, Justice O'Connor asked the attorney for the government, Solicitor General Paul Clement, whether the schools would be able to post notices or otherwise make their disapproval known at the recruitment offices where the military would be interviewing students without violating the amendment. Transcript of Oral Argument at 21, *FAIR III*, 126 S. Ct. 1297 (2006) (No. 04-1152), 2005 WL 3387694, at *21. Clement replied that the schools could, but he stated that there was a "line" limiting what the schools could do. *Id.* The instant Court apparently did not find it necessary to explore what that "line" might be.

91. *See FAIR III*, 126 S. Ct. at 1305 (interpreting the Solomon Amendment to require the schools to provide the military the same access *provided* to other employers allowed on campus); *see also* 10 U.S.C.A. § 983(b)(1) (West 2007) (requiring access for the military that is "at least equal in *quality* and scope to the access to campuses and to students that is *provided* to any other employer" (emphasis added)).

92. *See FAIR III*, 126 S. Ct. at 1305; Greenhouse, *supra* note 82, at A1 (explaining that during oral argument Justice Kennedy indicated that Petitioners' response that the school could organize a protest outside of the military's interview room conceded too much).

93. Notably, Paula C. Johnson, a law professor at Syracuse University and named plaintiff in the instant case, indicated in an interview that she expected that "things will begin to happen" on campuses as opponents of the military had time to better organize. Greenhouse, *supra* note 73, at A1. Similarly, Carl C. Monk, director of FAIR, commented to a reporter following the decision that FAIR would "continue to require its member schools to engage in 'significant' activities to counter the impact of the Solomon Amendment." *Id.* Such plans to organize protests and to see just how far law schools can go without violating the Solomon Amendment have already begun. *See, e.g.*, SolomonResponse.Org, http://www.law.georgetown.edu/solomon/ (last visited Jan. 24, 2007) (inviting law school students and faculty to protest the military's "don't ask don't tell" policy and calling the *FAIR III* decision "a call to arms to law school administrations across the country to vocally demonstrate their opposition"); Campus Antiwar Network, *National Day of Counter-Recruitment*, Dec. 6, 2005, http://campusantiwar.net/index.php?option=content&task=view&id=124&Itemid=36 (encouraging protests outside Supreme Court during oral arguments for *FAIR III* and further promoting future events in the "movement for COLLEGE NOT COMBAT,"

The instant Court also reined in the potentially far-reaching implications of *Dale*.[94] The instant case defined certain characteristics of a group member[95] that make the *Dale* analysis more manageable and eliminated its unknown breadth.[96] *Dale* no longer looms, threatening to allow exclusion of any person whose mere presence might impair a group's overall message;[97] the instant case limits the application of *Dale* to situations where the presence of the unwanted person is permanent.[98] This limitation prevents ridiculous circumvention of antidiscrimination laws.[99]

In sum, compelled speech is unconstitutional, inherently expressive conduct is protected, and a speaker may not be forced to alter his or her expressed message. The common thread is that a message must *actually* be expressed.[100] By refusing to recognize Respondents' conduct as speech within the confines of the First Amendment, the instant Court refused to stretch the First Amendment to new limits.[101] Excluding recruiters does not equal speaking.[102] Similarly, including recruiters sends no message regarding a school's agreement or disagreement with a recruiter's policies.[103] If the instant Court had ruled that the conduct of excluding recruiters was speaking, virtually any activity could easily be misconstrued

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including protests at school administration offices).

94. *See FAIR III*, 126 S. Ct. at 1312 (distinguishing *Dale*).

95. *See id.*

96. *Id.* (distinguishing the effect on the message conveyed by an organization of a permanently present group member versus that of a visitor).

97. *See* Chemerinsky, *supra* note 68, at 79 (noting that the Court had not previously limited freedom of association to "membership"). *See also* Elizabeth A. Powers, Comment, *Constitutional Law: The Freedom of Expressive Association, an Organization's Right to Choose What Not to Say*, 53 FLA. L. REV. 399, 408 (2001) (interpreting *Dale* broadly as allowing exclusion of anyone disagreeing with an institution's philosophy).

98. *FAIR III*, 126 S. Ct. at 1312. The instant Court recognized this distinction as "critical." *Id.*

99. *See id.* (declaring that speakers may not shield themselves from laws requiring equal access by claiming that their messages would be impaired by mere association).

100. The instant Court found that the Solomon Amendment regulated only conduct (i.e., what the schools must do), and not speech (i.e., what the schools must say). *Id.* at 1307. In analyzing the schools' conduct, the Court found that Respondents did not succeed in sending the intended message by excluding military recruiters from law school campuses, nor did they send an unwanted message by allowing recruiters access to campus. *Id.* at 1309-11. The Court noted that no one would know why the military was interviewing off-campus without an explanation, and therefore the conduct could not be considered inherently expressive. *Id.* at 1311; *see also supra* notes 62, 78 and accompanying text.

101. *See FAIR III*, 126 S. Ct. at 1313.

102. Respondents' conduct was not inherently expressive. *See supra* notes 62-64, 78, 100 and accompanying text.

103. *See supra* note 60 and accompanying text. Respondents were not directly compelled to say anything via oral or written communication. *See supra* notes 52-56 and accompanying text.

to fit beneath the protection of the First Amendment.[104] Despite the prior trend of expansive protection, that was a line that the Court was understandably unwilling to cross. It is still possible to "speak" without opening your mouth, but the message must be heard loud and clear if the First Amendment is to apply.[105]

104. *See supra* note 80 and accompanying text (discussing the absurdity of allowing any conduct, even conduct that is not inherently expressive, to become speech if the actor talks about it).

105. *See supra* note 77 and accompanying text (demonstrating that conduct that is not inherently expressive cannot reasonably receive First Amendment protection).