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THE SOLOMON AMENDMENT, EXPRESSIVE ASSOCIATIONS, AND PUBLIC EMPLOYMENT

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Employment law commentators have paid insufficient attention to the Solomon Amendment case of Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR) *and its discussion of the right to expressive association under the First Amendment. By failing to methodically analyze whether all law school constituents of the FAIR organization constitute expressive associations, the Court erroneously implied that both public and private law school members of FAIR may be expressive associations. This state of affairs will eventually be rectified given the strong constitutional structural arguments in opposition to such an interpretation. But such a modification should be accompanied by a unifying theory about how government efficiency concerns in maintaining core values and promoting certain messages should be balanced against the First Amendment rights of public employees to engage in protected constitutional activities. This Article fashions a coherent constitutional analysis for these public employment law cases by utilizing the* Pickering *framework and limiting the application of the* Garcetti v. Ceballos *government speech doctrine. This analysis discards the notion that the government employer has a constitutional right as an expressive association to disassociate itself from those it deems are promoting an antithetical message, focusing instead on whether the constitutional right of the public employee can be recognized without substantially disrupting the public employer's enterprise.*

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* Assistant Professor of Law, University of Mississippi School of Law. I thank Rick Bales, George Cochran, David Fagundes, Chris Green, Michael Hoffheimer, and Nancy Levit for their valuable insights and comments on earlier drafts of this Article. All errors and omissions are mine alone. Valuable research assistance was provided by Kara Lincoln of the University of Mississippi School of Law Class of 2007. Previous versions of this Article were presented at the First Annual Colloquium on Current Scholarship in Labor and Employment Law at Marquette University Law School and at the 2007 *UCLA Law Review* Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law.* I am indebted for the feedback I received from participants at these events. I would also like to express my gratitude to the Lamar Order of the University of Mississippi School of Law for providing funding for the writing of this Article.

INTRODUCTION

Recently decided labor and employment law cases have given employee rights advocates in the United States little reason to cheer. The National Labor Relations Board (NLRB) potentially denied collective bargaining rights to large groups of private-sector employees in its recent *Kentucky River* supervisor trilogy rulings,[1] and public employees saw First Amendment

1. *See* Oakwood Healthcare, Inc., 348 N.L.R.B. No. 37, 2006–2007 NLRB Dec. (CCH) ¶ 17,189 (Sept. 29, 2006) (finding certain charge nurses in an acute-care hospital fell outside the definition of "supervisor" set forth in Section 2(11) of the National Labor Relations Act (NLRA)); Beverly Enters.–Minn., Inc., 348 N.L.R.B. No. 39, 2006–2007 NLRB Dec. (CCH)

protections substantially diminished in so-called "official capacity" speech cases in light of the U.S. Supreme Court's decision in *Garcetti v. Ceballos*.[2] The lone bright spot for employees has been the robust interpretation given by the Supreme Court to antiretaliation provisions under Title VII of the Civil Rights Act of 1964[3] in *Burlington Northern & Santa Fe Railroad Co. v. White*.[4]

Perhaps because of the number of clearly significant employment law decisions in the past year, no employment law commentator has examined the Solomon Amendment case of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*[5] and its discussion of the right to expressive association under the First Amendment.[6] This is hardly surprising, given the less than obvious employment law connections. Nevertheless, some very real, if unintended, employment law consequences stem from this decision.

Since the civil rights cases of the 1950s and 1960s first recognized the constitutional right to association,[7] there has never been a satisfactory conception of what groups are protected associations for First Amendment purposes. Andrew Morriss lamented this fact in his recent pre-*FAIR* piece,[8] and others scholars have concurred.[9] Together, they point out that past expressive

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¶ 17,191 (Sept. 29, 2006) (concluding that charge nurses at a nursing home were not supervisors for purposes of the NLRA); Croft Metals, Inc., 348 N.L.R.B. No. 38, 2006–2007 NLRB Dec. (CCH) ¶ 17,190 (Sept. 29, 2006) (holding that lead persons working in a manufacturing facility were not supervisors under the Act). As problematic as these decisions may become for the labor movement, at least some commentators believe the decisions could have been worse for unions. *See, e.g.*, Posting of Jeff Hirsch to Workplace Prof Blog, Board Decides "Kentucky River" Cases, http://lawprofessors.typepad.com/laborprof_blog/2006/10/board_decides_k.html (Oct. 3, 2006) ("My personal take on these cases is that they're not great for unions, but they could have been worse.").

2. 126 S. Ct. 1951 (2006). For a more in-depth consideration of *Garcetti v. Ceballos* and its implications for public employee First Amendment rights, see *infra* Part IV.B.

3. 42 U.S.C. §§ 2000e–2000e-17 (2000).

4. 126 S. Ct. 2405, 2415 (2006) (holding that Title VII antiretaliation provisions are not confined to employment-related actions and requiring the plaintiff to "show that a reasonable employee would have found the challenged action materially adverse, which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." (citations and internal quotation marks omitted)).

5. 547 U.S. 47 (2006).

6. *See id.* at 1311–13.

7. *See infra* Part II.A.

8. *See* 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, 444 (2005) ("The Supreme Court's expressive association cases are . . . of little direct guidance on the question of what constitutes an expressive association largely because that issue has not yet arisen in a case before the Court.").

9. *See, e.g.*, Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1497–98 (2001); Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639, 679 (2002).

association cases like *Roberts v. U.S. Jaycees*,[10] *Board of Directors of Rotary International v. Rotary Club of Duarte*,[11] and *Boy Scouts of America v. Dale*[12] do not say much, outside of their own examples, about how to determine what is and what is not an expressive association.[13]

Not only did *FAIR* not help matters in this regard, it made matters worse by proceeding on the assumption that public employers, in the guise of FAIR's public law school members,[14] have expressive association rights.[15] The Court came to this conclusion without any analysis.[16] Instead, it should have considered that law schools may be expressive associations for certain limited purposes, but not for others, and that private and public law schools should be treated differently given the constitutional issues at stake.

As it turns out, this oversight did not impact the decision in *FAIR* itself, because, even though the law schools were expressive associations, the Court found that the requirement of equal access for military recruiters on law school campuses did not unconstitutionally burden the schools' expressive association rights.[17] The future consequences could be far reaching, however, if public employers generally are considered to have First Amendment rights to expressive association.[18] This could mean that public employers would gain constitutional rights at the expense of public employees' civil liberties and civil rights.[19]

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10. 468 U.S. 609 (1984).
11. 481 U.S. 537 (1987).
12. 530 U.S. 640 (2000).
13. *See* Farber, *supra* note 9, at 1498 ("So far, the Court has given us a series of examples without any defining principle."); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 215 (2003) ("[O]ne looks in vain to [*Boy Scouts of America v.*] *Dale* for some persuasive, principled, or even predictable limit on the First Amendment protections enjoyed by associations."); Mazzone, *supra* note 9, at 680 ("As the doctrine of freedom of association has developed the examples are all the rules we have.").
14. The Forum for Academic and Institutional Rights, Inc. (FAIR) includes law schools as institutions and law school faculties, but both are treated collectively as "law schools" in *Rumsfeld v. FAIR*. *See* 547 U.S. 47, 52, 69–70 (2006). Of the known members of the association, four are public law school faculties. *See infra* notes 35, 75 and accompanying text.
15. *See FAIR*, 547 U.S. at 68–70; *see also* Morriss, *supra* note 8, at 440 ("One indication that the lower courts [in *FAIR*] paid insufficient attention to this [expressive association] element is their failure to consider state law schools as members of FAIR."). Perhaps because the government conceded the point about FAIR members being expressive associations, the Court did not consider the potential ramifications of characterizing public law schools in such a manner. *See infra* Part I.C.
16. The actual language used by the Court concerning whether FAIR constitutes an expressive association is discussed in detail in Part I.C.
17. *See FAIR*, 547 U.S. at 68–70.
18. This outcome is a distinct possibility since public law schools can equally exercise these expressive association rights in the employment context. *See infra* Part III.A.
19. *See infra* Parts III.B, III.C.

Fortunately, it is hard to imagine that the Court, if faced with the question directly, would find that public employers have First Amendment rights of any kind. This interpretation of the First Amendment is structurally unsound because the Bill of Rights protects the governed, not the governing.[20] To the extent that public employers have interests in promoting messages consistent with their public mission and image, it is better to conceive of these interests as the same as those discussed in the *Pickering v. Board of Education* line of cases.[21] These cases concern the need for governmental efficiency and lack of disruption in the public employment sector even in light of public employee First Amendment rights.[22] To keep these governmental efficiency interests within reasonable bounds, however, the government speech doctrine discussed in *Garcetti v. Ceballos* should be limited to those public employees who are specifically hired to promote the government's message and not to all employees who engage in conduct pursuant to their job duties.[23]

The purpose of this Article, then, is to point out an inadvertent error that the Court made in *FAIR* on its way to doing the heavy analytical lifting. By failing to methodically analyze whether all constituents of the FAIR organization are expressive associations, the Court erroneously implied that both public and private law schools may be expressive associations. A careful unpacking of the rationale in *FAIR* will permit this judicial misstep to be corrected before the recognition of public employer expressive associations causes substantial harm to civil liberties and civil rights in the workplace. This Article also hopes to fashion a coherent constitutional analysis in public employment law cases by using the *Pickering* framework and limiting the application of the *Garcetti* government speech doctrine. This analysis discards the notion that the government

20. This is not to say that the U.S. Supreme Court has not extended constitutional rights to states in other contexts, especially in situations in which state and federal sovereign interests collide. David Fagundes has cogently argued that "in cases where private individuals are not involved and the dispute centers on the federal government's attempt to restrict the speech of another sovereign," constitutional rights for state actors should be recognized. *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1639 (2006). This Article, however, does not deal with such federal-state conflicts and, instead, concentrates on public employment cases involving private individuals' interactions with their government employers. In such instances, this Article argues, the U.S. Constitution should "function[] primarily as a bulwark against government abuse," *id.*, and should not be available for state actors to use offensively against contrary public employee constitutional and statutory rights. *See infra* Part IV.A.

21. Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

22. *See infra* Part IV.B.1.

23. *See infra* Part IV.B.2.

employer has a constitutional right as an expressive association to disassociate itself from those it deems are promoting an antithetical message, focusing instead on whether the constitutional right of the public employee can be recognized without substantially disrupting the public employer's enterprise.

This Article discusses in four Parts the Supreme Court's recognition of public employer expressive associations and how the Court should rectify this state of affairs, consistent with the protection of public employee civil liberties and civil rights. Part I explores in depth the Court's decision in *FAIR*, with a focus on the Court's expressive association analysis. Part II then examines the historically elusive meaning of which groups constitute expressive associations under Supreme Court precedent, explaining how this lack of clarity contributed to the recognition of public employer expressive associations in *FAIR*. Next, Part III outlines the potentially detrimental consequences to public employees of this unintended constitutional development and provides examples to illustrate what recognition of these public expressive associations would mean to public employees' civil rights and civil liberties. Part IV concludes by arguing that the Court will eventually undo this mistake by relying on structural arguments about the Bill of Rights, but urges the Court to use this opportunity to fashion a workable framework for balancing public employer efficiency interests against public employee constitutional rights by utilizing the durable *Pickering* balancing test. At the same time, the Article maintains that the Court should modify its *Garcetti* holding so that public employee constitutional rights are not needlessly sacrificed through an overblown application of the government speech doctrine.

I. *RUMSFELD V. FAIR*

A. "Don't Ask, Don't Tell" and the Solomon Amendment

The First Amendment case of *Rumsfeld v. FAIR*[24] stems from a legislative compromise concerning the inclusion of homosexual individuals in the military.[25] Whereas previously the military had more actively sought to exclude homosexual members from the armed services,[26] the new "Don't Ask, Don't Tell" (DADT) policy shielded homosexuals from being dismissed

24. 547 U.S. 47 (2006).

25. *See* Morriss, *supra* note 8, at 434 (citing Eugene R. Milhizer, *"Don't Ask, Don't Tell": A Qualified Defense*, 21 HOFSTRA LAB. & EMP. L.J. 349, 351–66 (2004)) (discussing the history surrounding the military's "Don't Ask, Don't Tell" (DADT) policy).

26. *See id.*

from service as long as they did not engage in homosexual acts, state that they were homosexuals, or marry a person of the same sex.[27] Despite challenges by gay rights activists,[28] the DADT policy remains in effect, and federal appellate and districts courts have consistently found it to be constitutional.[29]

A number of law schools, in solidarity with opponents of DADT, began restricting military recruiters' access to their campuses.[30] The schools' opposition to DADT was based on their own nondiscrimination policies that, among other things, prohibit recruiters from engaging in sexual orientation discrimination.[31] In response, the U.S. Congress enacted the Solomon Amendment, which prevents colleges and universities from receiving certain federal funding[32] if they prohibit military recruiters "from gaining access to campuses, or access to students . . . 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."[33]

A number of law schools believed that the Solomon Amendment required them to choose between abandoning their nondiscrimination

27. *See* 10 U.S.C. § 654(b) (2000).

28. For instance, the Servicemembers Legal Defense Network is currently mounting its fifth annual campaign to persuade the U.S. Congress to repeal the DADT policy and allow homosexuals to serve openly in the armed services. *See* Servicemembers Legal Defense Network, Lobby Day 2007, http://ga1.org/sldn/events/lobbyday07/details.tcl (last visited Jan. 7, 2007) (providing information for group lobbying efforts to repeal DADT in Washington, D.C., in March 2007).

29. *See* Able v. United States, 155 F.3d 628 (2d Cir. 1998); Holmes v. Cal. Army Nat'l Guard, 124 F.3d 1126 (9th Cir. 1997). The policy is being challenged today on different constitutional grounds in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), but still without success. *See* Cook v. Rumsfeld, 429 F. Supp. 2d 385 (D. Mass. 2006) (dismissing a challenge to the DADT policy on a Rule 12(b)(6) motion for failure to state a claim).

30. *See* Rumsfeld v. FAIR, 547 U.S. 47, 51 (2006).

31. ASS'N OF AM. LAW SCH., INC., BYLAWS AND EXECUTIVE COMMITTEE REGULATIONS PERTAINING TO THE REQUIREMENTS OF MEMBERSHIP, at Bylaw § 6-3(b), Exec. Comm. Regulation § 6-3.2 (2005), *available at* http://www.aals.org/about_handbook_requirements.php#6.

32. Although student financial assistance is not covered by the law, federal funding from the Departments of Defense, Homeland Security, Transportation, Labor, Health and Human Services, and Education, among other agencies, may be lost at the university-wide level if schools do not comply with the Solomon Amendment. *See* 10 U.S.C. § 983(d)(1), (2) (2000 & Supp. 2004).

33. *Id.* § 983(b) (Supp. 2004). In its first iteration, the Solomon Amendment withdrew federal funds from higher education institutions that prevented military recruiters "from gaining entry to campuses." However, the Department of Defense later adopted an informal policy that "entry to campus" meant that universities had to "provide military recruiters access to [their] students equal in quality and scope [as] that provided to other recruiters." *See* FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 283 (D.N.J. 2003) (internal quotation marks omitted). This equal access requirement was formally codified by Congress in the Solomon Amendment in 2004 as a result of litigation of this matter in the lower federal courts. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911–12 (2004).

policies and losing a substantial amount of federal funding.[34] A group of public and private law schools and faculties, called the Forum for Academic and Institutional Rights, Inc. (FAIR),[35] sued for a preliminary injunction against enforcement of the law, arguing that it impermissibly infringed on their First Amendment rights of speech and association.[36]

B. *Rumsfeld v. FAIR*

The Supreme Court unanimously[37] found that the Solomon Amendment did not infringe the FAIR law schools' freedoms of speech and association under the First Amendment.[38] The Court's opinion can be divided into two parts: (1) statutory; and (2) constitutional.

1. The Statutory Argument

The first part of the *FAIR* decision considered whether the case could be disposed of on statutory grounds as proposed by a brief filed by law professor amici.[39] These professors believed that the equal access requirement of the Solomon Amendment could be read to allow law schools to apply a general nondiscrimination policy to exclude military recruiters. In other words, as long as law schools excluded other recruiters that violated their nondiscrimination policies, it could treat military recruiters in the same fashion.[40]

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34. *See FAIR*, 547 U.S. at 52.

35. The declared mission of FAIR is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *Id.* (internal quotation marks omitted). According to SolomonResponse.org, FAIR consists of thirty-six participating law schools, including twenty-four faculties and twelve institutions. *See* SolomonResponse.org, FAIR Participating Law Schools, http://www.law.georgetown.edu/solomon/participating_schools.html (last visited Jan. 14, 2007). Of these, only twenty-four are publicly known, as the remaining members have chosen to remain anonymous for fear of retaliation from the government and private actors. *See FAIR*, 291 F. Supp. 2d at 286.

36. *FAIR*, 547 U.S. at 52–53.

37. Justice Alito did not participate in the case, so *FAIR* was actually an 8–0 decision. *See id.* at 50.

38. *Id.* at 70. The Supreme Court came to this conclusion after the district court found in favor of the government, *see FAIR*, 291 F. Supp. 2d 269, and the Third Circuit reversed in a divided opinion, *see* FAIR v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004).

39. *See FAIR*, 547 U.S. at 55–56 (citing Brief for Professors William Alford et al. as Amici Curiae Supporting Respondents at 10–18, *FAIR*, 547 U.S. 47 (No. 04-1152); Brief for 56 Columbia Law School Faculty Members as Amici Curiae Supporting Respondents and Supporting Affirmance at 6–15, *FAIR*, 547 U.S. 47 (No. 04-1152)).

40. *Id.* at 56.

As an initial matter, both the government and FAIR did not believe this to be the meaning of the equal access requirement of the Solomon Amendment. Both read the statue to say that for a law school and its university to receive federal funding, the same access must be afforded to campus and students by military recruiters as that received by other nonmilitary recruiters.[41] The Court agreed, finding that the proper focus of the statute was not on the "*content* of a school's recruiting policy," but the "*result* achieved by the policy."[42] Military recruiters must be given the same level of access to law schools as other recruiters who comply with the law schools' nondiscrimination policies.[43]

2. The Constitutional Arguments

After rejecting the statutory argument, the Court considered whether the First Amendment prevented the government from imposing the Solomon Amendment access requirements on law schools. Chief Justice Roberts began with the proposition that Congress has great latitude in enacting legislation to raise and support armies;[44] requiring campus access for military recruiters falls under that power unless the legislative branch exceeds other constitutional limitations, such as those imposed by the First Amendment.[45]

The Third Circuit, in finding for FAIR, had concluded that the conditions placed on university federal funding amounted to an impermissible unconstitutional condition and therefore exceeded the constitutional limitations on Congress's power to raise and support armies.[46] In reversing, the Supreme Court concluded that "a funding condition [is not] unconstitutional if it [can] be constitutionally imposed directly"[47] and determined that the access requirement did not violate the law schools' First Amendment rights to free speech or association.[48]

41. *Id.* at 55.
42. *Id.* at 57.
43. *Id.*
44. Congress has the power to "provide for the common Defence . . . [t]o raise and support Armies," and "[t]o provide and maintain a Navy," under Article I of the Constitution. U.S. CONST. art. I, § 8, cl. 1. When Congress acts pursuant to these powers, "judicial deference . . . is at its apogee." Rostker v. Goldberg, 453 U.S. 57, 70 (1981).
45. *FAIR*, 547 U.S. at 58.
46. *See id.* at 54 (citing FAIR v. Rumsfeld, 390 F.3d 219, 229–43 (3d Cir. 2004)). Under the doctrine of unconstitutional conditions, "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." *Id.* at 59 (internal quotation marks omitted) (citing United States v. Am. Library Ass'n, 539 U.S. 194, 210 (2003)).
47. *Id.* at 59–60 (citing Speiser v. Randall, 357 U.S. 513, 526 (1958)).
48. *Id.* at 70.

a. Free Speech Arguments

In determining that the access requirement did not violate the law schools' First Amendment rights, the Court first explored three different constitutional free speech arguments.[49] FAIR argued that the Solomon Amendment compelled them to "speak the Government's message," required them to "host or accommodate the military's speech," and "unconstitutionally infring[ed] [on their] right to engage in expressive conduct."[50] The Court rejected all three claims, finding generally that the Solomon Amendment did not require the FAIR schools to say or do anything.[51] More specifically, there was no government-mandated pledge or motto that the law schools had to endorse, as in *West Virginia State Board of Education v. Barnette*[52] and *Wooley v. Maynard*;[53] no requirement that the law schools accommodate a government message that interfered with the law schools' desired message, as in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*,[54] *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[55] and

49. Because the free speech contentions in *FAIR* are not central to the argument in this Article, I provide only a cursory overview of these arguments and their resolution by the Court. The Court also rejected a fourth argument, adopted by the Third Circuit, that "the Solomon Amendment violated the First Amendment because it compelled law schools to subsidize [government] speech." *See id.* at 1307 n.4. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550 (2005), the Court made clear that citizens do not have a "First Amendment right not to fund government speech." *Id.* at 562. Thus, the *FAIR* Court found no hasis for a First Amendment challenge on these grounds. 547 U.S. at 61 n.4.

50. *FAIR*, 547 U.S. at 60–61.

51. *Id.* at 61.

52. 319 U.S. 624, 642 (1943) (holding unconstitutional a state law that required school children to recite the Pledge of Allegiance in school).

53. 430 U.S. 705, 717 (1977) (holding unconstitutional a state law that made it a crime for New Hampshire motorists to obscure the state motto, "Live Free or Die," on their automobiles' license plates).

54. 515 U.S. 557, 566 (1995) (holding unconstitutional a state law requiring a parade to include a group with a message antithetical to those of the parade organizers). With regard to *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, the Court concluded that unlike the decision surrounding who participates in a parade, allowing military recruiters on law school campuses is not inherently expressive and does not sufficiently interfere with any message the law school wishes to send. *See FAIR*, 547 U.S. at 63–64. *But see* Dale Carpenter, *Unanimously Wrong*, 2005–2006 CATO SUP. CT. REV. 217, 240 (2006) ("[T]he 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 moraliry, 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.").

55. 475 U.S. 1, 20–21 (1986) (plurality opinion) (holding unconstitutional a public utility commission's order that required the state utility commission to place a third-party newsletter in an electric company's billing envelopes).

Miami Herald Publishing Co. v. Tornillo;[56] and no conduct that amounted to expressive conduct, as in *Texas v. Johnson*.[57]

b. Associational Arguments

Having determined that the Solomon Amendment did not violate the law schools' freedom of speech, the Court next turned to whether the law violated the schools' rights to expressive association as outlined in *Boy Scouts of America v. Dale*.[58] FAIR argued that the Amendment violated the law schools' rights to expressive association by inhibiting their ability to express their message that discrimination on the basis of sexual orientation is wrong by forcing them to allow military recruiters on their campuses.[59]

As outlined in *Dale* and other expressive association cases, such claims require that three elements be established: (1) The group is an expressive association; (2) forced inclusion of outsiders would significantly affect the group's expression; and (3) the government's interests do not justify this intrusion.[60] In *FAIR*, the Court focused on the second element; it completely ignored the first and found it unnecessary to reach the third.

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56. 418 U.S. 241, 258 (1974) (holding unconstitutional a right-of-reply state statute that violated a newspaper's right to determine the content of its publication).

57. 491 U.S. 397, 406 (1989) (holding that burning an American flag was expressive conduct protected by the First Amendment). Even if the test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), were applicable to the expressive conduct in *FAIR*, the Court concluded in the alternative that the Solomon Amendment was a "neutral regulation [that promoted] a substantial governmental interest" (for instance, raising and supporting armies) "that would be achieved less effectively absent the regulation." *See FAIR*, 547 U.S. at 67 (internal quotation marks omitted) (citing United States v. Albertini, 472 U.S. 675, 689 (1985)).

58. 530 U.S. 640 (2000). Although neither the right to expressive association, nor any other type of association, is found within the text of the First Amendment, *see* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."), the Court has nevertheless implicitly found such a right in the Constitution, *see* Roberts v. U.S. Jaycees, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."). Erwin Chemerinsky explains more practically that because groups have resources in human capital and money, such groups enhance an individual's freedom to engage in protected constitutional activities. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1155 (3d ed. 2006); *see also* Dale Carpenter, *Expressive Association and Anti-Discrimination Law After* Dale: *A Tripartite Approach*, 85 MINN. L. REV. 1515, 1519 (2001) ("[The First Amendment's] chief value may be the role it plays in protecting people who want to combine with others to promote common causes.").

59. *FAIR*, 547 U.S. at 68.

60. *Dale*, 530 U.S. at 655–59.

Proceeding on the assumption that the FAIR law schools were an expressive association,[61] the Court concluded that the Solomon Amendment did not significantly burden the schools' associational rights and thus, there was no need to justify the government's intrusion on those rights.[62] More specifically, the Court concluded that although law schools associate to some extent with military recruiters, these same recruiters do not come to campus seeking to "become members of the school's expressive association."[63] Moreover, even though the right to "expressive association protects more than just membership decisions," the Solomon Amendment does not make group membership in the law schools less attractive, since law school "[s]tudents and faculty are free to . . . voice their disapproval of the military's" DADT policy while the recruiters are on campus.[64]

The Court concluded that the Solomon Amendment did not violate the FAIR law schools' association rights. Instead, the Court found that FAIR had "attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."[65]

C. The Missing Expressive Association Analysis

The Court is actually the one who seems to have unwittingly stretched one First Amendment doctrine too far by failing to analyze whether all members of FAIR, including its state law school members, should have expressive association rights.[66] With regard to whether the law school members of FAIR are expressive associations, the Court only stated the following:

> The Solomon Amendment, however, does not similarly affect a law school's associational rights.[67]

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61. The missing part of the *FAIR* Court's expressive association analysis is discussed in detail in Part I.C.

62. *FAIR*, 547 U.S. at 69–70.

63. *Id.* at 69 In other words, there is no expressive association violation because "the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Id.* (quoting *Dale*, 530 U.S. at 648).

64. *Id.* at 69–70 ("A military 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.").

65. *Id.* at 70.

66. *See* Morriss, *supra* note 8, at 440 ("One indication that the lower courts [in *FAIR*] paid insufficient attention to this [expressive association] element is their failure to consider state law schools as members of FAIR.").

67. *FAIR*, 547 U.S. at 69.

> 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.[68]
>
> The Solomon Amendment has no similar effect on a law school's associational rights.[69]
>
> The Solomon Amendment therefore does not violate a law school's First Amendment rights. A military 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.[70]

Note that in all of these passages the Court is not assuming for the sake of argument that the law schools in FAIR are expressive associations; it is saying the law schools *are* expressive associations and doing so with a glaring absence of any analysis.[71]

Why might the Court have made this assumption?[72] This is necessarily speculation, but since the government did not contest the point that the law schools qualified as expressive associations, the Court apparently did not think this issue worthy of any mention.[73] It also might be that the Court did not want to distinguish between the public and private law school members of FAIR because it would have required an additional, and potentially difficult, analysis that was not necessary to decide the case.

So, what's the big deal? After all, FAIR lost the case. No harm, no foul. The issue lurking is that the Court strongly gestures in the direction

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68. *Id.*
69. *Id.*
70. *Id.*
71. *Accord* Fagundes, *supra* note 20, at 1685 (noting in *FAIR* that, "[a]lthough the Court did not explicitly address the issue of state actors' First Amendment rights, its decision proceeded on the premise that both public and private universities possess constitutional speech rights"); *see also* Morriss, *supra* note 8, at 416 (arguing that "the Third Circuit [in *FAIR*] improperly treated the law schools and [their] faculties as [worthy of] associational freedom claims").
72. The Court did not miss this significant issue because no one briefed it. Indeed, Andrew Morriss makes quite clear that a number of law professor and law student amici in favor of the Solomon Amendment pointed out the troubling implications surrounding the fact that FAIR included state law schools. *See* Morriss, *supra* note 8, at 440 ("One indication that the lower courts paid insufficient attention to this element is their failure to consider state law schools as members of FAIR. These schools, as instrumentalities of state governments, have no First Amendment rights." (citing Brief for Law Professors and Law Students as Amici Curiae Supporting Petitioners, Rumsfeld v. FAIR, 544 U.S. 1017 (2005) (No. 04-1152))).
73. Dale Carpenter comments: "While one scholar pre-*FAIR* questioned whether law schools qualified as expressive associations, the government did not contest this issue and the Court was not detained by it." Carpenter, *supra* note 54, at 249 (citing Morriss, *supra* note 8). If that was the case, it is hard to understand why the Court did not at least drop a succinct footnote indicating that it agreed that all of the law schools were expressive associations.

that public law schools, as members of FAIR, have expressive association rights. In fact, of the known FAIR members,[74] four are public law school faculties: the faculty of the City University of New York (CUNY) School of Law, the faculty of the District of Columbia David A. Clarke School of Law, the faculty of the University of Minnesota Law School, and the faculty of the University of Puerto Rico Law School.[75] The Court did not distinguish between institutional membership and faculty membership in the FAIR organization,[76] suggesting that recognition of FAIR law school faculties as expressive associations is tantamount to recognizing public law schools as expressive associations for purposes of First Amendment analysis.[77]

Although the Court found in *FAIR* that the Solomon Amendment did not significantly burden the law schools' expressive association rights, it is possible that public law schools and other public employers could argue in future cases that their expressive association rights permit them to not accept employee members they do not desire.[78] Indeed, the *FAIR* Court's expressive association analysis hinged to a large degree on the critical point that military recruiters were not seeking to become "members of the schools' expressive association."[79] On the other hand, potential faculty and staff do seek to become members of the school. *FAIR*, consistent with *Dale*, suggests that expressive association rights give a group the ability to reject members it does not want.[80]

74. As discussed previously, a number of the members of the FAIR association choose to remain anonymous. *See supra* note 35.

75. *See* SolomonResponse.org, *supra* note 35.

76. *See supra* note 14.

77. *Accord* Burt v. Rumsfeld, 354 F. Supp. 2d 156, 185 (D. Conn. 2005) (finding that the Yale Law School (YLS) faculty members may successfully assert an expressive association claim on behalf of the YLS in another challenge to the Solomon Amendment). Interestingly, in the *Burt* case, the Department of Defense defended on the ground that "Yale University, not the Faculty, is the proper party to bring these claims," *id.* at 160, but the court found that the faculty members were "the governing body of YLS," *id.*; *see also* Burt v. Rumsfeld, 322 F. Supp. 2d 189, 199–200 (D. Conn. 2004) (rejecting the Department of Defense's claim that the YLS faculty lacked standing). Thus, whether law faculties may be able to assert an expressive association claim on behalf of their law schools may depend on whether they establish the rules, by majority, that govern and regulate their law school. *See also* Morriss, *supra* note 8, at 452 n.161 (discussing the membership of FAIR and commenting that "[i]t is unclear what distinction is intended by the description of 'about half' of FAIR's members as 'law schools' and the other half as 'law faculties.' It may indicate something about the official position of the dean").

78. For a discussion of the implication of public employer expressive associations on employee civil rights and civil liberties, see *infra* Parts III.B, III.C.

79. Rumsfeld v. FAIR, 547 U.S. 47, 69 (2006).

80. *Id.*; Dale v. Boy Scouts of Am., 530 U.S. 640, 653 (2000). Nor is there anything in past Supreme Court precedent to suggest that employers per se cannot be expressive associations. In fact, the Court in *Hishon v. King & Spalding* implied just the opposite. 467 U.S. 69, 78 (1984) (implying employers have rights to association for certain purposes, such as when they make distinctive contributions to society's ideas and beliefs). For a more in-depth examination of *Hishon*, see *infra* Part II.A.3.

To explain how the Court arrived at this unintended state of affairs, the next Part explores how previous expressive association cases provided little clue, beyond their own examples, as to the definition of an expressive association. This brief review will clarify how the *FAIR* Court could have overlooked this significant constitutional issue.[81]

II. THE HISTORICALLY ELUSIVE MEANING OF EXPRESSIVE ASSOCIATION

A. Historical Foundations (1958–1984)

1. *NAACP v. Alabama ex rel. Patterson*

The development of expressive association rights closely mirrors the progress of the civil rights movement of the second half of the twentieth century. In the 1958 decision *NAACP v. Alabama ex rel. Patterson*,[82] the Supreme Court first noted that the ability to associate was an "inseparable aspect" of being able to fully exercise one's constitutional rights, especially those protected by the First Amendment.[83]

In *Patterson*, Alabama sought the production of documents including the name and addresses of all National Association for the Advancement of Colored People (NAACP) members in a transparent attempt to oust the NAACP from the state.[84] The Court unanimously found that Alabama could not compel the NAACP to disclose its membership lists consistent with its members' rights to associate with others to promote their common integrationist views.[85] Outing the NAACP members would make membership

81. The unanimous nature of the *FAIR* holding may have made this inadvertent error more likely because such decisions are not put through the fire of an adversarial process. Compromise is the norm in such cases, which makes it less likely that the Court will go out of its way to tackle potentially divisive issues. *See* Saul Brenner et al., *Fluidity and Coalition Sizes on the Supreme Court*, 36 JURIMETRICS J. 245, 253 (1996) ("[T]he Supreme Court is similar to other small groups in which casting a unanimous vote tends to bury the arguments on the other side.").

82. 357 U.S. 449 (1958).

83. *Id.* at 460. Other commentators have commenced their historical exploration of the expressive association right with earlier cases. *See, e.g.*, Carpenter, *supra* note 58, at 1520–22 (starting expressive association analysis with cases surrounding Espionage Act of 1917); David McGowan, *Making Sense of* Dale, 18 CONST. COMMENT. 121, 126 (2001) (beginning historical analysis of expressive association right with the Court's opinion in *United States v. Cruikshank*, 92 U.S. 542 (1875)). Although there are plausible reasons to start the historical analysis at other places, I start with *NAACP v. Alabama ex rel. Patterson* because it represents the first time that the Supreme Court explicitly recognized a First Amendment right to freedom of association.

84. *Patterson*, 357 U.S. at 453.

85. *Id.* at 466.

in the group less attractive, thereby putting a substantial restraint on the members' freedom to associate for a common cause.[86]

The discussion of the right to associate in *Patterson* assumes the right to associate belongs to the members of the group, not to the group itself.[87] Because there was no argument in this case that the NAACP itself had a right to association as an entity, the Court did not need to explain what groups constitute constitutionally protected associations.

2. *NAACP v. Button*

NAACP v. Button[88] concerned whether Virginia could prevent the NAACP from recruiting parents to participate in desegregation cases.[89] The Supreme Court again held in favor of the NAACP, finding that its activities were types of "expression and association protected by the First and Fourteenth Amendments."[90] This time, however, the Court recognized that organizations, separate and apart from their members, possess rights to associate for the purposes of advocacy.[91]

Perhaps because the NAACP was an expressive association par excellence, the Court did not undertake an independent analysis to determine if the nature of the group was sufficiently expressive to qualify for First Amendment protection. In any event, after *Button*, there was still no indication of how to determine which groups have associational freedoms under the First Amendment.

86. *Id.* at 462 ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

87. *Id.* (referring to the associational rights at issue in *Patterson* as members' rights to freedom of association); *see also id.* at 466 (commenting that the National Association for the Advancement of Colored People (NAACP) claimed rights to association on behalf of its members).

88. 371 U.S. 415 (1963).

89. *Id.* at 421.

90. *Id.* at 428–29.

91. *See id.* at 428 ("We think [the NAACP] may assert this right *on its own behalf*, because, though a corporation, it is directly engaged in those activities, claimed to be constitutionally protected, which the [Virginia] statue would curtail." (emphasis added) (citing Grosjean v. Am. Press Co., 297 U.S. 233 (1936))). *Grosjean* held that "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses." 297 U.S. at 244 (citing Smyth v. Ames, 169 U.S. 466, 522 (1898); Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896)).

3. *Hishon v. King & Spalding*

In the 1970s, the Supreme Court decided two cases involving racially discriminatory private schools and their rights to association.[92] In both cases, private schools were again assumed, without analysis, to constitute associations for constitutional purposes. However, in 1984, the Court considered a question that had not been addressed before: whether private employers could be considered associations due constitutional protection.

Hishon v. King & Spalding[93] concerned a law firm partnership decision that was allegedly based on unlawful gender discrimination in violation of Title VII of the Civil Rights Act of 1964.[94] On the Title VII issue in contention, the Court found that such partnership decisions were rightly considered a term, condition, or privilege of employment, and therefore, a covered employment decision under Title VII.[95] One of the arguments against this finding was that such an interpretation of Title VII would unconstitutionally interfere with the law firm's right to association by requiring it to invite unwanted members into its partnership ranks.[96]

The Court rejected this argument. While conceding that employers and their member employees could have rights to association for certain purposes, such as employees making "'distinctive contribution[s] . . . to the ideas and beliefs of . . . society'" (as did the NAACP),[97] the Court held that such rights do not exist when the employment decision by the association does not implicate these loftier goals.[98] In other words, some employers are expressive associations for limited purposes, and some employers are not expressive associations at all to the extent that they do not engage in a substantial amount of expressive activity.[99]

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92. *See* Runyon v. McCrary, 427 U.S. 160 (1976) (finding that a federal civil rights law prohibited racially discriminatory admission practices at private schools, even assuming schools had associational rights); Norwood v. Harrison, 413 U.S. 455 (1973) (holding a Mississippi textbook loan program unconstitutional in lending textbooks to students in racially discriminatory private schools, and finding that the state need not subsidize a more effective exercise of the private school's right to association).

93. 467 U.S. 69 (1984).

94. *Id.* at 71–72 (citing 42 U.S.C. §§ 2000e–2000e-17 (2000)).

95. *Id.* at 77–78.

96. *Id.* at 78.

97. *See id.* (quoting NAACP v. Button, 371 U.S. 415, 431 (1963)).

98. *Id.*; *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 637 (1984) (O'Connor, J., concurring) ("[O]rdinary law practice for commercial ends has never been given special First Amendment protection. . . . We emphasized this point only this Term in *Hishon v. King & Spalding* . . . .").

99. *See* Carpenter, *supra* note 58, at 1577 (maintaining that schools might have expressive association rights in the employment context when the employees are central to the expressive activities of the schools).

B. The Recent Cases (1984–2006)

1. *Roberts v. U.S. Jaycees*

Six weeks after *Hishon*, the landmark case of *Roberts v. U.S. Jaycees*[100] broke new ground in freedom of association cases by introducing an instructive dichotomy. The right to intimate association concerns rights to personal liberty located within the Due Process Clause of the Fourteenth Amendment.[101] The right to expressive association, on the other hand, involves association for the promotion of rights found primarily within the First Amendment.[102] The "nature and degree of constitutional protection" depends on the type of association in which a group engages.[103]

In *Roberts*, the state interference at issue involved the application of Minnesota's state public accommodations statute's gender discrimination provisions to the membership policies of the Jaycees, which did not grant women full membership in their organization.[104] The Court first explained that the Jaycees was not an intimate association because of its size, lack of selectivity in defining group membership, and its generally open, public nature.[105]

Having eliminated intimate association from consideration, the Court recognized the Jaycees as a type of expressive association whose members affiliated with one another to advocate certain views.[106] However, the analysis of why the Jaycees is an expressive organization turned very much on the specific facts of the case. After making the broad statement that "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,"[107] the Court concluded that "[i]n view of the various protected activities which the Jaycees engages . . . that right is plainly implicated

100. 468 U.S. 609 (1984).
101. *Id.* at 617–18.
102. *Id.* at 618.
103. *Id.*
104. *Id.* at 612–17.
105. *Id.* at 620–21. Not surprisingly, the Court also found employers do not have rights of intimate association when selecting employees. *See id.* at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.").
106. *Id.* at 622. Even though the Court concluded that the Jaycees had expressive association rights and that those rights were significantly burdened by the application of the public accommodation statute, *see id.* at 623, the Court nevertheless held that the state's compelling interest in eradicating gender discrimination justified the infringement on the group's rights, *id.*
107. *Id.* at 622.

in this case."[108] In turn, the Jaycees' activities are described later in the opinion as taking public positions on a number of diverse issues and regularly engaging "in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First Amendment."[109] Thus, in its first foray into describing which groups constitute expressive associations for First Amendment purposes, the Court offered an example of an expressive association without any defining or limiting principles.[110]

In contrast to Justice Brennan's dichotomy for the majority, Justice O'Connor's concurrence in *Roberts* suggested that nonintimate association cases should be further broken down into expressive association and commercial association cases. Her analysis would accord sufficient protection to expressive associations while placing appropriate burdens on groups claiming the protection of the First Amendment for commercial association purposes.[111] Whereas those associations that were predominantly expressive were due substantial protection from governmental interference, Justice O'Connor argued that commercial associations were largely nonexpressive and, therefore, state regulation was permissible as long as it was rationally related to a legitimate government purpose.[112] Indeed, this is how Justice O'Connor characterized the *Hishon* decision: as nothing more than a large law firm engaging in commercial associations lacking expressive content.[113] Furthermore, she suggested that most employment decisions are part of a commercial association, which can be regulated by states without impinging upon any constitutional right to association.[114]

Based on these "radically different constitutional protections for expressive and nonexpressive associations,"[115] Justice O'Connor concurred in the judgment of the Court that the Jaycees could not rely on an expressive association

108. *Id.*

109. *Id.* at 626–27.

110. *See* Hills, *supra* note 13, at 215–17; McGowan, *supra* note 83, at 132.

111. *Roberts*, 468 U.S. at 635–36 (O'Connor, J., concurring). Nevertheless, Justice O'Connor recognized that "[m]any associations cannot readily be described as purely expressive or purely commercial" and that "[t]he standard for deciding just how much of an association's involvement in commercial activity is enough to suspend the association's First Amendment right to control its membership cannot . . . be articulated with simple precision." *Id.* at 635.

112. *Id.* at 633–35.

113. *Id.* at 637.

114. *Id.* at 634 ("The Constitution does not guarantee a right to choose employees . . . or those with whom one engages in simple commercial transactions, without restraint from the State."). In this regard, Justice O'Connor maintained: "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas." *Id.* at 636.

115. *Id.* at 638.

right to immunize themselves from the application of the Minnesota public accommodations statute.[116] Unlike the majority, however, she found that the Jaycees primarily "promote[ ] and practice[ ] the art of solicitation and management,"[117] a distinct commercial enterprise, and therefore are subject to state regulation that meets low-level rational basis review.[118]

Justice O'Connor thus provided a more systematic approach to determine which groups constitute expressive associations, especially in the commercial-employment arena.[119] Her analysis was more rigorous than Justice Brennan's "I know it when I see it" approach. Nevertheless, in the twenty-three years since *Roberts*, the Supreme Court has not made any move to adopt Justice O'Connor's commercial association test.[120] Perhaps if it had, much of the potential for mischief caused by the *FAIR* decision's recognition of public employer expressive associations would have been avoided, since under her model, most public employers would be considered commercial associations due limited constitutional protection.[121]

2. Pre-*Dale* Cases: *Rotary Club of Duarte*, *New York State Club Ass'n*, and *Stanglin*

After *Roberts*, the Court decided *Board of Directors of Rotary International v. Rotary Club of Duarte*[122] and *New York State Club Ass'n v. City of*

116. *Id.* at 640.

117. *Id.* at 639.

118. *Id.*

119. *Accord* Farber, *supra* note 9, at 1498 ("The most serious effort to explain and justify the special treatment for expressive associations is found in Justice O'Connor's concurrence in *Roberts*."); *see also* Carpenter, *supra* note 58, at 1517–18 (extending O'Connor's *Roberts* concurrence and arguing for a tripartite approach that treats associations differently depending on the predominance of the protected expression in their activities).

120. *See* Julie Manning Magid & Jamie Darin Prenkert, *The Religious and Associational Freedoms of Business Owners*, 7 U. PA. J. LAB. & EMP. L. 191, 218 (2005) ("Justice O'Connor's well-reasoned concurrence in *Roberts* . . . wields less persuasive authority after *Dale* failed to recognize its commercial associations and expressive associations dichotomy." (footnote omitted)). *But see* Carpenter, *supra* note 58, at 1564 (arguing that although the Court has never adopted Justice O'Connor's commercial association test, subsequent cases can readily be explained by reference to that framework).

121. *Accord* Carpenter, *supra* note 54, at 249 ("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."). *But see* Hills, *supra* note 13, at 217 ("The difficulty with Justice O'Connor's theory . . . is that it places unsupportable weight on the distinction between commercial and noncommercial organizations.").

122. 481 U.S. 537 (1987) (holding that the application of the California Unruh Act, which required California Rotary Clubs to admit women into membership, did not interfere with expressive association rights of clubs).

New York,[123] both of which followed a case-specific expressive association analysis. Like *Roberts*, these two cases came out in favor of the government's right to regulate associations, notwithstanding the expressive association rights held by some of these groups.[124]

With regard to whether the groups at issue qualified as expressive associations, however, the Court again failed to provide a concrete framework for this constitutional inquiry. In *Rotary Club of Duarte*, the Court concluded that the Rotary Club engaged in expressive activities that were "quite limited,"[125] but nevertheless found that the Club implicitly constituted an expressive association.[126] Similarly, in *New York State Club Ass'n*, the Court sidestepped the question of which groups are expressive associations and unhelpfully declared that the local New York public accommodations law does not infringe "the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs 'to abandon or alter' any activities that are protected by the First Amendment."[127]

The third and less-known case from this time period, *City of Dallas v. Stanglin*,[128] provides some much-needed insight into at least the negative dimension of the question: which groups do not constitute expressive associations. In *Stanglin*, the "city of Dallas adopted an ordinance restricting admission to [specified] dance halls to persons between the ages of fourteen and eighteen."[129] The state court of appeals found that the ordinance violated the right of teenagers to associate with those outside of their age group.[130] The Supreme Court reversed, finding that no expressive association existed among the dance hall patrons.[131]

Specifically, the Court found that the interest of teenagers and adults in interacting together in a dance hall environment was associational in some respects but did not "involve the sort of expressive association that

123. 487 U.S. 1 (1988) (holding that the New York City public accommodations law did not violate the expressive association rights of private clubs engaged in substantial commercial activity).

124. *Id.* at 13–14; *Rotary Club of Duarte*, 481 U.S. at 548–49.

125. *See Rotary Club of Duarte*, 481 U.S. at 545 n.4. As an example, "Rotaty Clubs do not take positions on 'public questions'" like the Jaycees do. *See id.* at 548.

126. Actually, the Court in *Board of Directors of Rotary International v. Rotary Club of Duarte* never came out and said expressly that Rotary Clubs, whose "basic goals [are] humanitarian service, high ethical standards in all vocations, good will, and peace," are expressive associations, but merely implies it by finding that although "Rotary Clubs do not take positions on 'public questions,' including political or international issues," they "engage in a variety of commendable service activities that are protected by the First Amendment." *Id.* at 548.

127. *N.Y. State Club Ass'n*, 487 U.S. at 13 (internal citation omitted).

128. 490 U.S. 19 (1989).

129. *Id.* at 20.

130. *Id.* at 20–21.

131. *Id.* at 25.

the First Amendment has been held to protect."[132] The Court clarified that merely being patrons of the same business establishment does not qualify a group as an expressive association. Instead, the group must "take [a] position[ ] on public questions"[133] or engage in some of the charitable or civic activities described in the previous Supreme Court expressive association cases.[134]

This discussion went further in explaining which groups do not constitute expressive associations. However, the Court itself recognized the analytical dilemma surrounding these cases when it observed that "[i]t is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."[135] But having made this observation, the Court summarily concluded, without explanation, that when patrons of a dance hall engage in recreational dancing, their association is not protected First Amendment activity.[136] Thus, *Stanglin* offers yet another example by which to analogize subsequent cases, but not a concrete definition for distinguishing between expressive associations and nonexpressive associations.

3. *Boy Scouts of America v. Dale*

Unlike *Roberts*, *Rotary Club of Duarte*, *New York State Club Ass'n*, and *Stanglin*, the Court in *Boy Scouts of America v. Dale*[137] found in favor of a group claiming expressive association rights.[138] In an opinion written by Chief Justice Rehnquist, the Court held that the New Jersey state public accommodations

132. *Id.* at 24.

133. *Id.* at 25 (internal quotation marks omitted) (citing Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 548 (1987).

134. *Id.* at 24–25. On this point, the *Stanglin* Court made clear that associations do not have to engage in politics to benefit from expressive association rights. *Id.* at 25.

135. *Id.* at 25.

136. *Id.*

137. 530 U.S. 640 (2000).

138. *Id.* at 659. If one considers expressive association cases chronologically, it could be argued that *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), should be discussed next. But, like Justice Stevens, I do not characterize *Hurley* as an expressive association case because

> *Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place. The standards governing such a claim are simply different from the standards that govern [the Boy Scouts of America]'s claim of a right of expressive association. . . . An expressive association claim . . . normally involves the avowal and advocacy of a consistent position on some issue over time.

Dale, 530 U.S. at 696 (Stevens, J., dissenting).

statute impermissibly infringed on the Scouts' expressive association rights by requiring them to have a gay assistant scoutmaster as a member.[139]

The Court began its analysis by determining whether the Boy Scouts engaged in an expressive association and cautioned that "a group must engage in some form of expression, whether it be public or private."[140] The Court then examined the record, including the Boy Scouts' mission statement, and concluded that the Scouts' mission was "to instill values in young people," including the values of being "morally straight" and "clean."[141] The Court concluded that "[i]t seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."[142] Although Justice Stevens's dissent took the majority to task for other reasons,[143] he did not dispute that the Boy Scouts are an expressive association.[144]

The *Dale* Court thus made clear that initially determining whether a group constitutes an expressive association is essential to figuring out whether there have been expressive association violations.[145] Yet, the opinion still provides no workable framework for making this determination.[146] The Boy Scouts, like law firms, private schools, social

139. *See Dale*, 530 U.S. at 657–59. The Court deferred to the group's description of both its message concerning homosexuality and what would impair that message, and found that the New Jersey law substantially interfered with the Scouts' expressive association rights hy forcing them to accept a high-profile gay assistant scoutmaster. *See id.* at 651–53. The Court then concluded that, given the severity of the intrusion into the rights to expressive association, the Boy Scouts' First Amendment rights prevailed. *See id.* at 657–59. These portions of the *Dale* decision are discussed in more detail in Part III.

140. *Id.* at 648.

141. *See id.* at 649–50. *But see id.* at 675 (Stevens, J., dissenting) ("Beyond the single sentence in these policy statements, there is no indication of any shared goal of teaching that homosexuality is incompatible with being 'morally straight' and 'clean.'").

142. *See id.* at 650 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring)). The Court's formulation that "[i]t seems indisputable" is a rather bizarre way of concluding that the Boy Scouts qualify as an expressive association, *see id.*, and is wholly unconvincing when one considers that "the Court itself implicitly disputed [the 'transmits values' basis] in *Runyon v. McCrary* when it held that a racist private school had no First Amendment entitlement to exclude black children from its student body," Hills, *supra* note 13, at 215 (citing Runyon v. McCrary, 427 U.S. 160, 175–76 (1976)).

143. *See infra* Part III.B.

144. *See Dale*, 530 U.S. at 665–66 (Stevens, J., dissenting); *see also* Carpenter, *supra* note 58, at 1537 ("This is a bigger concession than it first appears because what makes the [Boy Scouts] an expressive association is not the political causes it pursues. It does not pursue any, in the usual sense.").

145. *See Dale*, 530 U.S. at 648.

146. *Accord* Hills, *supra* note 13, at 215 ("[T]he *Dale* majority seems to place no meaningful limits on the definition of 'expressive associations.'"); Morriss, *supra* note 8, at 451 (arguing that the Supreme Court's *Dale*-based jurisprudence fails to give much guidance about how to distinguish expressive associations from nonexpressive associations). Morriss believes this lack of guidance may be due to the fact that the Court so far has decided easy cases with regard to whether a group constitutes an expressive association, and "so the examples drawn from the cases leave significant gaps unfilled." *Id.*

organizations, and advocacy groups, are expressive associations only because the Supreme Court tells us so.

4. Post-*Dale* Third Circuit Opinions

Even with the lack of guidance from previous cases, the Supreme Court in *FAIR* had other potential sources for finding a more systematic way of determining the existence of an expressive association and might still have avoided its recognition of public law schools as expressive associations in *FAIR*. Following the decision in *Dale*, two Third Circuit decisions, *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh*[147] and *Circle School v. Pappert*,[148] tried to fill the gaps left in the Supreme Court's reasoning about which groups qualify as expressive associations.[149]

Pi Lambda Phi considered whether a university fraternity was an expressive association entitled to protection under the First Amendment after the university stripped the fraternity of its status as a recognized student organization as a result of a drug raid at the fraternity house.[150] Even after recognizing that the Supreme Court did "not set a very high bar for expressive association," the Third Circuit found the fraternity did not qualify.[151]

The Third Circuit emphasized that it was not enough to merely say that the group was a social association; the proper analysis required a more searching inquiry.[152] Although there was no prerequisite that the group be political or even primarily expressive to qualify for constitutional protection,[153] a "de minimis threshold" existed[154] and not "*any* possible expression" qualified.[155] The Third Circuit concluded that the fraternity did not meet this de minimis threshold because "[n]othing in the record indicates the Chapter ever took a public stance on any issue of public, political, social, or cultural importance."[156]

147. 229 F.3d 435 (3d Cir. 2000).

148. 381 F.3d 172 (3d Cir. 2004).

149. The Third Circuit Court of Appeals in *Pi Lambda Phi Fraternity, Inc. v. University of Pittsburgh* put it diplomatically when it observed that the Supreme Court's analysis in *Dale* of whether a group is engaging in expressive association was "very succinct." 229 F.3d at 443.

150. *See id.* at 438–39.

151. *Id.* at 438.

152. *Id.* at 442–43.

153. *See id.* at 443.

154. *Id.* at 443–44 (citing City of Dallas v. Stanglin, 490 U.S. 19 (1989) (holding that patrons in the dance hall had not engaged in expressive association)).

155. *Id.* at 444.

156. *Id.* The court clarified that fraternities per se were not excluded from being expressive associations, but that each entity must be considered individually. *Id.*

Circle School v. Pappert also examined expressive associations post-*Dale*. The court found that the private schools at issue were expressive associations and their rights were violated by a Pennsylvania law that required schools to hold recitations of the Pledge of Allegiance or the national anthem at the beginning of each school day.[157] Judge Sloviter found that, like the Boy Scouts in *Dale*, the private schools engaged in "some form of expression, whether it be public or private."[158] Looking at the record in the case, the court noted that each of the schools had clear educational philosophies and goals, including the mission of providing students with "freedom of choices."[159] In fact, schools, by their very nature, are highly expressive organizations that inculcate their students with their philosophy and values.[160] Combining an analysis of the type of institution being examined with a more case-specific exploration of the record, the Third Circuit concluded that these schools were expressive associations.[161]

Pi Lambda Phi and *Circle School* thus provide a more detailed framework for the initial expressive association determination. By looking at the nature of the organization, the purposes for which it is claiming expressive association rights, and the actual evidence in the record, these courts were able to come to a more grounded conclusion on the issue.[162] These cases also stand for the proposition that even though the Supreme Court has "cast a fairly wide net" in defining expressive associations,[163] a group "must do more than simply claim to be an expressive association."[164] Unfortunately, even this basic point did not register on the Supreme Court's radar in *FAIR*. The failure of the Court to analyze the expressive association claim of the FAIR law schools may lead to the unintended consequences discussed in the next Part.

157. Circle Sch. v. Pappert, 381 F.3d 172, 174 (3d Cir. 2004).

158. *Id.* at 182 (internal quotation marks omitted) (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000)).

159. *Id.* (internal quotation marks omitted).

160. *Id.* Although the court made this statement in the secondary school context, there is no indication that the same analysis would not apply in the higher education context.

161. *Id.* Having thus concluded, the court held that the Pennsylvania pledge law placed a substantial burden on the schools' expressive association rights without compelling justification and found a First Amendment violation. *See id.* at 182–83.

162. This is not to say, however, that these cases provide defining principles, but only that their analyses are more thorough and well supported than previous Supreme Court decisions in the expressive association area.

163. Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh, 229 F.3d 435, 443 (3d Cir. 2000).

164. *Id.* at 444.

III. THE DELETERIOUS CONSEQUENCES OF PUBLIC EMPLOYER EXPRESSIVE ASSOCIATIONS

A. From Military Recruiting to Public Employment

As the discussion in Part I makes clear, the Supreme Court in *Rumsfeld v. FAIR* did not adopt the expressive association analysis put forth by the two Third Circuit opinions, nor did it explicitly follow the three-step analysis set out by *Boy Scouts of America v. Dale*. Had the Court taken the time to consider that law schools may be expressive associations for certain limited purposes but not for others, and that private and public law schools should be treated differently for expressive association purposes given the constitutional issues at stake, it might not have stumbled into this Serbonian bog.[165]

Had the Court considered a case like *Circle School v. Pappert*, it might have recognized that although schools are generally highly expressive organizations, schools can, and do, express themselves in more ways than just inculcating their students with values.[166] For instance, institutions of higher education also express themselves by engaging in the four essential freedoms, as termed by Justice Frankfurter in his concurrence in *Sweezy v. New Hampshire*.[167] Arguing for the exclusion of the government from the intellectual life of the university, Frankfurter famously quoted a statement of a conference of senior scholars from South Africa:

> It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail "the four essential freedoms"

165. *See* John Milton, *Paradise Lost*, bk. 2, ll. 592–94 (1667), *in* 1 NORTON ANTHOLOGY OF LITERATURE 1445, 1481 (M.H. Abrams ed., 5th ed. 1986), *quoted in* DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 454 n.1 (3d Cir. 2003) ("A gulf profound as that Serbonian bog / Betwixt Damiata and Mount Casius old, / Where armies whole have sunk . . . .").

166. It is conceivable that the *FAIR* Court was merely deferring, consistent with *Dale*, to FAIR's own assertions concerning the character of its expressive association. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000). In its trial brief, FAIR claimed the control over on-campus law school recruiting was "about the freedom of law schools to shape their own pedagogical environments and to teach, by word and deed, the values they choose, free from government intrusion." *See* Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 1, FAIR v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433); *see also* FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 304 (D.N.J. 2003) ("The record reveals that the law schools . . . seek to inculcate a certain set of values and principles in their students."). Yet, even if one finds this explanation of the Court's expressive association analysis in *FAIR* persuasive, it is still not clear why the Court simply did not indicate this in a footnote.

167. 354 U.S. 234 (1957).

> of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.[168]

Each of these freedoms is arguably a type of expression, including the ability of the university to determine for itself who shall teach. Consequently, the Court's finding in *FAIR* is not necessarily limited to the law schools' advocacy against the DADT policy, but could also be seen as protecting the schools' faculty hiring decisions.[169]

There is, therefore, reason to think that a public law school's expressive association rights extend to the employment context.[170] Indeed, *Hishon v. King & Spalding*[171] suggests that employers who have expressive purposes may be deemed expressive associations.[172] Finally, to recognize that all public employers have expressive association rights like the Boy Scouts in *Dale* is simply a matter of

168. *Id.* at 263 (Frankfurter, J., concurring).

169. Like other groups and associations, employers may engage in some form of expressive activity. *Cf. Dale*, 530 U.S. at 678–79 (Stevens, J., dissenting) (discussing employers as expressive associations and limits on such associational rights).

170. Although employment relationships are not discussed, the *FAIR* decision does indirectly suggest that covered membership decisions might include employment ones. *Cf.* Rumsfeld v. FAIR, 547 U.S. 47, 69–70 (2006) ("The Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their approval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable.").

Moreover, even prior to the Supreme Court's decision in *FAIR*, legal arguments were already being made in the private employment sector that employer expressive association rights should trump contrary antidiscrimination statutes. In a brief filed in the Title VII case of *Curay-Cramer v. Ursuline Academy of Wilmington*, a Catholic school argued that as an expressive association, it should not be required to maintain in employment a teacher who signed a pro-choice advertisement in the local newspaper. *See* Brief of Appellees the Ursuline Academy of Wilmington at 35–39, Curay-Cramer v. Ursuline Acad. of Wilmington, 450 F.3d 130 (3d Cir. 2006) (No. 04-4628). The brief does not rely upon the Supreme Court's decision in *FAIR*, since it had not yet been decided, but does use the Third Circuit's opinion in *FAIR* to support its argument. *Id.* at 36. The Third Circuit's decision in *Curay-Cramer*, however, found for the school on other grounds and did not address the expressive association argument. *See Curay-Cramer*, 450 F.3d at 142.

171. 467 U.S. 69 (1984).

172. *Id.* at 78. This is not to say that all employment decisions made by employers are subject to associational freedom claims. As Carpenter aptly points out, a school might have expressive association rights when it chooses teachers, but it might not have such a right when selecting maintenance or secretarial personnel. *See* Carpenter, *supra* note 58, at 1577. The same type of analysis should also apply to employment decisions made outside of the academic context.

acknowledging that public law schools are just one potential type of public employer.[173]

To see why this interpretation of the law, if adopted, would be so damaging, it is necessary to revisit the *Dale* decision to see what types of constitutional protections groups enjoy once they are deemed expressive organizations.

B. The Impact of *Dale* Deference on Public Employee Civil Rights

In discussing the nature of the right to expressive association in *Boy Scouts of America v. Dale*,[174] the Supreme Court gave some important additional rights to expressive associations to be free from government regulation that did not exist previously under *Roberts v. U.S. Jaycees*[175] and that could have sweeping consequences for federal and state antidiscrimination laws.[176] As Justice Stevens commented in his *Dale* dissent, these additional rights and the consequent amount of deference the Supreme Court gave to the Boy Scouts' assertions concerning the nature of its expressive activities is simply astounding.[177]

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173. *Accord* Carpenter, *supra* note 58, at 1564 (maintaining expressive associations like the Boy Scouts in *Dale* should be protected in their selection of members and employees).

There is an argument against treating law schools like other public employers, based on cases like *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), that institutions of higher education may be able to claim certain types of First Amendment protections based on notions of institutional academic freedom. *See* Paul Horwitz, Grutter's *First Amendment*, 46 B.C. L. REV. 461, 468 (2005). As discussed below, although institutions of higher education may have significant autonomy-based interests grounded in the Constitution, I do not believe these interests rise to the level of constitutional rights. *See infra* Part IV.A. As a result, public law school employers should not enjoy enhanced constitutional standing under the First Amendment as compared to other public employers, and *FAIR*'s recognition of puhlic employer expressive associations should not be seen as limited to the academic context. *See also infra* note 253.

174. 530 U.S. 640 (2000).

175. 468 U.S. 609 (1984); *see* McGowan, *supra* note 83, at 125 (maintaining that "[t]he Court's stated deference [in *Dale*] was inconsistent with its analysis in prior cases").

176. *See* Farber, *supra* note 9, at 1492–93 ("[T]he upshot of the majority opinion [in *Dale*] seems to be that once an association is identified as expressive, any colorable claim of interference with its activities is enough to block application of anti-discrimination laws (at least in cases where the Court does not find the particular state interest particularly compelling)."). Some commentators have already spelled out what the recognition of these types of expressive association rights in the private-sector workforce could mean for employee civil rights. *See* Magid & Prenkert, *supra* note 120, 192–93 (arguing recent free exercise, hybrid rights, and associational cases decided by the Supreme Court support religiously devoted employers' rights to promote religion and disassociate from individuals who do not share their beliefs without violating antidiscrimination laws).

177. *See Dale*, 530 U.S. at 686 (Stevens, J., dissenting) ("Once the organization 'asserts' that it engages in particular expression . . . '[w]e cannot doubt' the truth of that assertion. This is an astounding view of the law." (internal citations omitted)); *id.* ("It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims.").

Once a group is found to be an expressive association, a court must determine the nature of the group's expression.[178] The scope of that inquiry is limited, however, and the Court indicated in *Dale* that it was proper not only to give deference to an association's assertions regarding the nature of its expression, but also to the association's view of what would impair that expression.[179] So, in *Dale*, even though the evidence was extremely thin that the Boy Scouts were actually promoting an antihomosexual message,[180] the Court deferred to the Scouts' claim that inclusion of a high-profile gay assistant scoutmaster would force the organization to send a message inconsistent with its stance on homosexuality.[181] Based on the Boy Scouts' assertions, the Court found that the New Jersey public accommodations law, which would have required inclusion of the gay assistant scoutmaster, caused a "severe intrusion" on the Boy Scouts' right to freedom of expressive association that outweighed any countervailing compelling interest that the state had in eradicating sexual orientation discrimination.[182]

178. *See id.* at 650 (majority opinion).

179. *See id.* at 653. Going even further, the Court also said that "associations 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." *Id.* at 655. Consequently, an employer could claim that hiring a certain individual as a member of its organization is inconsistent with its views on a controversial topic, even though it did not engage in that hiring for the purpose of taking a stance on that topic.

180. *See id.* at 670 (Stevens, J., dissenting) ("In light of [the Boy Scouts of America]'s self-proclaimed ecumenism . . . it is even more difficult to discern any shared goals or common moral stance on homosexuality.").

181. *See id.* at 648 (majority opinion) ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association . . . plainly presupposes a freedom not to associate.'" (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984))). Justice Stevens would have required instead that a group adopt and advocate an unequivocal position before permitting assertions of an expressive association right. *See id.* at 687 (Stevens, J., dissenting). *But see* Carpenter, *supra* note 58, at 1542–63 (criticizing Justice Stevens's message-based approach on four different grounds); Seana Valentine Shiffrin, *What Is Really Wrong With Compelled Association?*, 99 NW. U. L. REV. 839, 846 (2005) (finding Justice Stevens's approach in *Dale* "troubling and counterproductive" because "[g]roups who tolerate or encourage within their ranks internal dissent, experimentation, or critical re-examination are more likely to lose control over their membership than those who adopt a posture of unyielding stridency").

182. Although *Dale* appears to imply that the state has a strong interest in eradicating sexual orientation discrimination, the Court did not come out and say so explicitly, as it did in previous cases dealing with gender discrimination. *See Dale*, 530 U.S. at 658. Furthermore, the Court lessens the importance of that interest by engaging in a balancing of interests: "[T]he associational interest in freedom of expression has been set on one side of the scale, and the State's interest on the other." *Id.* at 658–59.

It may first appear that *FAIR*, which does not concern a membership situation like *Dale*,[183] does not have much to add to *Dale* as far as the consequences of labeling an organization an expressive association. But as discussed above, *FAIR* can be read as providing expressive association rights to public law schools.[184] In fact, combining *FAIR* and *Dale* leads to the startling conclusion that public employers can engage in expressive activities, define the nature of their expressive association, determine which prospective or current employees impair the message of their association, and then disassociate from those individuals (by not hiring or taking other adverse employment action), all without violating potentially applicable federal and state antidiscrimination laws.[185] To make these consequences more concrete, consider just a few hypotheticals.

First, consider a city police force that fires a female police offer on the grounds that she had an abortion. The police department wishes to propound a point of view that abortion is inconsistent with its mission of protecting the lives of the innocent and believes that the continued employment of the female police officer would impair that message. As discussed in more detail below,[186] that female police officer might have substantive due process arguments in her favor in light of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[187] and *Lawrence v. Texas*,[188] but it is anyone's guess whether those interests would be considered compelling enough to overcome the "severe intrusion" on the police force's expressive association rights occasioned by having to maintain the employment of that police officer. Moreover, to the extent that the female police officer counters with a claim of sex discrimination, it is likely that such a claim will be trumped by the police department's associational rights under the *Dale* analysis.[189]

183. *See* Rumsfeld v. FAIR, 547 U.S. 47, 69 (2006). Indeed, the Court was not as deferential in *FAIR* as it was in *Dale*, because *FAIR* itself is not a membership case.

184. *See supra* Parts I.C, III.A.

185. It may be that public employers can not still plausibly claim the right to exclude blacks because of the strong antidiscrimination norms emanating from the Constitution, but the civil rights of other historically excluded groups, who enjoy less protection under the law, would certainly be at risk under this conception of the law. *See* Farber, *supra* note 9, at 1492–93 (suggesting *Dale* could mean that associational rights trump contrary civil rights under antidiscrimination law); Magid & Prenkert, *supra* note 120, at 193 ("*Dale* portends an important shift in the constitutional balance toward promoting associational freedoms over equality.").

186. *See infra* Part III.C.2.

187. 505 U.S. 833 (1992).

188. 539 U.S. 558 (2003).

189. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000) (finding Boy Scouts' expressive association rights outweigh any competing state interests in eradicating discrimination).

Second, contemplate for a moment the hypothetical brought up by Justice Souter in his *Dale* dissent, in which an individual becomes "so identified with a position as to epitomize it publicly."[190] Once a group is recognized as an expressive association, Justice Souter indicates that such high-profile individuals may be excluded by that group to maintain the effectiveness of its message, even if such exclusions would normally run afoul of otherwise applicable federal and state antidiscrimination laws.[191] Needless to say, Justice Souter's hypothetical could easily apply to the employment context.[192]

Finally, reflect on the lower court decision in *FAIR* itself. The district court concluded that since the law schools had adopted official policies with respect to sexual orientation, the law schools qualified as expressive associations.[193] In coming to this conclusion, the court noted that FAIR law schools believe that "invidious discrimination on the basis of sexual orientation is a moral wrong, and that 'judgments about people bearing no relation to merit harm and inhibits students, faculty, and eventually society at large.'"[194] Given the nature of the law schools' expressive association and *Dale*'s notion that courts should defer to the group's assertion about what would impair its expression,[195] it would appear that a FAIR law school could argue that hiring a prospective faculty member who previously served in the military's Judge Advocate General's (JAG) Corps would be tantamount to hiring a person with antigay views and refuse to hire such a person. As absurd as that claim may sound, remember that *Dale* counsels extreme deference both to the nature of an association's expression and to the association's views of what would impair that expression.[196] If that member of the military makes a claim of discrimination based on veteran status under a state employment antidiscrimination statute, he or she might well lose the case based on the law school's contrary associational claims.[197]

As these examples make clear, the recognition of expressive association rights for public law schools, and, by extension, all public employers,

190. *See id.* at 702 (Souter, J., dissenting).

191. *See id.* ("When that position is at odds with a group's advocated position, applying an antidiscrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right.").

192. For an example of how such a scenario could play out, consider the case of Robert Delahunty discussed in Part III.C.1.

193. FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 304 (D.N.J. 2003).

194. *Id.*

195. *See Dale*, 530 U.S. at 653.

196. *Id.*

197. *See id.* at 659 ("The state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association.").

would entail a vast accretion of employer power to potentially exclude unpopular, controversial, or just plain disagreeable employees from the public sector. Even more troubling, this power to exclude employees would be largely immunized from antidiscrimination laws.[198]

C. The Effects of Public Employer Expressive Association Rights on Existing Public Employee Constitutional Rights

As detrimental as *Dale* expressive association rights might be to public employee civil rights, this constitutional development may prove more devastating to the already vastly diminished constitutional rights of public employees. Since public employee free speech protection reached its apogee in *Pickering v. Board of Education*,[199] these rights have been greatly weakened as a result of the "public concern" test of *Connick v. Myers*[200] and the more recent "official capacity speech" test of *Garcetti v. Ceballos*.[201] While *Connick* requires that the public employee speech at issue be directed toward matters of public importance if it is to be provided a modicum of First Amendment protection,[202] *Garcetti* robs even "public concern" speech of constitutional protection if it is spoken in accordance with the employee's official duties.[203]

But the situation would become even worse for public employees if courts recognized public employer expressive association rights. Quite simply, it is a zero-sum game, and whatever additional power the government gains to make employment decisions through these new expressive association rights must necessarily come at the expense of public employees' constitutional rights. A couple of real world examples, one academic in the First Amendment context and one nonacademic in the substantive due process context, will suffice to illustrate the point.

198. *See supra* note 185 and accompanying text. There is a counterargument that since *Dale* was decided in 2000, there have not been many private employers advancing associational claims with a related reduction of employee civil rights in the private sector. But such claims do exist, *see supra* note 170 (discussing the Title VII religious discrimination case of *Curay-Cramer v. The Ursuline Academy of Wilmington*), have been advanced in the religious discrimination context by academic commentators, *see* Magid & Prenkert, *supra* note 120, at 192–93, and may become more prevalent in light of *FAIR*.

199. 391 U.S. 563 (1968).

200. 461 U.S. 138 (1983).

201. 126 S. Ct. 1951 (2006).

202. *Connick*, 461 U.S. at 146.

203. *Garcetti*, 126 S. Ct. at 1960.

1. The Case of Robert Delahunty

Controversy erupted at the University of Minnesota Law School[204] over the decision to hire Robert Delahunty as a visiting professor.[205] Delahunty previously held a position in the Justice Department's Office of Legal Counsel, where he coauthored one of the now-infamous memos in which he opined that the Geneva Conventions and War Crimes Act did not apply to al Qaeda and Taliban war prisoners.[206] When word got out that Minnesota planned to appoint Delahunty to this position, a group of Minnesota law professors sent an open letter[207] and a significant number of students circulated a petition to protest the appointment as antithetical to the core values held by the institution.[208] The student petition stated, "[w]e would like to make clear that we are supportive of an ideologically diverse faculty, we would simply prefer that the University be extremely protective of its reputation by hiring faculty that are beyond question ethically."[209] The interim co-deans of the University of Minnesota did not bow to the pressure, however, and Delahunty began teaching classes at the law school in January 2007.[210]

Regardless, the story provides an opportunity to consider what the detrimental impact would be on public employees' First Amendment rights

204. Interestingly, the faculty of the University of Minnesota Law School is one of the public law school members of FAIR. *See supra* note 35 and accompanying text.

205. *See* Paul D. Thacker, *Appointment Roils a Law School*, INSIDE HIGHER ED, Nov. 29, 2006, *available at* http://insidehighered.com/layout/set/print/news/2006/11/29/delahunty. Robert Delahunty was a constitutional law professor at the University of St. Thomas Law School.

206. *See* Memorandum from John Yoo & Robert J. Delabunty [sic], to William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), *in* THE TORTURE PAPERS: THE ROAD TO ABU GHRAIB 38 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). "[T]he memo concluded that the Geneva Convention did not cover al-Qaeda suspects captured in Afghanistan, and helped lay the foundation for the Bush administration's handling of prisoners captured during the war on terror." Thacker, *supra* note 205.

207. *See* Letter from University of Minnesota Law School to Members of the University of Minnesota Law School's Community, *available at* http://insidehighered.com/index.php/content/download/104089/1389631/file/DelahuntyLTRNov28,2006.pdf (last visited Mar. 20, 2007).

208. *See* Thacker, *supra* note 205.

209. Petition to Ask the Deans to Reconsider the Hiring of Robert Delahunty, http://insidehighered.com/index.php/content/download/104088/1389628/file/Delahunty%20petition.doc (last visited Mar. 20, 2007). The petition went on to state: "We place a considerable value on the reputation that comes with being in a law school with this level of prestige, and we would like to avoid any negative connotations that will result from hiring a person with such a negative and divisive reputation as Delahunty." *Id.*

210. *See* Karlee Weinmann, *Outcry at Law School Quiets*, MINNESOTA DAILY, Jan. 23, 2007, *available at* http://www.mndaily.com/articles/2007/01/23/70418.

if a public law school had constitutional rights of expressive association.[211] In this regard, *Roberts v. U.S. Jaycees* makes clear that expressive associations have the right to be free from "intrusion into the[ir] internal structure or affairs"[212] and that such groups cannot be forced, without compelling justification, to accept members they do not desire.[213] In other words, the freedom of association plainly presupposes a freedom not to associate.[214] And although compelling justifications may have existed for the Jaycees and Rotarians to be forced to accept female members,[215] it is unlikely that the same level of justification exists to compel Minnesota Law School to associate with Delahunty.[216]

Recall that the Court in *Boy Scouts of America v. Dale*[217] gave great deference to not only the group's assertions about the nature of its expression, but also to its views about what would impair that expression.[218] Thus, in a world where a public law school has expressive association rights, the school might not hire a Delahunty in order to transmit a certain set of values and not others.[219] Indeed, the student petition against Delahunty relied on an argument of this type when it requested that the Minnesota Law School not affiliate with anyone of questionable ethical background.[220] Finally, recall that Justice Souter indicated in his *Dale* dissent that in cases in

211. It may be that the First Amendment rights of public employees like Delahunty are already, without any consideration of expressive association rights, severely circumscribed by the government speech doctrine, under which the government employer may claim, without First Amendment concern, the ability to hire only those individuals willing to transmit its values or propound its chosen point of view. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) ("We have generally assumed . . . that compelled funding of government speech does not alone raise First Amendment concerns."). As will be explored below, however, the government speech doctrine is probably most tenuous in the public university professor context. *See infra* Part IV.B.2.

212. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984) (citing Cousins v. Wigoda, 419 U.S. 477, 487–88 (1975)).

213. *Id.*

214. *Id.*

215. *See id.* at 624; Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 549 (1987).

216. Claims of ideological discrimination, at least outside of political party affiliation cases like *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), do not enjoy heightened judicial scrutiny like gender or race discrimination claims.

217. 530 U.S. 640 (2000).

218. *Id.* at 653.

219. Stanley Fish, for one, does not agree that "schools should[ ] have values, except in a very narrow sense," and "should avoid taking a political stance at all cost." Elia Powers, *A Freewheeling Academic Freedom Debate*, INSIDE HIGHER ED, Jan. 5, 2007, *available at* http://insidehighered.com/news/2007/01/05/acfreedom (describing remarks Fish made during the 2007 Annual Meeting of the Association of American Law Schools (AALS)). Indeed, Fish brought up the *FAIR* case during a recent talk to illustrate his point. *See id.*

220. *See supra* note 209 and accompanying text.

which a high-profile individual becomes the public embodiment of a certain controversial position, like Delahunty has on the terrorist detainment issue, expressive associations should be able to insulate their expression by disassociating from such individuals.[221]

Delahunty could respond to this invocation of expressive association rights by claiming that his past stance on matters of public concern is protected from adverse employment action by the First Amendment.[222] Indeed, cases like *Pickering v. Board of Education*[223] and *Connick v. Myers*[224] stand for the proposition that public employees have certain rights to speech and expression for which they cannot be retaliated against, unless the public employer can point to overriding and legitimate efficiency interests.[225] But *Pickering* First Amendment claims are rather weak ones in the constitutional hierarchy of rights, given the needs of government employers to run their workplaces.[226] Such rights, even under current doctrine, may be overcome by a mere showing that the employee's expression would substantially disrupt the employer's enterprise.[227] On the other hand, expressive association rights are much more sacrosanct and may be

221. *See Dale*, 530 U.S. at 702 (Souter, J., dissenting). Of course, in Justice Souter's hypothetical, he was suggesting that such expressive association rights of a group would overcome any contrary antidiscrimination laws. *See id.*

222. Such an argument should be available to Delahunty, as *Pickering v. Board of Education* applies to retaliatory hiring decisions based on a prospective employee's prior protected expression. *See* Rankin v. McPherson, 483 U.S. 378, 395 (1987) ("We have . . . recognized that the government's power as an employer to make hiring and firing decisions on the basis of what its employees and prospective employees say has a much greater scope than its power to regulate expression by the general public." (citations omitted)); *see also* Worrell v. Henry, 219 F.3d 1197, 1207 (10th Cir. 2000) (applying the *Pickering* balancing test in the hiring context); Shahar v. Bowers, 114 F.3d 1097, 1102–03 (11th Cir. 1997) (en banc) (applying the *Pickering* balancing test to a government employer's withdrawal of a job offer); Hubbard v. EPA, 949 F.2d 453, 460 (D.C. Cir. 1992) (applying the *Pickering* balancing test to a hiring decision, observing that "[m]erely because an employer is *hiring* rather than *firing* . . . does not justify unconstitutional action").

223. 391 U.S. 563 (1968).

224. 461 U.S. 138 (1983).

225. *Id.* at 143–44; *Pickering*, 391 U.S. at 568.

226. *See* Paul M. Secunda, *The (Neglected) Importance of Being* Lawrence: *The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 97 (2006) ("Yet even though the government employer does not possess unfettered discretion when it comes to impinging upon the exercise of its employees' constitutional rights, it retains substantial latitude when setting the terms and conditions of its employees' employment, a discretion which is not available in its dealing with the same individuals as citizens." (citing Garcetti v. Ceballos, 126 S. Ct. 1951, 1960 (2006); Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996); Waters v. Churchill, 511 U.S. 661, 671–72 (1994) (plurality opinion))).

227. *See id.* at 97–101 (citing Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1018 (2005)) (discussing the substantial disruption theory of the *Pickering* line of cases).

overcome only "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[228]

If one were therefore to balance public employer expressive association rights against public employee *Pickering* First Amendment rights, given the nature of the interests involved, it is more than likely that the government employer would prevail in the vast majority of these cases.[229] Put differently, it is unlikely that the somewhat attenuated public employee right to free speech would qualify as the compelling state interest necessary to overcome the public employer's expressive association rights.[230] In short, this hypothetical exercise indicates that recognition of public law school expressive association rights in a case like Delahunty's would almost certainly diminish individual public employees' rights to free speech and expression.[231]

2. The Case of Debora Hobbs

The impact of expanding expressive association rights would not be limited to public law schools or to the First Amendment context, as the next example illustrates. In a previous article, I wrote about a female sheriff dispatcher, Debora Hobbs, in Penders County, North Carolina, who was told by her supervising sheriff to marry her live-in boyfriend, move out, or

228. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

229. Even if the employee somehow beat the odds and won his or her constitutional claim, the employer might still be considered the winner in the long run if the turmoil from such legal battles has a chilling effect on controversial speech from unknown future hires. In other words, public law schools and other public employers will likely be very careful with their future employment decisions and will make sure they are noncontroversial. Indeed, after this debacle, it will be interesting to see if the University of Minnesota Law School appoints anyone with even close to the same type of controversial background as Delahunty. I am indebted to Nancy Levit for this additional insight.

230. So even though *Dale* did not involve a case in which there was an assertion of a countervailing constitutional right by the scoutmaster, the relatively weak First Amendment right that public employees have under *Pickering* and its progeny would likely be outweighed by contrary expressive association rights held by the public employer. In this sense, a public employee like Delahunty would be no better off with his *Pickering* constitutional rights than the gay scoutmaster was in *Dale* with his statutory rights under the New Jersey public accommodations law.

231. Some might like this outcome because they do not agree with Delahunty's views on the Geneva Conventions and terrorist detainees. But one could easily imagine a similar case involving a public employee with more progressive views being excluded from the association of a more conservative public law school. Suppose that, like the Boy Scouts, a conservative public university does not want to associate with an outspoken gay rights activist and refuses to hire him or her. Again, the rights afforded to expressive associations under *Roberts*, *Dale*, and similar cases would seem to permit the university to refuse to hire such an individual, even though this would appear to be an instance of a governmental entity blatantly interfering with a public employee's First Amendment rights to advocate his or her views on matters of public concern.

lose her job.[232] The sheriff based his demand on an 1805 state cohabitation statute. The female dispatcher lost her position when she refused to comply.[233] She sued in state court and won based on the court finding, in light of *Lawrence v. Texas*,[234] that her firing unconstitutionally infringed her liberty interests under the Due Process Clause of the Fourteenth Amendment.[235] Although the state court's exact reasoning does not appear in a published decision,[236] the strongest argument to support its holding is that a public employer must have a substantial and legitimate interest before interfering with an employee's off-duty private and personal decisions in matters pertaining to sex.[237]

But what if the sheriff's department could claim a right to expressive association based on language in *FAIR*? The argument would go that central to maintaining the image and credibility of a law enforcement agency in a socially conservative part of the country is the ability to hire only individuals who hold the traditional values of their community, including the values associated with traditional forms of marriage. Thus, requiring the sheriff's department to employ those who choose to express other values by cohabitating without being married (whether they are heterosexual or homosexual) forces the department to promote nontraditional conduct outside of marriage as a legitimate form of behavior.

Dale stands for the proposition that expressive associations have the right not to be forced to send a message that is contrary to their chosen beliefs.[238] As discussed previously, *Dale* also indicated that a court

232. *See* Secunda, *supra* note 226, at 131–32 (citing Steve Hartsoe, *ACLU Challenges N.C. Cohabitation Law*, WASH. POST, May 10, 2005, at A06).

233. *See id.*

234. 539 U.S. 558 (2003) (striking down a Texas antisodomy statute based on the liberty interest individuals have in making decisions about their personal and private lives).

235. *See* Andrea Weigl, *Judge Rules Against Cohabitation Law*, NEWS & OBSERVER, July 21, 2006, *available at* http://www.newsobserver.com/102/story/462833.html; *see also* Posting of Paul M. Secunda to Workplace Prof Blog, North Carolina Cohabitation Law Struck Down in Case of Female Sheriff Dispatcher, http://lawprofessors.typepad.com/laborprof_blog/2006/07/north_carolina_.html (July 21, 2006). I refer to this liberty interest recognized in *Lawrence* as a public employee's right to decisional noninterference in private affairs. *See* Secunda, *supra* note 226, at 115–19.

236. *See Judge Rules N.C. Anti-Cohabitation Law Unconstitutional*, USA TODAY, July 21, 2006, *available at* http://www.usatoday.com/news/nation/2006-07-21-cohabitation_x.htm ("State Superior Court Judge Benjamin Alford issued the ruling late Wednesday, saying the law violated Hobbs' constitutional right to liberty. He cited the 2003 U.S. Supreme Court case titled *Lawrence v. Texas*, which struck down a Texas sodomy law.").

237. *See* Secunda, *supra* note 226, at 116.

238. *See* Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000); *see also* Roberts v. U.S. Jaycees, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."). *But see* Shiffrin, *supra* note 181, at 841 ("As with compelled speech, our concern should be turned inward onto the internal thinking process of group members, rather than predominantly on whether there is confusion in the transmission of a group's message.").

must defer to the organization's characterization of its expression, as well as the organization's belief as to what would impair it.[239] These principles suggest that a court reviewing the Penders County sheriff's decision to fire Hobbs for cohabitation would have little ability to inquire into the bona fides of the county's putative values and would have to take the county at its word that its expressive association would be harmed by having as members those with nontraditional values such as Hobbs.

Nor would a reading of *Lawrence v. Texas* that recognizes a heightened liberty interest in decisional noninterference in employees' private affairs make a difference once public employers were endowed with expressive association rights. Although the modified *Pickering* analysis that I previously proposed would not permit a public employer to interfere with its employee's private and personal life (especially in matters pertaining to sex) without legitimate and substantial justification,[240] the public employer's right to expressive association—to choose not to propound a point of view contrary to its belief—would certainly suffice as a substantial and legitimate justification. Thus, recognition of public employer expressive association rights would turn the clock back on public employee civil liberties and retard newly emerging substantive due process rights for public employees.

IV. STRUCTURAL ARGUMENTS, EFFICIENCY INTERESTS, AND THE GOVERNMENT SPEECH DOCTRINE

A. The Structural Argument Against Public Expressive Associations

Although a number of the normative reasons illustrated above counsel against recognizing public law schools and public employers as expressive associations, the most persuasive argument against the Supreme Court's unfortunate assumption in *Rumsfeld v. FAIR* is a structural one. It is simply this: The Bill of Rights protects the rights of the governed, not the governing.[241]

239. *See Dale*, 530 U.S. at 653.

240. *See* Secunda, *supra* note 226, at 118–19.

241. Justice Stewart made this very point in his concurrence in *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government."). As Fagundes has pointed out in his excellent recent piece on government speech, and though Fagundes himself thoughtfully challenges this notion, Stewart's concurrence remains the majority view in this area of the law. *See* Fagundes, *supra* note 20, at 1643 ("[W]hen the question of whether the First Amendment applies to government speech has arisen, judges have typically acknowledged Justice Stewart's concurrence without critical reflection, resulting in what one district court called 'the well-settled point of law that the First Amendment protects only citizens' speech rights from government regulation, and does not apply to government

In this regard, the discussion in the recent case of *Coalition to Defend Affirmative Action v. Granholm*[242] is instructive. The case concerned whether the court should preliminarily enjoin the recently adopted Michigan amendment banning the use of race preferences from going into effect, especially the part that applies to public universities.[243] The court denied the requested injunctive relief based on its holding that the First and Fourteenth Amendments permit states to use certain forms of affirmative action, but does not mandate that they do so.[244]

In its losing argument, the public universities in Michigan[245] maintained that "they have an academic freedom right, based in the First Amendment to the Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such factors . . . as race."[246] Dismissing this claim, the Sixth Circuit made the point that the schools' "interests" in selecting a diverse student body should not be confused with schools having actual First

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speech itself.'" (citing Sons of Confederate Veterans, Inc. v. Holcomb, 129 F. Supp. 2d 941, 944–45 (W.D. Va. 2001))); *see also* Morriss, *supra* note 8, at 440 ("These [state law school members of FAIR], as instrumentalities of state government, have no First Amendment rights.").

242. 473 F.3d 237 (6th Cir. 2006).

243. *See id.* at 239–40. The court described the underlying facts as follows:

> On November 7, 2006, the people of Michigan approved a statewide ballot initiative—Proposal 2—which amended the Michigan Constitution to prohibit discrimination or preferential treatment based on race or gender in the operation of public employment, public education, or public contracting in the State. Under the Michigan Constitution, the proposal was scheduled to go into effect on December 23, 2006.

Id. at 239–40.

244. *Id.* at 240.

245. The public universities were the University of Michigan, Michigan State University, and Wayne State University. *Id.*

246. *Id.* at 242; *see also id.* at 247. Interestingly, with regard to an institutional academic freedom right, William Van Alstyne observed at a recent panel discussion on academic freedom at the 2007 Annual Meeting of the AALS that although there were some thirty decisions from the Supreme Court using the doctrine of institutional academic freedom, not one of them relied directly on that right for its holding. *See* William Van Alstyne, Remarks at the 2007 Annual Meeting of the Association of American Law Schools (Jan. 4, 2007), *available at* http://www3.cali.org/aals07/mp3/AALS%202007%20%20Plenary%20Session%20Academic%20Freedom%20200700104.mp3; *see also* Urofsky v. Gilmore, 216 F.3d 401, 412 (4th Cir. 2000) (en banc) ("Despite these accolades, the Supreme Court has never set aside a state regulation on the basis that it infringed a First Amendment right to academic freedom." (citing Minn. State Bd. for Cmty. Colls. v. Knight, 465 U.S. 271, 287 (1984))); Horwitz, *supra* note 173, at 526 (arguing that the Third Circuit *FAIR* decision can be understood as saying that "academic freedom claims of the kind pressed by the plaintiffs in *FAIR* are parasitic—that one cannot bring a free-standing claim of academic freedom under the First Amendment, although academic freedom itself may lend weight to arguments based on other First Amendment claims").

Amendment rights.[247] After all, the court observed, it is not at all clear "how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters."[248] In other words, the Constitution protects the people from the state, not the state from the people.[249]

Nor does the analysis change when considering one of the points emphasized in *Grutter v. Bollinger*[250]: Public universities' academic decisions concerning complex educational judgments should be given a substantial degree of deference by the courts.[251] The Sixth Circuit in *Granholm* refuted this point by noting that the *Grutter* Court more specifically stated that this degree of deference should only be granted "within constitutionally prescribed limits"[252] and "[o]ne of those 'constitutionally prescribed limits' . . . is the separate requirement of narrow tailoring—an inquiry that no one maintains may be satisfied simply by invoking a university's legitimate, but hardly dispositive, interest in academic freedom."[253] Based on this line of reasoning, the *Granholm* court concluded that the

247. *See Granholm*, 473 F.3d at 247 ("The Universities mistake interests grounded in the First Amendment—including their interests in selecting student bodies—with First Amendment rights."). *But see Urofsky*, 216 F.3d at 412 ("The Supreme Court, to the extent it has constitutionalized a right of academic freedom at all, appears to have recognized only an institutional right of self-governance in academic affairs.").

248. *Granholm*, 473 F.3d at 247 (citing Trs. of Dartmouth Coll. v. Woodward, 17 U.S. 518 (1819)).

249. *See id.*; *see also* Fagundes, *supra* note 20, at 1638 ("[T]he Speech Clause is typically understood as a bulwark of protection against—rather than a source of rights for—government."); *id.* at 1639 ("Courts have varied in their receptivity to the notion that the First Amendment may extend to government speech. The majority of courts have . . . rel[ied] on the assumption that the First Amendment can only restrict, not protect, state actors." (citing Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (en banc))). *But see* Nadel v. Regents of the Univ. of Cal., 34 Cal. Rptr. 2d 188, 197 (Ct. App. 1994) (recognizing speech rights for government actors); County of Suffolk v. Long Island Lighting Co., 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (same).

250. 539 U.S. 306 (2003).

251. *See id.* at 328–29 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.").

252. *Granholm*, 473 F.3d at 248.

253. *Id.* In this regard, one can see the universities' interests in institutional academic freedom as similar to the efficiency interests that the Court has recognized in the *Pickering* public employment free speech context. *See infra* Part IV.B. As in *Pickering*, these important public entity interests do not rise to the level of a constitutional right. Significantly, this understanding, correct in my view, undercuts the argument that public university employers are sui generis and that whatever the Court assumed in *FAIR* with regard to public law schools' expressive association rights does not equally apply to other public employers.

universities have no First Amendment right to continue their racial preferences as part and parcel of their rights to institutional academic freedom.[254]

If public universities do not have First Amendment rights to select diverse student bodies, then surely they also lack constitutional rights when selecting members of their faculties. Deciding who teaches, like deciding who to admit to study, is one of the four essential freedoms discussed by Justice Frankfurter in his concurrence in *Sweezy v. New Hampshire*.[255] Although the Supreme Court has historically given substantial deference to academic decisions by universities related to their educational mission[256]—and the hiring of faculty may be considered such a decision[257]—Supreme Court case law does not support the notion that public universities have First Amendment rights sounding in institutional academic freedom to choose their faculty members.[258] Moreover, many university employment decisions

254. *See id.* *But see* Fagundes, *supra* note 20, at 1662 (maintaining that "[t]he majority rule proscribing constitutional status for government speech . . . fails to account for a scenario in which the federal government wrongly attempts to restrict the speech of another sovereign, or where government speech merits application of a statute or common law doctrine that is designed to safeguard constitutional speech interests"). Although Fagundes's thoughts on the First Amendment rights of state actors are thought-provoking, his categories for when government speech should be constitutionally protected nonetheless do not appear to cover instances in which state public universities or public employers seek to assert constitutional rights against the contrary First Amendment rights of their public employees. In other words, public employment does not raise the more difficult question, present in *FAIR*, of whether, under principles of federalism, a state should be able to assert First Amendment rights or traditional state powers against federal government intrusions. *Cf. Grutter*, 539 U.S. at 328; City of Boerne v. Flores, 521 U.S. 507, 534 (1997) (noting that the federal Religious Freedom Restoration Act (RFRA) law constitutes "considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens").

255. *See* Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

256. *See* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment."); *see also* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 89–90 (1978) ("Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full-hearing requirement.").

257. *See* J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 319 (1989) ("Peer review certainly comes within the protection of institutional academic freedom if any university activity other than teaching and scholarship does. Peer review is the canonical procedure for determining 'who will teach.'"); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, LAW & CONTEMP. PROBS., Winter & Spring 1990, at 227, 266 ("These four freedoms . . . seem to cover appointment, promotion, tenuring, and termination of faculty . . . .").

258. *See, e.g.*, Univ. of Pa. v. EEOC, 493 U.S. 182, 199 (1990) (refusing to recognize an expanded constitutional right of institutional academic freedom to protect confidential peer review materials from disclosure). Indeed, neither the Supreme Court nor lower courts have ever satisfactorily explained the scope and the meaning of the institutional academic freedom doctrine. Horwitz, *supra* note 173, at 469; *see also* Byrne, *supra* note 257, at 320 ("One reason that institutional academic freedom remains little more than a potential constitutional right is that it has not been explained satisfactorily by legal scholars.").

are not even considered academic decisions for purposes of the academic freedom doctrine, and, therefore, lie outside the realm of cases in which courts have given deference to the judgment of the university.[259] In such cases, there is even less of an argument that the employment decisions of the public university are due some form of constitutional protection.

In short, given the strength of these structural arguments and the weak foundations for claims of public university constitutional rights based on notions of institutional academic freedom, it is likely that if the Supreme Court were to consider the issue head on, it would not deem the FAIR public law schools, or any other public employer, to be expressive associations.[260] However, because of the confusion engendered by the *FAIR* Court in this area of the law, the Supreme Court should not merely correct this oversight in the next case in which it has the opportunity to discuss expressive association rights. It should set out a coherent understanding of what type of rights public employers, including public universities acting in that capacity, have in deciding how best to convey certain messages to the public and protect their institutions' core values. The Court should take its cue from the Sixth Circuit and deem such important claims to be interests, rather than rights, and analyze these interests with other governmental efficiency concerns under the *Connick-Pickering* First Amendment free speech framework. At the same time, the Court should step back from the abyss it reached in *Garcetti v. Ceballos* and not too quickly assume that all government employees are engaged in unprotected government speech every time they express themselves in line with their job duties.

259. *See* Stastny v. Bd. of Trs. of Cent. Wash. Univ., 647 P.2d 496, 504 (Wash. Ct. App. 1982) ("'It does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution.'" (quoting Kunda v. Muhlenberg Coll., 621 F.2d 532, 547 (3d Cir. 1980))).

260. The *FAIR* Court appeared willing to proceed on this assumption only because most of its analytical energies were consumed by more difficult issues, such as the doctrine of unconstitutional conditions, the congressional power to raise and support armies, and a number of obtuse First Amendment speech doctrines, including the doctrines of compelled speech and expressive conduct. Rumsfeld v. FAIR, 547 U.S. 47, 58–68 (2006). Even in the expressive association portion of the case, the Court seemed unconcerned about the nature or the constituents of the FAIR expressive association and focused instead on whether having military recruiters on law school campuses significantly burdened law school rights to expressive association. *Id.* at 69–70.

B. A Return to *Pickering* Efficiency Interests and a Detour Around the Government Speech Doctrine

1. *Pickering* Efficiency Interests

To reiterate a point made in the previous Subpart, university academic judgments are better conceived of as interests grounded in the First Amendment, rather than constitutional rights. This conception of the academic employer's interests in exercising discretion to decide who to hire and retain as employees is consistent with similar governmental efficiency interests already discussed in the *Pickering* line of cases.

The scope of *Pickering v. Board of Education*[261] was most recently clarified by the Court in *Garcetti v. Ceballos*.[262] In *Garcetti*, a deputy district attorney for Los Angeles County, Richard Ceballos, was subjected to adverse employment actions for speaking out about an allegedly defective search warrant in a criminal case.[263] The question presented to the Supreme Court was whether Ceballos had engaged in speech protected by the First Amendment, such that he could not be retaliated against for his actions with regard to the search warrant.[264]

In its analysis in *Garcetti*, the Court noted that the *Connick-Pickering* analysis requires courts in public employee free speech cases to consider whether the employee spoke in his or her capacity as a citizen on a matter of a public concern,[265] and if so, courts must then balance the First Amendment interests of the employee against the government employer's interest in efficiency.[266] The governmental interests recognized in *Pickering*

261. 391 U.S. 563 (1968).

262. 126 S. Ct. 1951 (2006).

263. *See id.* at 1955–56.

264. *Id.* at 1955. As far as answering that question, the Court found in *Garcetti* that because Richard Ceballos was engaged in expression consistent with his job duties, he was not speaking as a citizen on a matter of public concern, but only as a government employee. As such, the Court concluded that Ceballos did not have any First Amendment protection and there was no need to conduct a *Pickering* balancing of interests. *See id.* at 1960 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

265. *See* Connick v. Myers, 461 U.S. 138, 146–47 (1983).

266. *See Pickering*, 391 U.S. at 568. I have recently argued that this same type of *Pickering* analysis should be extended to the substantive due process area in the context of sexual privacy rights in light of the Supreme Court's landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Under this reasoning, employees should also be free from decisional interference by their employers in their private and personal affairs, unless the government can point to overriding efficiency interests. *See* Secunda, *supra* note 226, at 122–24.

are not in any sense constitutional rights, but rather interests government employers have in maintaining "a significant degree of control over their employees' words and actions" because "without it, there would be little chance for the efficient provision of public services."[267] The balance undertaken in *Pickering* is required because even though the government employer performs "important public functions"[268] and consequently possesses far broader powers in its employer capacity than in its sovereign capacity,[269] "a citizen who works for the government is nonetheless a citizen."[270] The First Amendment therefore limits the ability of the employer to condition employment on the forfeiture of the employee's constitutional rights.[271]

Similarly, the interests that public employers have in advocating certain views and policies and maintaining the core values of their institutions may be seen as more akin to *Pickering* efficiency interests than a First Amendment right to expressive association.[272] As the *Garcetti* Court observed: "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and *promote the employer's mission*."[273] In setting out the relevant interests, the Court utilizes the language of efficiency interests, not of employer expressive association rights.[274]

If a public employer wishes not to hire a prospective employee because that employee has engaged in controversial speech through the written word, like Delahunty,[275] or through nontraditional living arrangements, like Hobbs,[276] the proper analysis is not to suggest that the government employer has a constitutional right as an expressive association to disassociate itself from those individuals it deems are promoting antithetical messages.

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267. *Garcetti*, 126 S. Ct. at 1958 (citing *Connick*, 461 U.S. at 143).

268. *See id.* at 1959 (citing Rankin v. McPherson, 483 U.S. 378, 384 (1987)).

269. *See id.* at 1958 (citing Waters v. Churchill, 511 U.S. 661, 671 (1994) (plurality opinion)).

270. *Id.*

271. *See id.* (citing Perry v. Sindermann, 408 U.S. 593, 597 (1972)). The doctrine of unconstitutional conditions figured prominently in *Rumsfeld v. FAIR*, 547 U.S. 47, 59 (2006) ("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.").

272. *See Garcetti*, 126 S. Ct. at 1960 ("Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity.").

273. *Id.* (emphasis added).

274. This is particularly telling; since *Garcetti* was decided only about three months after *Rumsfeld v. FAIR*, one would have expected some comment about expressive association rights if the Court had recognized the implications of its own statements in *FAIR*. Clearly, however, the Court did not understand its *FAIR* decision in this manner.

275. *See supra* Part III.C.1.

276. *See supra* Part III.C.2.

Rather, a court should determine whether the constitutional rights of the individual cannot be recognized without substantially disrupting the public employer's enterprise.[277] This proposed analysis is more consistent with constitutional doctrine in the public employer area and does not take the unprecedented step of suggesting that government employers have First Amendment rights.

2. The Menace of the Government Speech Doctrine to Public Employee First Amendment Rights

Pickering thus provides the proper framework for understanding how courts should conceive public employer interests to promote certain messages. However, the government speech doctrine has the ability to wreak havoc on public employees' remaining constitutional rights in a large subcategory of official capacity speech cases by taking away public employees' *Pickering* rights.

In coming to its conclusion in *Garcetti* that Ceballos did not have First Amendment rights because he was acting in accordance with his job duties, the Court commented that Ceballos's speech "owe[d] its existence to [his] professional responsibilities" and "simply reflects the exercise of employer control over what the employer itself has commissioned or created."[278] In making this point, the Court cited to *Rosenberger v. Rector & Visitors of University of Virginia*,[279] with a parenthetical that "when government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."[280] This language in turn derives from similar

277. I do not mean to suggest that the *Pickering* balance does not have its own shortcomings. Its reliance on determining constitutional rights based on whether a public employee's conduct causes his or her employer substantial disruption comes close to constitutionalizing the heckler's veto. *See* Kozel, *supra* note 227, at 1018–19 ("Such a test is inconsistent with the notion of robust exchange of divergent ideas, as it leaves vulnerable the speech that is most likely to have a strong effect.").

278. *See Garcetti*, 126 S. Ct. at 1960.

279. 515 U.S. 819 (1995).

280. *Garcetti*, 126 S. Ct. at 1960 (quoting *Rosenberger*, 515 U.S. at 833). *Rosenberger v. Rector & Visitors of University of Virginia* involved a student-run Christian newspaper at the University of Virginia. 515 U.S. 819. The Court concluded that it was viewpoint discrimination to deny funding to the newspaper. However, the outcome would have been different if the university spoke itself or subsidized the transmittal of a favored message. *See id.* at 833–34.

language in the abortion funding case of *Rust v. Sullivan*,[281] another case that relies on the government speech doctrine.[282]

Under the government speech doctrine, individuals can be compelled to subsidize government speech without violating their First Amendment rights.[283] The Court in *Garcetti* thus seems to suggest that characterizing Ceballos's expression as government speech helps to explain why he has no First Amendment rights when speaking in his official capacity, whereas normally under the *Connick-Pickering* framework, he would. Such a broad notion of public employee speech as government speech, however, could all but wipe out a significant portion of public employee First Amendment rights.[284]

Fortunately, it does not appear that the Court is willing to take the government speech doctrine in the public employment context to that length quite yet. Instead, the cite to the *Rosenberger* case in *Garcetti* was a "*cf.*" cite, suggesting that the "[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support."[285] In other words, there is still room to doubt that the government speech doctrine applies in its adulterated form to all public employee speech cases in which statements are made pursuant to official duties.

Justice Souter in his *Garcetti* dissent provided ample reason why the government speech analysis should be mostly extraneous to the *Pickering* doctrine. He noted that "[s]ome public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto."[286] Indeed, as Justice Souter pointed out, no evidence exists that Ceballos himself was hired to "broadcast[ ] a particular

281. 500 U.S. 173, 174–75 (1991).

282. *See id.* at 192–93 ("[G]overnment may 'make a value judgment favoring childbirtb over abortion, and . . . implement that judgment by the allocation of public funds.'" (quoting Maher v. Roe, 432 U.S. 464, 474 (1977))). *Rust* did not involve private speech, but employed private speakers to transmit specific information related to the government's prohibition on abortion-related advice. *See id.* at 194.

283. *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 559 (2005) ("[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and defend its own policies. We have generally assumed . . . that compelled funding of government speech does not alone raise First Amendment concerns." (citing Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 229 (2000))).

284. *See Garcetti*, 126 S. Ct. at 1969 (Souter, J., dissenting) ("The fallacy of the majority's reliance on *Rosenberger*'s understanding of *Rust* doctrine . . . portends a bloated notion of controllable government speech going well beyond the circumstances of this case.").

285. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 47 (Columbia Law Review Ass'n et al. eds., 18th ed. 2005).

286. *Garcetti*, 126 S. Ct. at 1969 (Souter, J., dissenting) (citing Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001)).

message set by the government"; instead, he was hired "to enforce the law by constitutional action . . . ."[287] Similarly, no one would seriously argue that public university professors are hired to parrot a particular government message.[288]

In short, although Justice Souter conceded that there may be some public employees who are hired to advance specific governmental policies and thus fall under the government speech doctrine, many public employees, including government lawyers, do not. Souter is right that "*Rust* is no authority for the notion that the government may exercise plenary control over every comment made by a public employee in doing his job."[289] Here's hoping that in the future, the Supreme Court recognizes *Garcetti*'s error in this regard and takes a mere "*cf.*" for what it is worth.

CONCLUSION

Neither public law schools nor public employers have the constitutional right to expressive association as *Rumsfeld v. FAIR* implicitly assumes. This state of affairs will eventually be rectified, given the strong constitutional structural arguments in opposition to such an interpretation. Such a modification, however, should be accompanied by a unifying theory about how government efficiency interests in maintaining core values and promoting certain messages should be balanced against the First Amendment rights of public employees to engage in protected constitutional activities.

In some cases, then, public employers should be permitted to adhere to core values and promote certain messages as a part of their *Pickering* efficiency interests in running their organizations as they see fit. Even so, these efficiency interests must be balanced against employee constitutional rights and cannot simply override such interests. Furthermore, the government speech doctrine should not be read expansively into the public employment context to strip public employees of constitutional rights when they are acting pursuant to their official duties. Instead, that doctrine should be limited to only those instances in which a public employee has been hired to actually promote a specific governmental message.

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287. *Id.*

288. *See id.* ("This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor . . . ."). The majority grants that different considerations might apply when the academic freedom concerns of professors engaged in teaching and scholarship are involved, but does not decide that issue since *Garcetti* itself does not concern academic freedom. *See id.* at 1962 (majority opinion).

289. *Id.* at 1969 (Souter, J., dissenting).

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