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## What Goes Around, Comes Around: Legal Ironies in an Emergent Doctrine for Preserving Academic Freedom and the University Mission

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# WHAT GOES AROUND, COMES AROUND: LEGAL IRONIES IN AN EMERGENT DOCTRINE FOR PRESERVING ACADEMIC FREEDOM AND THE UNIVERSITY MISSION†

Barbara K. Bucholtz‡

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For we built so well so long . . . still, when I look at the road we're  
traveling on . . . I wonder what's gone wrong . . . can't help but  
wonder what's gone wrong.

- *Simon and Garfunkel*<sup>1</sup>

## I. INTRODUCTION

Eight hundred years ago, political institutions and intellectual institutions in Western Europe began parallel evolutionary quests to foster Freedom, Justice, and Equality. Eight hundred years *later*, the legal institutions of the U.S. have yet to craft a doctrine to protect the universities in their continuing quest for Freedom, Justice, and Equality. This paper chronicles that sad tale.

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1. SIMON & GARFUNKEL, *America, on Simon & Garfunkel, The Concert in Central Park* (Warner Bros. Records, Inc. 1982).

Freedom, Justice, and Equality—keystone principles in western deliberative democracies—have both supported and been nurtured by systems of free inquiry developed within the great universities of Europe. Indeed, the parallel evolution of these intellectual institutions and their political or legal counterparts was initiated by path-breaking events in the High Middle Ages<sup>2</sup> and especially during the Thirteenth Century. In England, two notable changes were wrought in the institutions of government, which were foundational in initiating an evolutionary political process toward institutionalized guarantees of Freedom, Justice, and Equality. First, the Magna Carta, signed by King John in 1215, established the principles of limited sovereignty, the primacy of law over monarchy, and the guarantee of judicial process.<sup>3</sup> While each of the 63 clauses of the Magna Carta limits the sovereignty of the monarch in some way, of particular importance for the subject-matter of this conference is Article 39, which states: “No free man shall be arrested, or imprisoned, or deprived of his property, or outlawed, or exiled, or in any way destroyed, nor shall we go against him or send against him, unless by legal judgment of his peers, or by the law of the land.”<sup>4</sup>

The second major liberalizing change in English political institutions that occurred in the Thirteenth century was the enactment of the Provisions of Oxford against the monarchy in 1258,<sup>5</sup> which imposed upon the King the legal necessity of conferring with representatives of the nobility and townspeople through Councils. The Provisions of Oxford reconstituted the Councils (formerly called at the King’s discretion) into a formally institutionalized Parliament, charged with the responsibility of reviewing the King’s policies. They mandated that the King act in consultation with the Parliament only. Thus, the Magna Carta opened the door to constitutional protections of individual rights while the Provisions of Oxford set the stage for representational government. In tandem with these foundational changes in political institutions and limitations on political power that occurred during the Thirteenth Century, innovations in both intellectual method and intellectual institutions also emerged.

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2. Roughly, the period between the years 950 and 1350 C.E. witnessed a robust population growth (fueled by favorable weather conditions and advances in technology that provided an adequate agricultural base to sustain the increase in population) and a revival of urban life and trade that had largely disappeared during the early Middle Ages. *See generally* ROBERT S. LOPEZ, *THE COMMERCIAL REVOLUTION OF THE MIDDLE AGES, 950–1350*, at 27–34 (1976) (analyzing the cultural climate of the middle ages).

3. *See generally* J.C. HOLT, *MAGNA CARTA* (2d ed. 1992) (giving an in-depth analysis of the Magna Carta along with its history and effect).

4. *Id.* at 461.

5. *See generally* ROBERT BARTLETT, *ENGLAND UNDER THE NORMAN AND ANGEVIN KINGS: 1075–1225* (2000) (giving an overview of English society from 1075–1225).

The Thirteenth century witnessed the introduction of the institutionalization of higher learning, research, and scholarship in the form of universities. The first two universities were established in Bologna and Paris<sup>6</sup> at the beginning of the Thirteenth century; and by the end of that century, the institution of the university had spread throughout Western Europe. Different in many respects from their modern counterparts, medieval universities did afford the intellectual community a locus of power and organization. It also established the rudiments of a system of degrees, departments, and colleges.<sup>7</sup>

At about the same time, radical changes were taking place with regard to intellectual method, scope, and perspective. Monasticism, a theory of study and scholarship that was predominantly passive and rote,<sup>8</sup> was challenged and gradually supplanted by scholasticism.<sup>9</sup> And while scholasticism was a step toward free inquiry and the empirical methods of research and analysis we enjoy today,<sup>10</sup> it was elementary. Scholasticism changed the scope and method of intellectual endeavor by reaching beyond Biblical and Church-generated texts to secular, even non-Christian texts<sup>11</sup> and by engaging the texts in a

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6. See STEPHEN C. FERRUOLO, *THE ORIGINS OF THE UNIVERSITY: THE SCHOOLS OF PARIS AND THEIR CRITICS*, 1100–1215, at 5 (1985).

7. See ALAN B. COBBAN, *ENGLISH UNIVERSITY LIFE IN THE MIDDLE AGES* 4–5 (1999). Before the institutionalization of higher learning by universities, teachers opened their own separate schools or colleges. Monasteries and urban Cathedrals also ran institutions of higher learning. See *id.*

8. Under the strictures of monasticism (most famously, The Rule of Saint Benedict), monks (and, later, students within monastic universities) were directed to accept the texts of the Bible and of church-designated authors (Church “Fathers”) without questioning them. See JOHN W. BALDWIN, *THE SCHOLASTIC CULTURE OF THE MIDDLE AGES*, 1000–1300, at 34–38 (Waveland Press 1997) (1971).

9. Scholasticism came upon the intellectual scene in the late eleventh century. Its method of learning was argumentative analysis rather than passive acceptance. *Id.* at 58–70. An early “handbook” of the scholastic method was appropriately titled *Sic et Non* by Peter Abelard (of Heloise fame). M.T. CLANCHY, *ABELARD: A MEDIEVAL LIFE* 6 (1997).

10. Even though scholasticism sought out discrepancies and inconsistencies it found in the texts under analysis, it also sought to synthesize the apparent contradictions it found. Moreover, the linchpin of scholasticism was religious (Catholic) faith. Resolution of textual contradiction was driven, at least in the early years, by that overarching concern. See BALDWIN, *supra* note 8, at 81, 94.

11. Two of the most important authors upon whom the Scholastics relied were not even Christians: Aristotle, a pagan (known to Scholastics as “The Philosopher”), whose translated writings became increasingly available to European scholars in the High Middle Ages; and Ibn Rashd (known to medieval scholars variously as “Averroes” or, simply, “The Commentator”), a Muslim philosopher whose facility in rendering a lucid account of Aristotle’s philosophical discourse made him indispensable to Scholastics. See ARMAND A. MAURER, *MEDIEVAL PHILOSOPHY* (Etienne Gilson 2d ed., Pontifical Institute of Mediaeval Studies 1982) (1962). The story of how the writings of Aristotle and the ancient Greek philosophers generally became available to Catholic scholars in medieval Europe through the translations of Greek to Arabic and, then, to Latin by Muslims and Jews in the Medieval Islamic kingdom of al-Andalus on the Iberian peninsula (now, part of Spain) is itself a fascinating story of intellectual discourse largely unimpeded by ideology and orthodoxy and demonstrates

point-counterpoint analysis of their meanings.<sup>12</sup> It is important to understand that scholasticism's triumph over monasticism by 1300 was largely attributed to the re-emergence of urbanization and commercialization in the High Middle Ages, which brought with them a heterogeneity of thought and a consequent need to develop techniques for successful argument. That is to say that as trade and urban life brought disparate groups into close proximity, the homogeneity of thought mandated by Christian orthodoxy seemed outmoded and irrelevant. Even the Church was at least ambivalent about scholasticism: on the one hand, scholasticism offered the possibility of developing techniques for fending off arguments that challenged Church teachings; on the other hand, scholasticism's reliance on non-Christian texts and logical analysis of textual contradictions inherently posed a threat to Church orthodoxy.<sup>13</sup>

By the end of the High Middle Ages, critical changes had occurred in political institutions and perception, as well as in intellectual institutions and methods that laid the foundation for subsequent liberating developments that gradually lifted constraints on individual freedoms. It is, however, perhaps instructive to recall that the progression from the medieval beginnings of these institutions to their present form was hardly linear and consistent. Indeed, history from that era to this one appears to be more circular than linear because it is replete with instances, even periods, of regression, some of which (notably the scourge of slavery) were discussed at the Gloucestershire conference.<sup>14</sup> The imminent threat posed by the Religious Right to free inquiry in American universities today (the topic of this paper) is

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pluralism's facility in enriching the intellectual culture of a society. *See* MEDIEVAL IBERIA: READINGS FROM CHRISTIAN, MUSLIM, AND JEWISH SOURCES (Olivia Remie Constable ed., The Middle Ages Series, 1997); BERNARD F. REILLY, THE MEDIEVAL SPAINS 202 (1993); L.P. HARVEY, ISLAMIC SPAIN: 1250 TO 1500 (1990) (detailing the coexistence of Christians and Muslims in Medieval Spain); MARIA ROSA MENOCAL, THE ORNAMENT OF THE WORLD: HOW MUSLIMS, JEWS, AND CHRISTIANS CREATED A CULTURE OF TOLERANCE IN MEDIEVAL SPAIN (2002) (analyzing the culture in Medieval Spain and the tolerance between Jews, Christians, and Muslims).

12. *See* CLANCHY, *supra* note 9, at 6.

13. Indeed, for sporadic and limited periods during the 13th century, popes banned the teachings of Aristotle and/or some of his texts at the University. One inescapable problem was that there were some conflicts between Church teachings and Aristotelian and Islamic philosophy that simply could not be resolved or synthesized. These included theologically critical issues like the duration of the world's existence, the nature of God, and the afterlife of the human soul. *See* MAURER, *supra* note 11, at 89.

14. The first day included William Wiecek, T.K. Hunter, David Konig, Janis McDonald, Kathleen McKee, Regina Rauxloh, Elaine Dewhurst, Daniel Hulsebosch, Alfred Blumrosen, Stephen Waddams, and Margaret Russell. 2006 Gloucester Conference, <http://www.gloucesterconference.com/program6-19.asp> (last visited Jan. 20, 2006). The second day included Colin Bobb-Semple, Cheryl Harris, Nicola Williams, Floyd Weatherspoon, Mary Louise Frampton, and Nekima Levy-Pounds. 2006 Gloucester Conference, <http://www.gloucesterconference.com/programs6-20.asp> (last visited Jan. 20, 2006).

another example of the occasional surfacing of regressive forces that seek to roll back the evolutionary development of individual rights guarantees.

Another related aspect of this nonlinear evolutionary progression that we do well to emphasize is illustrated by the subject-matter of this paper: that the project of protecting human rights continues to be a work-in-progress whereby societal shifts may reveal hitherto undetected weaknesses in institutional protections that expose the fragility and remind us of the vulnerability of our human rights protections.

The American university model is the progeny of the European university that has evolved since the High Middle Ages, just as our government institutions and our legal system are heir to European successes in institutionalizing human rights principles. And while there are differences, to be sure, among various models of higher education in Western democratic societies, they share a common foundation and (as was the case in medieval society) a mutually reinforcing dynamic: freedom of inquiry at institutions of higher learning has historically been an important source of advancing human freedoms in the political sphere, while the legal systems of constitutional democracies act as a bulwark against challenges to free inquiry in the university. At least that is the common perception. Recent Supreme Court case law appears to call that perception into question by opening the door to assaults on this bedrock principle of free inquiry in higher education.

Within a university, free inquiry is protected by the “university mission” itself. A typical statement of a university mission is: “[T]o develop human resources, to discover and disseminate knowledge, to extend knowledge and its application beyond the boundaries of its campuses, and to serve and stimulate society by developing in students heightened intellectual, culture and humane sensitivities . . . and a sense of purpose.”<sup>15</sup>

This open system of free inquiry is buttressed by university rules regarding academic freedom. The AAUP<sup>16</sup> forward to its Recommended Institutional Regulations on Academic Freedom and Tenure offers a rationale for academic freedom when it states, in part: “A college or university is a marketplace of ideas, and it cannot fulfill its purposes of transmitting, evaluating and extending knowledge if it requires conformity with any orthodoxy of content and method.”<sup>17</sup>

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15. This is the Mission Statement of the University of Wisconsin, at issue and quoted in *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 221 (2000) (quoting Wis. STAT. § 36.07(1) (1993–1994)) and discussed *infra* notes 47–72 and accompanying text.

16. American Association of University Professors.

17. AM. ASSOC. OF UNIV. PROFESSORS, POLICY DOCUMENTS & REPORTS 21 (8th ed. 1995).

Thus, the foundational concept of the university is its mission to expand knowledge and understanding. And that mission, in turn, relies upon academic freedom to bring it to fruition. However, in recent years, public universities in the U.S. have faced an increasingly insistent challenge to academic freedom that threatens to encroach upon the “university missions” in substantial ways.<sup>18</sup> The impetus for the challenge comes from no less an august source than the Supreme Court itself. Ambiguities in a newly-minted religious speech doctrine,<sup>19</sup> created by the Rehnquist Court, have invited lawsuits filed by Religious Right organizations against university programs. These lawsuits pose a real threat to the right of free inquiry of professors and of academic departments, especially with regard to curricular and course content issues.<sup>20</sup> The Religious Right challenge (if successful) would materially curtail, if not extinguish, the “university mission” to expand knowledge and understanding. While the “university mission” requires the diversity and pluralism afforded by academic freedom, these lawsuits challenge that very premise on the grounds of religious speech, using the Court’s emergent “religious speech” doctrine as authority.<sup>21</sup> The problem may be exacerbated at public universities by the very recent decision of the Roberts Court in *Garcetti v. Ceballos*<sup>22</sup> where, by a 5-4 majority, the Court held that the First Amendment does not protect a government employee “from discipline based on speech made pursuant to the employee’s official duties.”<sup>23</sup> Only when a public employee speaks as a citizen on an issue of public debate might the employer assert First Amendment rights superior to the rights of the employer to discipline his speech.<sup>24</sup> Without question, this statement of the First Amendment rights of public employees baldly threatens the academic freedom of scholars in public universities.<sup>25</sup>

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18. See *infra* notes 39–65 and accompanying text.

19. *Id.*

20. See *infra* notes 58–72 and accompanying text.

21. *Id.*

22. *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

23. *Id.* at 1955, 1962.

24. See *id.* at 1957 (citing *Pickering v. Bd. of Township High Sch. Dist. 205, Will County*, 391 U.S. 563, 568 (1968)).

25. In Justice Souter’s well-reasoned dissent, he—joined by Justices Stevens and Ginsburg—pointed out the majority’s “new formulation”: “Restricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself has commissioned or created[.]” is dangerous. *Id.* at 1969 (Souter, J., dissenting) (quoting *id.* at 1960). Justice Souter reflected upon the breadth of that statement and commented:

This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor, and I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’

Moreover, universities have not been able to point to any constitutional doctrine in support of academic freedom and the “university mission.” Higher education cases that have raised academic freedom issues in the past are long on expansive paeans to academic freedom<sup>26</sup> but short on any express doctrinal counterpoise that would limit either the emergent religious speech doctrine’s broad and indeterminate reach<sup>27</sup> or the uncertain boundaries of the brand new “public duties” doctrine.

All is not lost, however, and help may be on the way. The recently decided case of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,<sup>28</sup> in which plaintiffs (“FAIR”)<sup>29</sup> challenged the constitutionality of the Solomon Amendment,<sup>30</sup> also suggests an effective doctrinal defense for universities whose principles of academic freedom are under siege. In that case, FAIR argued that the Solomon Amendment, which conditions a university’s receipt of federal funds on its willingness to accommodate military recruitment on campus, violated the university’s constitutional rights because the military discriminated on the basis of sexual orientation while plaintiff universities stood by an anti-discrimination policy.<sup>31</sup>

FAIR lost the “battle” in the case<sup>32</sup> but it may have gone a long way toward winning the war against assaults on universities’ freedom of inquiry. One of FAIR’s arguments was premised upon the notion of associational rights,<sup>33</sup> which the Supreme Court acknowledged universities were entitled. And in an elegant demonstration of the adage that “what goes around, comes around,” the Court also adopted FAIR’s argument that the relevant authority was the iteration of association rights in a 2000 Supreme Court decision.<sup>34</sup> In that 2000 Supreme Court decision, the Court held that a state government public accommodation law violated the Boy Scouts’ expressive association rights to discriminate against gays.<sup>35</sup> What goes around . . . comes around.

It would be a lovely piece of irony if the Supreme Court case that established an association doctrine in support of discrimination

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*Id.* at 1969 (Souter, J., dissenting) (citations omitted).

26. *See infra* note 100 and accompanying text.

27. *See infra* notes 61–73 and accompanying text for an analysis of the destabilizing effects of the doctrine.

28. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 126 S. Ct. 1297 (2006); *see infra* notes 108–72 and accompanying text for discussion of the FAIR case.

29. Forum for Academic and Institutional Rights is an association of law schools and law faculties. *Id.* at 1302.

30. *See id.* at 1303.

31. *See id.*

32. *See id.* at 1313.

33. *See id.* at 1303.

34. *See id.* at 1311–12 (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000)).

35. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 644 (2000).



(thereby constraining Freedom, Justice, and Equality) provided the groundwork for the doctrine's subsequent development as a vehicle for advancing Freedom, Justice, and Equality in our institutions of higher education. In any case, the development of a system of free inquiry within our intellectual institutions has been in the making for 800 years. It is about time our legal institutions provided us with a doctrine to protect it.

This article proceeds chronologically. It begins in Part II with the dismantling of the traditional religious clauses and free speech balancing doctrines by the Rehnquist Court. The Rehnquist Court's doctrine applicable to religious speech in "the university" developed in several cases, culminating in *Bd. of Regents of the Univ. of Wisc. Sys. v. Southworth*<sup>36</sup> Part III analyzes that case and its doctrine and explains how it poses a danger to free inquiry in higher education. Part IV chronicles the litigious aftermath of *Southworth*, which demonstrates how *Southworth* opened the door for Religious Right challenges to curricular programs; and it also identifies some evidence of a resultant chilling effect on curricular policy-making. Part V reviews the *FAIR* case and suggests how the associational rights doctrine might provide a counterpoise to the Religious Right's siege on free inquiry.

## II. THE DISMANTLING THE TRADITIONAL RELIGIOUS CLAUSES AND FREE SPEECH BALANCING DOCTRINES BY THE REHNQUIST COURT

The First Amendment<sup>37</sup> is fecund with promises. Among other characteristics, it contains two provisions for religion and at least one for speech.<sup>38</sup> With regard to the latter, it famously promises "freedom of speech."<sup>39</sup> With regard to the former, it provides both protection *for* the "free exercise" of religion and protection *from* the governmental "establishment of religion."<sup>40</sup> The potential for conflict between these two clauses is apparent: At what point does accommodation of one religious group's religious freedom under government auspices give rise to the charge that the government's solicitude toward that group situates it as a state religion with respect to other religious

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36. See *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 220-21 (2000).

37. The Constitution of the United States of America, Amendment I provides: "Congress shall make no law respecting an establishment of religion [the "Establishment Clause"], or prohibiting the free exercise thereof [the "Free Exercise Clause," and collectively, the "Religion Clauses"]; or abridging the freedom of speech [the "Free Speech" Clause], or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

38. See *id.*

39. *Id.*

40. See *id.*

groups? Traditional jurisprudence developed by Supreme Courts that preceded the former Rehnquist Court maintained a balance between the two religious clauses (the “free exercise” clause, on the one hand, and the “establishment clause” on the other) giving weight to each clause by—among other doctrinal techniques—treating religious speech as unique and different from secular speech under the “freedom of speech” clause. That distinction between religious and secular speech supplied the doctrinal link and provided a synthesizing element between the two religious clauses.

Religious expression under the doctrine was limited when it became entangled with the government such that it gave the appearance of receiving a special governmental imprimatur. This distinction between religious speech and secular speech is particularly important in the context of “the university” because, as is evident, religious speech is premised on religious belief, while secular speech, in the same context, is premised upon empiricism and logic. The dichotomy is similar to that which appeared, by the end of the 13th Century, between monasticism, on the one hand and scholasticism (and, by the 18th century, empiricism) on the other.

But the Rehnquist Court abandoned that traditional approach by conflating secular speech and religious speech under the First Amendment; by treating religious speech as simply another “view point;” and by interposing a new test of “viewpoint neutrality” as a litmus test for determining the constitutionality of the government’s treatment of religious speech. In the public university context, the “viewpoint neutrality” test was enunciated in *Rosenberger v. Rector & Visitors of the Univ. of Va.*<sup>41</sup> There, the University refused to allocate student activ-

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41. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 828–30 (1995). For background on this issue, see generally Marci Hamilton, *The Constitution’s Pragmatic Balance of Power Between Church and State*, 1 A.L.I.–A.B.A. HISTORIC PRESERVATION L. 501, 506 (1998) (discussing the Framers’ concerns about protecting religion from society and society from religion: “[R]eligion is as often the source as it is the recipient of oppression.”). See also Noah Feldman, *From Liberty to Equality: The Transformation of the Establishment Clause*, 90 CAL. L. REV. 673 (2002) (an overview of the development of Establishment Clause justification); Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323 (1996) (reviewing and critiquing the traditional tests under the two Religion Clause precedents); Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the “No Endorsement” Test*, 86 MICH. L. REV. 266, 268–72 (1988) (challenging the efficacy of the neutrality test as it was developed in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), applied in *Lynch v. Donnelly*, 465 U.S. 668 (1984), and amended by Justice O’Connor’s concurrence in *Lynch*, 465 U.S. at 688–92); John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 94–130 (1986) (investigating the doctrine as it was first enunciated in *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)); Liza Weiman Hanks, Note, *Justice Souter: Defining “Substantive Neutrality” in an Age of Religious Politics*, 48 STAN. L. REV. 903 (1996) (describing Justice Souter’s reliance on precedent in order to maintain the proper balance among the clauses and showing how his analysis differed from the Rehnquist Court majority who dismantled that balance).

ity fee money to a student-run religious newspaper.<sup>42</sup> The University decided that, because the newspaper advocated a particular religious dogma, financial support of the newspaper by the University would create an Establishment Clause problem. That is to say, it would associate a public university with a particular theology.<sup>43</sup> And, under the traditional tests, that was a fair reading of what the doctrine (enunciated by earlier Supreme Courts) required.<sup>44</sup> But the Rehnquist Court decided that speech (even religious proselytizing speech) was simply speech. Thus, as long as the student activity fee program was administered in a way that was “view point neutral,” the University would not violate the Establishment Clause by including a student religious activity in its pool of fund recipients. Simply including religious support for student-run, extra-curricular programs was not, according to the Court, a violation of the Establishment Clause.<sup>45</sup>

On its face, and under the facts, the *Rosenberger* case could appear benign and, well, neutral: it simply provided a shield for a university that gave extra-curricular fund support to a religious student group for an extra-curricular activity. But Justice Souter perceived the “view-point neutrality” test as a slippery slope, and the next case to apply the test after *Rosenberger*, *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*,<sup>46</sup> demonstrated just how accurate Souter’s perception was. In *Southworth*, the University’s shield (the “viewpoint neutrality” test) became the Religious Right’s sword.

### III. THE *SOUTHWORTH* DOCTRINE THE DANGER IT POSES TO FREE INQUIRY IN HIGHER EDUCATION

*Southworth* was another case brought by a group of students, this time with the financial support of a religious advocacy organization, the Alliance Defense Fund. The self-proclaimed purpose of the organization was, according to the *New York Times*, “defunding the

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42. For an excellent discussion of the futility of interposing a neutrality test in Establishment Clause analysis, see Frank S. Ravitch, *A Funny Thing Happened on the Way to Neutrality: Broad Principles, Formalism, and the Establishment Clause*, 38 GA. L. REV. 489 (2004). Professor Ravitch argues that because there is no such thing as absolute formal neutrality, a more conceptualized test that looks to the effect on religion of a government policy or activity is a better measuring tool for constitutional analysis. See *id.* at 572; see also Philip B. Kirkland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961) (discussing formal neutrality as an analytical tool); Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DEPAUL L. REV. 993, 995–1001 (1990) (arguing that a formal neutrality test is unworkable).

43. See *Rosenberger*, 515 U.S. at 822–23, 827.

44. See *id.* at 823.

45. See *id.* at 845–46.

46. 529 U.S. 217 (2002). The University could reasonably have believed the situation created an entangling alliance under the *Lemon* test. See *supra* note 42 and accompanying text.

left.”<sup>47</sup> As in *Rosenberger*, the plaintiff group in *Southworth* challenged the constitutionality of the University’s student activity fee program.<sup>48</sup> The *Southworth* group, however, unlike the *Rosenberger* students, sued *not* because they wanted to be *included* in the program but because they wanted either to *exclude* groups with which they disagreed or they wanted to exclude themselves (by opting out of the campus-wide requirement to pay into the student activity fee program).<sup>49</sup> Thus, the shield that protected the University from a charge violating the Establishment Clause by including a religious group in the program became a sword thrust against other groups within the program and against the University that had included them.

In *Southworth*, the Religious Right students argued that the mandatory student activity fee forced them to support student organizations with which they disagreed, thereby violating the Religious Right students’ First Amendment rights of free speech, free association, and free exercise.<sup>50</sup> In an unpublished opinion, the United States District Court for the Western District of Wisconsin agreed and granted the students’ motion for summary judgment.<sup>51</sup> The court premised its decision on two Supreme Court cases<sup>52</sup> that held unconstitutional an organization’s attempt to compel individuals to subsidize political speech that the individuals opposed when the speech was not directly related to the organization’s mission: *Abood v. Detroit Board of Educ.*<sup>53</sup> and *Keller v. State Bar of Cal.*<sup>54</sup> The University of Wisconsin appealed and the Seventh Circuit ruled that the mandatory student activity fee program was not germane to the University’s mission and, therefore, violated the constitutional rights of the Religious Right students.<sup>55</sup> The Circuit reasoned that not only the *Abood/Keller* rule but also the *Rosenberger* case compelled its decision.<sup>56</sup>

47. Linda Greenhouse, *No Student Veto for Campus Fees*, N.Y. TIMES, Mar. 23, 2000, at A1.

48. See *Southworth*, 529 U.S. at 220–2. For a more detailed review of *Southworth*, see Barbara K. Bucholtz, *On Canonical Transformations and the Coherence of Dichotomies: Jazz, Jurisprudence, and the University Mission*, 37 U. RICH. L. REV. 425, 428–38 (2002) [hereinafter *Canonical Transformations*].

49. See Greenhouse, *supra* note 47.

50. *Southworth*, 529 U.S. at 227.

51. *Id.* at 217.

52. *Id.*

53. *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 234–36 (1977). The Supreme Court held the dues unconstitutionally infringed on the teachers’ free speech and free association rights. See *id.* at 234–35.

54. *Keller v. State Bar of Cal.*, 496 U.S. 1, 13–14 (1990). In *Keller*, the Supreme Court applied the same rule to mandatory state bar association fees and found that, to the extent the fees supported the bar’s political agenda (and not its mission to improve the quality of legal practice) the fees unconstitutionally infringed upon California lawyers’ free speech and free association rights. *Id.* at 13–14.

55. See *Southworth v. Grebe*, 151 F.3d 717, 732–33 (7th Cir. 1998).

56. See *id.*

The Supreme Court disagreed with the result and the rationale of the Seventh Circuit (thereby reversing), but it did so in a way that expanded its nascent “viewpoint neutrality” doctrine to accommodate the Religious Right group, thereby transforming a shield into a sword that has subsequently posed a threat to academic freedom and the “university mission.”<sup>57</sup> How did the Court create this unfortunate result?

In the first place, the Court agreed with the district court and the Seventh Circuit that the plaintiff-students’ rights were *Abood/Keller* rights, but the Court concluded that the *Abood/Keller* tests were inapplicable in the context of an organization with such a broad mission.<sup>58</sup> That mission, to expand knowledge and understanding, was more appropriately analyzed under the *Rosenberger* “viewpoint neutrality” test, the Court said, because the test acknowledged the University’s arguably boundless mission while constraining its policies in realizing its mission to an even-handed neutrality.<sup>59</sup> In addition to this broad, theoretical approach, the Court also acknowledged that: (1) given the breadth of the “university mission,” the Seventh Circuit erred in holding that the student activity program was unconstitutional,<sup>60</sup> and (2) that, as a practical matter, the *Abood/Keller* test would destroy these extracurricular activity programs.<sup>61</sup>

By contrast, the Court decided that the *Rosenberger* test appropriately supports the program as long as its distribution of the funds is “view point neutral.” And, applying *Rosenberger* to the facts in *Southworth* where the parties had stipulated, at the trial level, to the “viewpoint neutrality” of the student activity program, the Wisconsin program was deemed to have passed constitutional muster.<sup>62</sup> In the immediate aftermath of the *Southworth* decision, it was hailed as a victory for higher education. And, at first glance, a “viewpoint neutrality” test seems well-suited to the University’s mission to expand knowledge and understanding. “Viewpoint neutrality” certainly sounds inclusive enough to protect the free-ranging speech that is crucial to the University’s mission. But sober reflection and subsequent events reveal the emergent “viewpoint neutrality” test, post-*Southworth*, to be seriously flawed.

The first aspect of the test that is problematic is its analytical starting point: the Supreme Court’s enunciation of students’ rights as rights-not-to-associate with speech that offends them or with which

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57. See *Southworth*, 529 U.S. at 227–28.

58. *Id.* at 231–32.

59. See *infra* notes 63–65 and accompanying text.

60. See *Southworth*, 529 U.S. at 227, 231–32.

61. *Id.*

62. *Id.* at 232–33 (stating that the University’s mission “undertakes to stimulate the whole universe of speech and ideas[.]” and “[t]he University may determine that its mission is well served” by such a program by engaging students in debate, advocacy, and dialogue).

they disagree (*Abood/Keller* rights). Is it reasonable to posit *Abood/Keller* rights against an organization with a mission of free inquiry? Is not the purpose of free inquiry to serve the “university mission” of expanding knowledge and understanding by a dialogic process in which competing ideas are given latitude to tease out new understandings?<sup>63</sup> Does not premising students’ First Amendment rights in the university open the power to exclude ideas, compromise the mission of the university at the outset, and evince a lack of understanding, at some fundamental level, about the nature of free inquiry? Recall that the *Southworth* students did *not* assert rights to be *included*. Rather they, and students in subsequent cases, sought to have the speech of others *excluded*. *Southworth’s* concession to the plaintiff-students, granting them rights-not-to-associate with speech they oppose, is fatally flawed because it fails to acknowledge the diverse and disputatious nature of intellectual speech, which is at the very heart of the university project.

Thus, under the emergent doctrine, as it is currently constituted, students have a valid legal claim, and a *prima facie* case, whenever they assert that speech in a university offends their religious sensibilities or the tenets of their faith. The burden of proof, then, is thrust upon a university to demonstrate the speech is one of “neutrality.” Having asserted *Abood/Keller* rights, students can compel the university to prove its *Rosenberger* “viewpoint neutrality.”

It follows that the second serious flaw in *Southworth’s* development of *Rosenberger’s* “viewpoint neutrality” test, is that, as Justice Souter pointed out, it flips the burden of proof. Under the facts of *Rosenberger*, a program that included religious projects did not violate the Establishment Clause unless it was *not* “view point neutral” (plaintiff’s burden of proof); under *Southworth*, a university program challenged under *Abood/Keller* is unconstitutional unless it can demonstrate it is “viewpoint neutral”<sup>64</sup> (university’s burden of proof).

Moreover, it is worth emphasizing that the *Southworth* Court was not put to the test of applying its own rendition of the *Rosenberger* doctrine to the facts of the *Southworth* case because the parties’ stipulation to the “viewpoint neutrality” that most of the University’s program satisfied the test. What would have happened in *Southworth* had the parties not stipulated? The Seventh Circuit had occasion to pon-

63. To paraphrase the Court, if each student were free to select what his or her fee would support, free student organizations and programs (as *Abood/Keller* seem to mandate) would be confronted with an administrative nightmare. *See id.* at 232.

64. After all, intellectual debate is not a zero-sum game or winner-take-all sporting event. Rather, debate in higher education is “an ongoing process that explores new intellectual territory and reassesses the existing intellectual terrain on both sides of the theoretical divide. That exploration and reassessment is a dialogic negotiation that leads to the goals envisioned by the university mission: the expansion of human understanding in all its vicissitudes.” *Canonical Transformations*, *supra* note 48, at 441.

der that conundrum when the Supreme Court remanded the case for resolution of the remaining issue<sup>65</sup> and the plaintiff-students, upon remand, withdrew their stipulation in its entirety. Whereupon, noting the absence of guidance in the Court's opinion concerning application of the "viewpoint neutrality" test, the Seventh Circuit *sua sponte* concluded the entire program was "viewpoint neutral."<sup>66</sup> And, there, the matter of *Southworth* stands: without any resolution of what factors courts will consider when determining whether universities have met their new burden of proof or, even, whether the Seventh Circuit "got it right" in *Southworth*.<sup>67</sup>

We can anticipate the reaction of universities to such an ambiguous and indeterminate burden of proof. The threat of litigation alone might induce universities to eliminate programs rather than risk expensive and protracted litigation. Moreover, operating under a Damocles sword of litigation could chill academic and scholarly speech. The threat is exacerbated where, as here, a university's burden of proof is so amorphous.

And it follows logically from the problems of operating under an indeterminate burden of proof that another problem posed by the "viewpoint neutrality" test is the eponymous ambiguity of the test itself. What constitutes "neutrality"? Is "neutrality" even possible? What kind of facts need to be garnered to prove it? Is "neutrality" even a unworkable test?<sup>68</sup> Furthermore, even assuming the nature of neutrality is ascertainable and achievable, What does it mean to be "viewpoint neutral"? Must all views on a given issue be equally represented? We simply do not know, as the Seventh Circuit Court of Appeals acknowledged when it addressed the issue subsequently.<sup>69</sup>

And that problem raises another indeterminacy of the test: we do not know how far into the life of "the university" the test will extend. The *Southworth* case involved an extracurricular program, but there is nothing inherently limiting in the "viewpoint neutrality" test that forecloses its application to all programs in higher education. In *South-*

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65. See *Southworth*, 529 U.S. at 236. Justice Souter summarized that the *Southworth* majority mistakenly raises the University's burden of proof to include viewpoint neutrality as a necessary and sufficient condition for constitutionality. See *id.* at 236 (Souter, J., dissenting).

66. While both parties agreed that the bulk of the student activity program was administered in a view point neutral manner, plaintiff-students questioned the viewpoint neutrality of one aspect of the program in which funding decisions were rendered by majority voting. See *id.* at 224-25.

67. The Court supported its conclusion on the basis that the student activity program's funding standards and appeals process were sufficient to prove its viewpoint neutrality. See *Southworth v. Bd. of Regents of the Univ. of Wis. Sys.*, 307 F.3d 566, 595 (7th Cir. 2002).

68. See Laycock, *supra* note 42, at 995-1001.

69. See *supra* note 43 and accompanying text for incisive discussions of these intractable problems.

worth, the Court stated that the test would “likely”<sup>70</sup> not be imposed on curricular programs. This is little comfort when you consider the porous boundary between curricular and extra-curricular programs. Think, for example, of hybrid programs including summer abroad programs. Where do you draw the line?

The *Rosenberger* Court also made a futile attempt to distinguish between government (or public university) speech and private (student) speech by looking to the source of funding for each kind of speech. As Justice Souter stated in his *Rosenberger* dissent, “The opinion of the Court makes the novel assumption that only direct aid financed with tax revenue is barred [from *Rosenberger* ‘viewpoint neutrality’ analysis] and draws the erroneous conclusion that the involuntary Student Activities Fee is not a tax.”<sup>71</sup> But the distinction, as Souter points out, between taxpayer-funded speech and student-funded speech is similarly chimerical since university programs often have multiple sources of financing. Thus, neither the distinction between curricular and extracurricular nor the line between tax or tuition-based and student-fee-based programs can give us guidance or comfort about the reach of the “viewpoint neutrality” rule.

Finally, by treating religious speech as simply speech, the “viewpoint neutrality” doctrine eliminates any consideration of the Establishment Clause problems the test will certainly generate or any recognition that at some point (but what point?) the Establishment Clause must surely be invoked.

Given the indeterminacies, the ambiguities, and the serious flaws in the emergent “viewpoint neutrality” doctrine, it is a small wonder that, following *Southworth*, there has been a flurry of legal activity by Religious Right and ultra-conservative groups seeking, in a variety of ways, to solidify and expand the doctrinal territory they gained in *Southworth*. Moreover, like the plaintiff-students in *Southworth*, the Religious Right’s goal is to silence and exclude. But, they go beyond *Southworth* and its concern with extra curricular activities: now targeting the context of speech in core activities of “the university.” The plaintiff-students seek to eliminate curricular or academic programs

70. See *Canonical Transformations*, *supra* note 48, at 436.

71. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 864–65 (1995) (Souter, J., dissenting); see also *Southworth*, 529 U.S. at 235 (“Where the University speaks, either in its own name . . . or . . . through its diverse faculties, the analysis likely would be altogether different.”) (emphasis added), quoted in *Canonical Transformations*, *supra* note 48, at 435–36 (noting that in *Rosenberger/Southworth*, the Court relocates the traditional “viewpoint neutrality” test from a physical forum, like a public park, to an incorporeal forum, like the subject-matter of a course. “When the Court leaps from the *terra firma* of the street corner, public parks, and rooms in buildings to the incorporeal region occupied by a mandatory student fee program, which even the *Rosenberger* Court acknowledged to be more ‘metaphysical’ than a public park, then certain issues arise. Most obvious in the questions of where you draw the circle around an incorporeal force field we must now call a *Southworth* ‘forum,’ subject to viewpoint neutrality.” (citations omitted)).



or perspectives with which they disagree. And, it is no surprise that the assault has had a chilling effect on university programs.<sup>72</sup>

#### IV. THE LITIGIOUS AFTERMATH OF *SOUTHWORTH*

Take, for example, the case of *Yacovelli v. Moesser*.<sup>73</sup> In July 2002, three unnamed students, members of the entering class at the University of North Carolina (UNC), with the support of a Religious Right organization, American Family Association Center for Law & Policy, sued UNC.<sup>74</sup> The students argued that their *Southworth* religious speech rights were violated by a reading and study assignment for incoming students.<sup>75</sup> The book assigned to the incoming freshmen was *Approaching the Qur'an: The Early Revelations*, written by Michael Sells, a religion professor at Haverford College. In sum, the students argued that the *Southworth* "viewpoint neutrality" doctrine gave the students the right to veto curricular decisions of a major public university and to preclude discussion of topics that were anathema to them.<sup>76</sup> On August 15, 2003, by minute entry, the court denied the students' motion for preliminary injunction;<sup>77</sup> whereupon, the students requested and were granted interlocutory appeal to the circuit court.<sup>78</sup> Contemporaneously, the executive committee of the faculty of UNC passed a resolution reaffirming the Academic Freedom Code, Section 600 of the Code of the Board of Governors of the University of North Carolina.<sup>79</sup> UNC's president stated that "The campus' selec-

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72. See *Rosenberger*, 515 U.S. at 896 (Souter, J., dissenting).

73. *Yacovelli v. Moesser*, 324 F. Supp. 2d 760 (M.D.N.C. 2004).

74. Civil Docket, *Yacovelli*, 324 F. Supp. 2d 760 (No. 1:02-CV-596).

75. See *Yacovelli*, 324 F. Supp. 2d at 762.

76. See *id.* In the students' "Brief in Opposition to Defendants' Motion to Dismiss Amended Complaint," the students state, in part, that:

The University *compelled* the freshmen to read, meditate on, discuss and write on a sacred religious text . . . . [I]t required the students to listen to the chants of Muslim religious leaders recite a call to prayer in Arabic. The book . . . presents a decidedly favorable slant to the religion of peace. . . . No other religion has been given such attention.

Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss Amended Complaint at 12–13, *Yacovelli*, 324 F. Supp. 2d 760 (No. 1:02-CV-596).

77. See Minute Entry, *Yacovelli*, 324 F. Supp. 2d 760 (No. 1:02-CV-596).

78. Notice of Interlocutory Appeal of Oral Order Denying Plaintiffs' Motion for Preliminary Injunction, *Yacovelli*, 324 F. Supp. 2d 760 (No. 1:02-CV-596).

79. THE CODE OF THE BOARD OF GOVERNORS OF THE UNIV. OF N.C., § 600(1) (9th ed. 2006), available at [http://intranet.northcarolina.edu/docs/legal/policymanual/100.1\\_The\\_Code.pdf](http://intranet.northcarolina.edu/docs/legal/policymanual/100.1_The_Code.pdf). Section 600 states:

(1) The University of North Carolina is dedicated to the transmission and advancement of knowledge and understanding. Academic freedom is essential to the achievement of these purposes. The University therefore supports and encourages freedom of inquiry for faculty members and students, to the end that they may responsibly pursue these goals through teaching, learning, research, discussion, and publication, free from internal or external restraints that would unreasonably restrict their academic endeavors.

tion for summer 2002—*Approaching the Qur'an* by Michael Sells—was influenced by the attacks of 9-11 and intended to introduce students to the culture of the Middle East and to engage students on the very relevant, but little-understood, topic of Islam.”<sup>80</sup> On August 22, 2002, the chair of the Board of Governors asked the Board to reaffirm its “historic, unchanged position”<sup>81</sup> on academic freedom. However, the resolution in support failed to garner the requisite two-thirds vote of the Board of Governors.<sup>82</sup>

During the same time period, one house (the Senate) of the North Carolina Legislature passed a bill that would ban funding of religious courses to be offered to incoming freshmen unless the courses gave equal time to all religions.<sup>83</sup> That bill was deleted by the appropriations committee of the House and Senate in their final session of the legislation.<sup>84</sup>

Eventually, the interlocutory appeal in *Yacovelli* was withdrawn, and subsequently, the case was dismissed.<sup>85</sup> Nonetheless, the case was actively pursued for two years, and the firestorm it generated illustrates how tenuous the principles of academic freedom and the “university mission” appear since *Southworth's* indeterminacies and ambiguities have seemed to undermine them. And, there is, at least, anecdotal evidence that the lawsuit had a chilling effect on UNC's subsequent book selections.

In 2004, the book selection for the incoming freshman class at UNC was *Absolutely American: Four Years at West Point*, by David Lipsky, a former West Point cadet.<sup>86</sup> While members of the selection commit-

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80. *Board of Governors Committee Reaffirms Academic Freedom*, BULLETIN ONLINE, [http://www.ncsu.edu/BulletinOnline/08\\_02/BOGresolution.htm](http://www.ncsu.edu/BulletinOnline/08_02/BOGresolution.htm) (last visited Oct. 16, 2006).

81. *Id.*

82. *Id.*

83. S. 1115 § 9.5A, 2001–2002 Sess. (N.C. 2002) (5th ed.), available at <http://www.ncleg.net/sessions/2001/Bills/Senate/PDF/S1115v5.pdf>. The bill declares, in pertinent part:

Section 9.5A. No state funds or overhead receipts may be expended by a constituent of The University of North Carolina to offer for entering freshman students prior to their first semester for credit or otherwise any course or summer reading program in any religion unless all other known religions are offered in an equal or incremental way. This section is not intended to interfere with academic freedom, but to ensure that all religions are taught in a nondiscriminatory fashion.

*Id.*

84. See Current Operations, Capital Improvements, and Finance Act of 2002, 2001–2002 N.C. Sess. Laws, available at <http://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2001-2002/SL2002-126.pdf>.

85. See *Yacovelli v. Moeser*, 324 F. Supp. 2d 760, 765 (M.D.N.C. 2004).

86. DAVID LIPSKY, *ABSOLUTELY AMERICAN* (2003); see Bill Cessato, *Wary of Controversy, UNC-Chapel Hill Picks Book on West Point for Freshmen To Read This Summer*, CHRON. HIGHER EDUC., Feb. 26, 2004, <http://chronicle.com/daily/2004/02/2004022605n.htm>. Cessato reports that the other finalist that year was Bill McKibben's, *Enough: Staying Human in an Engineered Age* (2003). *Id.*

tee at UNC thought the book would offer an interesting read for incoming freshmen, they also acknowledged that their choice (a non-controversial one from a Religious Right viewpoint) had been heavily influenced by the pending lawsuit.<sup>87</sup> And no wonder. Following its 2002 book selection on the Koran that triggered the *Yacovelli* lawsuit, the book selection committee in 2003 chose Barbara Ehrenrich's *Nickel and Dimed: On (Not) Getting by in America*, in which she describes her first-hand experiences as one of the working poor. This also incited the Religious Right, which dubbed the book "sacrilegious."<sup>88</sup> The Religious Rights' charge has gravitas only because of the apparent imprimatur granted to the Religious Right by the emergent "viewpoint neutrality" doctrine and its consequent challenge to the "university mission" and to academic freedom on the grounds proffered by the Court's newly minted religious speech protection. Opposition to any academic program on the grounds of religious speech and association has become an extremely effective weapon. In the future, universities can reasonably fear, and will undoubtedly face, more lawsuits that must surely have a chilling effect on university policy.<sup>89</sup>

But lawsuits are not the only tactic being employed: lobbying for legislation and legislative initiatives poses a threat from another source and enlists another branch of government—the legislature. The "Academic Bill of Rights" is the most well-publicized of this kind of initiative.<sup>90</sup> This initiative is currently finding its way into state leg-

87. The Chronicle of Higher Education quotes the chairperson of the selection committee as conceding that "[w]hen we talked about a book, we thought also about imagining it in the headlines and thinking about how it would be received." *Id.*

88. *See id.*; Eric Hoover, *Chapel Hill Picks Book on Race Relations for Summer Reading Assignment*, CHRON. HIGHER EDUC., Jan. 21, 2005, <http://chronicle.com/daily/2005/01/2005012103n.htm> (stating that critics referred to the book as "pure liberal propaganda" and "Christian bigotry").

89. As an example, in 2004, students who ran a Christian newspaper at the University of Oklahoma sued the University claiming religious discrimination because they did not receive the amount they requested from the student activity fund. *See* Elizabeth F. Farrell, *2 Students Say U. of Oklahoma Fee Decision Discriminated Against Christian Newspaper*, CHRON. HIGHER EDUC., Feb. 25, 2004, <http://chronicle.com/daily/2004/02/2004022503n.htm>. A lawyer representing the organization that backed them (Alliance Defense Fund) said that the University action violated the "viewpoint neutrality" test and cited *Rosenberger* as the analogous precedent. *See id.* The Christian newspaper received only \$150 of the \$2300 it requested. *See id.* The University explained that: (1) it does not grant money to fund religious services; (2) the newspaper did not sponsor its own fund raising activities; and (3) the newspaper had "reprinted syndicated articles without copyright permission." *See id.* Nonetheless, the president of the University, after finding *no evidence of discrimination*, established an ad hoc committee that decided to give the newspaper an additional \$500 anyway. *See id.* Subsequently, the University settled the lawsuit by *changing its policy and awarded* the newspaper \$2,500 (more than its original request). *See* Elizabeth F. Farrell, *Notebook*, CHRON. HIGHER EDUC. (Wash., D.C.), Aug. 13, 2004, at A31.

90. *See* Sara Hebel, *Patrolling Professors' Politics: Conservative Activists and Students Press Campaigns Against Perceived Bias on Campuses*, CHRON. HIGHER EDUC. (Wash., D.C.), Feb. 13, 2004, at A18. The initiative was developed by David Horowitz<sup>328</sup>

isolation. It is ostensibly designed to fight liberalism and to measure diversity by ideological viewpoint, but it misperceives the nature of intellectual discourse. No less an authority than Judge Richard Posner (hardly a liberal ideologue) has said that the “Academic Bill of Rights” turns the issue inside out by compelling faculty hires on the basis of their politics, not on the quality of their academic work.<sup>91</sup> Both leaders of the “Academic Bill of Rights” initiative and the Religious Right misapprehend the nature of academic freedom and intellectual debate.<sup>92</sup> Both political ideologues and Religious Right zealots who support the “Academic Bill of Rights” initiative posit a zero-sum game between intransigent ideologues. It is their view that intellectual debate is a winner-take-all war between opposing “faiths.” In fact, intellectual debate among competing ideas in university tradition relies on the persuasive force of logic, research, and empirical evidence. In that process of expanding knowledge and understanding, the intransigence of argument based simply on faith or ideology is irrelevant.<sup>93</sup> *The Scientific American*, in a pointedly ironic April Fool’s

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president of the California-based Center for the Study of Popular Culture. *Id.* The initiative calls upon Congress to enact “principles” by which colleges and universities must abide. *Id.* These principles mandate that a diversity of ideological viewpoint be compelled in tenure decisions and in class syllabi. *Id.*

91. See Posting of Brian Leiter to Leiter Reports, <http://leiterreports.typepad.com/blog/2004/12/index.html> (Dec. 19, 2004, 5:44 PM). The posting states:

There is no doubt that the academy is to the left of the society at large; there is also no doubt that views to the right of the society at large are better represented in the academy than anywhere else. The fact remains for genuine diversity of political viewpoint, no other major institution in American society holds a candle to the universities: not corporations, not law firms, not Congress . . . . That is as it should be given the tasks charged to universities, but what is amazing is that—in keeping with the “black-is-white” moment we’re living in America . . . now *The Economist* is doing its bit to propagate this “big lie.” . . . *The Economist* attributes the academic right’s desertion of the Republican Party not to that Party’s having gone off the rails, but rather to the academy’s having done so! . . . There is no doubt that serious academic disciplines are “rigged” against Straussians [as ultra-conservatives have persuaded *The Economist*], since they are “rigged” (at least when working well) against scholarly incompetence. But how could one expect *journalists* to be able to assess that claim? One would actually have to know something, for example, about the actual quality of Allan Bloom’s translation of *The Republic* or Leo Strauss’s interpretation of the same text to realize that the absence of Straussians from philosophy and classics departments—indeed, their absence even from politics departments outside North America—is entirely *on the merits*. Let us hope that universities remain inhospitable to diversity of scholarly mediocrity.

*Id.*

92. See, for example, the discussion of the literary “culture wars” in *Canonical Transformations*, *supra* note 48, at 438–443. “[A] closer look at this most famous version of the past decades’ academic culture wars reveals certain themes that amount to a leitmotif—what we have here is not a permanent schism, but the process [of reasonable argument] by which human knowledge and understanding is refined and expanded, whatever else its bellicose visage seems to convey.” *Id.* at 443.

93. Paul Krugman, *An Academic Question*, N.Y. TIMES, Apr. 5, 2005, at A23.

Day editorial titled, "Ok, We Give Up," "apologized" for endorsing the theory of evolution: "[A]s editors, we had no business being persuaded by mountains of evidence [and in succumbing] to the easy mistake of thinking that scientists understand their fields better than, say, U.S. senators or best-selling novelists do."<sup>94</sup> The United States Congress has also weighed in on the issue.<sup>95</sup> And at least one university made a valiant but unavailing effort to accommodate the "viewpoint neutrality" craze with a five-year plan to select faculty on the basis of their "cultural competency."<sup>96</sup> Even Phi Beta Kappa's "viewpoint neutrality" had been called into question.<sup>97</sup>

This maelstrom of challenges to the "university mission" and academic freedom is directly attributable to the very questionable and certainly abstruse *Rosenberger/Southworth* "viewpoint neutrality" doctrine. In its current posture, it could reasonably be interpreted to impose an all-inclusive and mathematically balanced representation of faith and ideologically based interests in teaching and scholarship. Such an interpretation would undoubtedly imperil the American university because it completely misconstrues the purpose to which academic freedom and discourse are put. But there is no question that, as the doctrine stands today, it is a real threat to the university and its traditional role of expanding knowledge and understanding.<sup>98</sup> What legal doctrine can universities employ to balance or juxtapose these principles against the "viewpoint neutrality" doctrine? To date, there is no such doctrine.

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94. *Id.*

95. See Kelly Field, 'Political Rigidity' in Academe Undermines Federal Support for Higher Education, *Senator Tells Commission*, CHRON. HIGHER EDUC., Dec. 12, 2005, <http://chronicle.com/daily/2005/12/2005121201n.htm>.

96. See Scott Smallwood, *U. of Oregon Backs Off Plan Linking Tenure and 'Cultural Competency' After Faculty Members Balk*, CHRON. HIGHER EDUC., May 27, 2005, <http://chronicle.com/daily/2005/05/2005052702n.htm>. Interjecting a note of reason into the debate over the plan, a chemistry professor declared, "I was hired to teach chemistry and do research. . . . I wasn't hired to be evaluated and even interrogated about cultural competency, whatever that is." *Id.*

97. See Sara Lipka, *Free-Speech Group Questions Phi Beta Kappa's Commitment to Academic Freedom*, CHRON. HIGHER EDUC. (Wash., D.C.), Dec. 16, 2005, at A36, available at <http://chronicle.com/weekly/v52/i17/17a03601.htm> (reporting that when Phi Beta Kappa rejected George Mason University's bid to open a chapter on its campus, another "Rights" group, the Foundation for Individual Rights in Education, accused the honors society of inconsistently and selectively applying a speech code).

98. See *Canonical Transformations*, *supra* note 48, at 437-38 ("[G]iven the uncertain reach of *Southworth*, there is always the danger that, in the context of a particularly virulent and protracted . . . culture war [like the one we witness today], courts might be persuaded to temper traditional notions of academic freedom with some version of the viewpoint neutrality rule [that is violative of the university's mission]" ) 330

# V. THE ASSOCIATIONAL RIGHTS DOCTRINE AS A COUNTERPOISE TO THE RELIGIOUS RIGHT'S SIEGE ON FREE INQUIRY

It is somewhat unnerving to review Supreme Court case law in search of some kind of doctrine that protects the "university mission" and academic freedom. The Supreme Court's higher education cases that have raised academic freedom issues abound with eloquent tributes to academic freedom but lack any doctrinal counterpoise that would limit *Southworth's* broad and indeterminate reach.<sup>99</sup> Each carefully acknowledges and even lauds the virtues of academic freedom and/or the "university mission" with the eloquence that dicta permits; but, in each case, the constitutional grounds for the decision never rest on a doctrine addressing the special constitutional protections these bedrock canons require. An example is Justice Frankfurter's concurring opinion in *Sweezy v. New Hampshire*:<sup>100</sup>

In a university, knowledge is its own end, not merely a means to an end. . . . A university is characterized by the spirit of free inquiry, its ideal being the ideal of Socrates—"to follow the argument where it leads." This implies the right to examine, question, modify or reject traditional ideas and beliefs. . . . It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation.<sup>101</sup>

A tribute, to be sure, but one with no doctrinal teeth. What the universities require is a doctrine that is consonant with the "university mission" to expand knowledge and understanding through free inquiry and argument premised upon academic freedom. That means,

99. See generally *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 215, 226 (1985) (ruling on a narrow due process question but extolling the virtues of academic freedom); *Widmar v. Vincent*, 454 U.S. 263 (1981) (acting as the immediate precursor to *Rosenberger* and employing the public forum test to find that students' rights to use university facilities could not be trumped by the university mission); *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603-04 (1967) (ruling state Cold War legislation was unconstitutionally vague and overbroad, but also eulogizing the importance of academic freedom); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (holding was based on Fourteenth Amendment due process grounds but praising the importance of free inquiry); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (ruling state Cold War legislation was unconstitutionally vague and overbroad); *id.* at 196-98 (Frankfurter, J., concurring) (eulogizing the importance of academic freedom). More recent cases have taken a similar approach. See *Cent. State Univ. v. Am. Ass'n. of Univ. Professors*, Cent. State Univ. Chapter, 526 U.S. 124, 125 (1999) (per curiam) (deciding an academic freedom case on Equal Protection Clause grounds); *Univ. of Pa. v. EEOC*, 493 U.S. 182 (1990) (finding no academic freedom under the Constitution to withhold confidential peer review information relevant to discrimination); *Minn. State Bd. for Cmty. Colls. v. Knight*, 465 U.S. 271, 273 (1989) (finding that no special First Amendment right for academic freedom—assuming there is one—creates free speech rights of professors to oppose collective bargaining procedure). For additional cases that follow the same pattern, see *Canonical Transformations*, *supra* note 48, at 464 n.248.

100. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

101. *Id.* at 262-63 (Frankfurter, J., concurring) (quoting *The Open Universities in S. Afr.* 10-12).

at a minimum, that *Abood/Keller*<sup>102</sup> rights to exclude or silence views with which some individuals disagree must be recognized as anathema. Given the “university mission,” students’ First Amendment rights are more properly characterized as rights to be heard and included, rather than rights to silence or exclude. Another contiguous aspect of the doctrine should recognize that intellectual debate in the university context is premised upon research, empirical evidence, and logic, not upon religious faith, dogma, political affiliation, or ideology. That recognition should illuminate the dangers that the inappropriate “viewpoint neutrality” test poses. Freedom of inquiry requires a doctrine to act as a counterpoise to the overreaching and the misperceptions about open debate that the *Rosenberger/Southworth* decisions have created.

The problem posed by the *Rosenberger/Southworth* “viewpoint neutrality” rule has been recently compounded by the *Garcetti* decision denying First Amendment protections to public employees’ speech uttered in their “official duties.”<sup>103</sup> For scholars in public universities, *Rosenberger/Southworth* and, now, *Garcetti* may become the one-two punch that knocks academic freedom out of higher education. *Garcetti* has created a false dichotomy: positioning speech by government employees on cambered terrain so that public employee speech must perforce be identified either as “official duty” speech with no First Amendment protection or “citizen public issue” speech with, possibly, some First Amendment protection.<sup>104</sup> The danger of this either/or conundrum is most evident in the context of university speech. Like the amorphous taxonomies generated by the “viewpoint neutrality” test (public funded versus private funded speech and curricular versus extra curricular speech),<sup>105</sup> this new “test” for First Amendment protection seems destined to invite new challenges to academic freedom. For, in which category does classroom speech and scholarly publication belong: to the category labeled “public employment speech” or to the category marked “citizen public issue speech”? It could reasonably be argued, as Justice Souter did in his *Garcetti* dissent, that if those are our only choices, it would appear that speech generated by classroom duties and scholarly responsibilities are more a species of “public employee” rather than “private citizen” speech.<sup>106</sup> At this critical juncture it is, at the very least, prudent to press for the development of a doctrine to protect both academic freedom and the “university mission” that relies upon it.

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102. See *supra* notes 53–62 and accompanying text discussing the *Abood/Keller* rights. *Southworth* agreed with plaintiff-students that their rights, in the university context, were *Abood/Keller* rights to exclude. See *supra* note 57 and accompanying text.

103. *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1962 (2006).

104. See *id.* at 1956–62.

105. See *supra* notes 71–72 and accompanying text.

106. See *supra* note 24.

A recent decision by the Third Circuit seems to provide the doctrinal balance and counterpoise that is required to protect the kind of diversity that is espoused by the "university mission" and that is endemic to academic freedom. In *Forum for Academic & Institutional Rights, Inc. (FAIR) v. Rumsfeld*,<sup>107</sup> a group of law schools and individual faculty members<sup>108</sup> appealed a decision denying their challenge to the constitutionality of the Solomon Amendment. The named plaintiff (FAIR) argued that the amendment violated law schools' First Amendment rights. Reversing the district court decision, the Third Circuit held that the plaintiffs had stated claims that were likely to succeed on the merits.<sup>109</sup>

At the trial level, plaintiffs sought a preliminary injunction against enforcement of the Solomon Amendment asserting that: (1) it impermissibly conditioned a benefit on the relinquishment of constitutional rights in violation of the doctrine of unconstitutional conditions; (2) it discriminated against law schools that upheld their anti-bigotry policies by refusing to admit military recruiters to their premises; and (3) its opaque guidelines conferred "unbridled discretion on military bureaucrats" thereby running afoul of the void for vagueness doctrine.<sup>110</sup>

The Solomon Amendment<sup>111</sup> permits the Secretary of Defense to deny federal funding to universities (including separate graduate schools, like law school) that refuse to give military recruiters access to its students.<sup>112</sup> The Solomon Amendment (originally passed in 1994) is the most recent attempt by Congress to discourage university policies foreclosing military recruitment on campus by withholding federal financial support from universities.<sup>113</sup> The Amendment broadened the coverage of earlier legislation, and in its most recent version, it requires schools to give military recruiters access in a man-

107. 390 F.3d 219 (3d Cir. 2004).

108. Named plaintiffs included the FAIR corporation itself, a consortium for law schools; the Society of American Law Teachers; the Coalition for Equality; Rutgers Gay and Lesbian Caucus / (law professors); Pam Nickisher, Michael Blauschild, and Leslie Fischer (law students); Erwin Chemerinsky and Sylvia Law. *Id.* at 219–20.

109. *See id.* at 224.

110. *See Forum for Academic & Institutional Right, Inc. (FAIR) v. Rumsfeld*, 291 F. Supp. 2d 269, 274–75 (D.N.J. 2003).

111. 10 U.S.C. § 983(b) (2000).

112. Subsection (b) of the Amendment reads, in part:

DENIAL OF FUNDS FOR PREVENTING MILITARY RECRUITING ON CAMPUS.—No funds described in subsection (d)(2) may be provided by contract or by grant . . . to an institution of higher education . . . if the Secretary of Defense determines that that institution . . . has a policy or practice . . . that either prohibits, or in effect prevents—(1) the Secretary of a military department or Secretary of Transportation from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or (2) access by military recruiters for purposes of military recruiting to the following information pertaining to students . . . enrolled at that institution.

*Id.*

113. *See FAIR*, 291 F. Supp. 2d at 278.



ner “‘at least equal in quality and scope to that afforded to other employers.’”<sup>114</sup>

For their part, most U.S. law schools and their professional Association<sup>115</sup> operate under nondiscrimination policies that include a commitment to ensuring only prospective employers that attest to their own nondiscrimination policies would be permitted to recruit students for employment on law school premises.<sup>116</sup>

For its part, the military does discriminate on the basis of sexual orientation through its “don’t ask–don’t tell” policies.<sup>117</sup> And, in recent years, the Department of Defense has been increasingly insistent that law schools be fully compliant with the Solomon Amendment. The plaintiffs asked the court to enjoin enforcement of the Solomon Amendment on three grounds of unconstitutionality.<sup>118</sup> But the district court,<sup>119</sup> applying the established rules for injunctive relief,<sup>120</sup> found that plaintiffs were unable to show their likelihood of success on the merits of their claims. The plaintiffs were unable to show the likelihood of success because, while the spending power of Congress can not be used to condition a benefit upon a right, here, the Solomon Amendment’s interference with plaintiffs’ constitutional rights was merely “incidental” and “attenuated.”<sup>121</sup> This minimal effect does not rise to the level of the relinquishment of constitutional rights (of

114. See *id.* at 278 (quoting 32 C.F.R. § 216.4(c)(3) (2005)). The Court identified the kinds of federal funding covered by the Solomon Amendment by way of Department of Education regulations. See *id.* at 279. The coverage under the Solomon Amendment includes funding for “non-compliant” graduate schools, like law schools, as well as the university itself. See *id.* at 279–80. The most recent version of the Solomon Amendment is found at 10 U.S.C.A. ‘ 983 (West Supp. 2006).

115. AALS (American Association of Law Schools).

116. Nondiscrimination policies of most law schools protect members of any category describing national origin, age, color, gender, disability, ethnic group, race, religion, marital or parental status, or sexual orientation. *FAIR*, 291 F. Supp. 2d at 280. AALS By-Laws at Section 6-4 require member schools to observe a nondiscrimination policy with respect to employer recruitment, but the organization does permit its member schools to admit military recruiters as long as the schools take “ameliorative” measures that might include informing students that the military violates the nondiscrimination policy but is allowed to recruit because of the over-the-barrel situation created for the law schools by the Solomon Amendment. See *id.* at 281.

117. 10 U.S.C. § 654 requires that military personnel be discharged from the armed forces if it is shown that the member “engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless . . . such conduct . . . is unlikely to recur; . . . was not accomplished by use of force, coercion, or intimidation . . .” *Id.* at 281 n.3.

118. See *id.* at 274–75.

119. See *supra* note 111 and accompanying text.

120. Likelihood of success on the merits; likelihood of irreparable harm without a preliminary injunction; the harm of denying the injunction outweighs the harm of granting it; and the injunction would serve the public interest. See *FAIR*, 291 F. Supp. 2d at 296.

121. See *id.* at 299–302.

speech and association) claimed by plaintiffs.<sup>122</sup> Under a similar analysis of the facts, the court dismissed plaintiffs remaining claims.<sup>123</sup>

On appeal, the Third Circuit reversed by a vote of 2 to 1. In finding that FAIR had shown its likelihood of success on the merits, and, therefore, its entitlement to injunctive relief,<sup>124</sup> the Circuit was most persuaded by FAIR's assertion that the Solomon Amendment violated the doctrine of unconstitutional conditions.<sup>125</sup> The Circuit was persuaded by FAIR's assertion because, under the facts of the case, a benefit by the government (public funding) was being proffered on the condition that FAIR relinquish constitutional rights.<sup>126</sup>

Under the doctrine of unconstitutional conditions, FAIR could establish its free speech claim either by establishing that its "expressive association" rights were impaired or by establishing that its free speech rights were violated by "compelled speech" (because the Amendment's provisions mandated that law schools engage in "compelled speech" to support military recruiters). If FAIR established its *prima facie* case under either free speech venue, then the burden shifted to the government to show that the Amendment was the least restrictive means of effecting its program and was narrowly tailored to serve its compelling government interest—the traditional strict scrutiny test.<sup>127</sup>

The Third Circuit was persuaded that FAIR's constitutionally protected expressive association rights were impaired by the Solomon Amendment under both kinds of protected free speech. First, the Circuit found that FAIR's First Amendment rights were impaired by the

122. See *id.* at 299–305. Of particular importance, the court found the Amendment's interference did not rise to the level found by the Supreme Court in *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000). See *id.* at 305.

123. The court also ruled that plaintiffs could muster only marginal evidence for its other claims. In short, plaintiffs failed to meet their *prima facie* burden. See *id.* at 315–22.

124. See *Forum for Academic & Institutional Rights, Inc. (FAIR) v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004).

125. The test for injunctive relief employed by the Third Circuit was the traditional three factor test used by the district court: "FAIR must establish (1) a reasonable likelihood of success on the merits, (2) irreparable harm absent the injunction, (3) that the harm to FAIR absent the injunction outweighs the harm to the Government of granting it, and (4) that the injunction serves the public interest." *Id.* at 228 (citing *Tenafly Eruv Ass'n v. Tenafly*, 309 F.3d 144, 157 (2002)).

126. See *id.* at 236.

127. "Under the unconstitutional conditions doctrine, the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.'" *Id.* at 229–30 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)) (also citing *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995)) ("public university could not condition funds for student publications on their secular perspectives"). In *FAIR* we may have come full circle, balancing the *Rosenberger/Southworth* "viewpoint neutrality" doctrine (premised on the First Amendment free speech rights of the students) with the First Amendment free speech rights of "the university," with both sets of rights being protected by the doctrine of unconstitutional conditions.

Solomon Amendment under the Supreme Court's "expressive association" doctrine.<sup>128</sup> That doctrine was recently elucidated in *Boy Scouts of America v. Dale*,<sup>129</sup> a case in which, ironically, the association (Boy Scouts of America) successfully asserted its "expressive association" rights to defend itself from a claim that its termination of an openly gay assistant scout master violated New Jersey's public accommodation law.<sup>130</sup> In doing so, the Boy Scouts of America had to clear the hurdles of a three factor test: (1) that it was an "expensive association" (that is, an association that is premised upon and communicates a particular set of ideas or values);<sup>131</sup> (2) that the government action impairs the group's ability "to advocate its viewpoint,"<sup>132</sup> and (3) that the government's action cannot survive a strict scrutiny test.<sup>133</sup>

Both the district court and the Third Circuit had no trouble finding that law schools are "expressive associations." But their reasoning diverged on the second prong of the test. While the district court found the occasional presence of military recruiters on the law school premises was minimal and distinguishable from the *Dale* case (where the apparent authority of a gay scoutmaster sent a significantly conflicting message that undermined the Scouts' associational message),<sup>134</sup> the Third Circuit found *Dale* analogous. Just as the presence of a gay scoutmaster sent a message that conflicted with the Scouts' disapproval of "homosexual conduct,"<sup>135</sup> so the presence of military personnel, charged with the mission to hire under a policy that discriminates against gays, puts law schools in the constitutionally untenable position of contradicting their own anti-discrimination val-

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128. See *id.* at 235.

129. *Boy Scout of Am. v. Dale*, 530 U.S. 640 (2000).

130. See *FAIR*, 390 F.3d at 230-31 (citing *Dale*, 530 U.S. at 659).

131. The seminal case that elaborated the current "expressive association" doctrine was *Roberts v. United States Jaycees*, 468 U.S. 609, 622-23 (1984), wherein the court stated that "implicit in the right to engage in activities protected by the First Amendment [like free speech, is] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." The implied right of association:

[I]s especially important in preserving political and cultural diversity and in shielding dissident expression from the suppression by the majority. . . . Government actions that may unconstitutionally burden this freedom can take a number of forms. . . . [One of which is] intrusion into the internal structure or affairs of an association . . . [like a] regulation that forces the group to accept members it does not desire.

*Id.* 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. See *id.* at 623. Thus, "[f]reedom of association . . . plainly presupposes a freedom not to associate." *Id.*

132. See *Boy Scout of Am.*, 530 U.S. at 647-48.

133. See *id.*

134. See *id.* at 660.

135. See *id.*

ues.<sup>136</sup> The Third Circuit also disagreed with the district court on the issue of whether the occasional presence of a conflicting message was sufficient to rise to the level of an unconstitutional impairment of the association's rights to express its values. Citing its own 2004 precedent, *Circle School v. Pappert*,<sup>137</sup> where it held that the government could not compel private schools' students to recite the Pledge of Allegiance and sing the National Anthem, the Third Circuit reiterated its conclusion that "[c]ertainly, the temporal duration of a burden on First Amendment rights is not determinative of whether there is a constitutional violation."<sup>138</sup>

Moreover, the Third Circuit took issue with the district court's measure of when a conflicting message amounted to an impairment of the association's expression of its own message and values. The Third Circuit quoted *Dale*, where the Supreme Court directed that courts must "give deference to an association's view of what would impair its expression[.]"<sup>139</sup> and then applied that rule to the facts in *Dale*. The Supreme Court deferred to the Boy Scouts' view and concluded that the impairment was substantial.<sup>140</sup> By contrast, the Third Circuit pointed out that the district court in *Dale* and the district court in *FAIR* had impermissibly interjected their own conclusions as to whether the government action amounted to an impairment.<sup>141</sup>

Having found that *FAIR* cleared the first two hurdles of the "expressive association" test, the Third Circuit turned to the strict scrutiny test, acknowledging at the outset that the government's interest in hiring lawyers for the military was compelling.<sup>142</sup> But it cautioned that the nature of the interest was not enough. The means employed by the government to achieve its ends must be "narrowly tailored,"

136. See *Forum for Academic & Institutional Rights, Inc. (FAIR) v. Rumsfeld*, 390 F.3d 219, 231–32 (3d Cir. 2004).

137. *Circle Sch. v. Pappert*, 381 F.3d 172, 182 (2004).

138. See *FAIR*, 390 F.3d at 232 (quoting *Pappert*, 381 F.3d at 182 (2004)).

139. *Id.* at 233 (quoting *Dale*, 530 U.S. at 653).

140. See *id.*

141. See *id.* (citing *Dale*, 530 U.S. at 653) (explaining the district court's conclusion that there was no impairment of the Boy Scouts' message because the policy of the Scouts was to "discourag[e] its leaders from disseminating any views on sexual issues[.]" (quoting *Dale*, 530 U.S. at 654) (citation omitted)). The Third Circuit emphasized that the requisite difference compelled a finding that, on the second prong of the "expressive association" doctrine, *FAIR* was likely to prevail because—like the Scouts resisting the message that a gay scout master conveys—the military's message would undermine the association's message because the association said so. See *id.* at 233–34. The Third Circuit calls our attention to the emphasis the *Dale* court put on the association's own view that its message was impaired and how that emphasis differs from the approach taken in the seminal case of *Roberts v. United States Jaycees*, 468 U.S. 609 (1984), and in *Board of Directors of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987), where the Supreme Court did not defer to the association's view that its associational rights were impaired. See *id.* at 233 n.12. Since those seminal cases, however, the Court has regularly deferred to the association's view of what might impair its message.

142. See *FAIR*, 390 F.3d at 234, 234 n.14.

such that there are no alternative means available that would be less restrictive.<sup>143</sup> Finding the government had offered no evidence on the issue,<sup>144</sup> the court concluded that the government failed to meet its burden of showing that the Solomon Amendment process was the least restrictive means.<sup>145</sup> Conversely, the Third Circuit held that FAIR met its burden under the "expressive association" test and was likely to succeed on the merits of that claim.<sup>146</sup>

Because it is this "expressive association" doctrine that currently offers the most promising venue for developing a doctrine that would protect academic freedom and the "university mission" from political and religious incursions invited by the "viewpoint neutrality" doctrine (and the nascent "public employee speech" test), our analysis might stop here. Nonetheless, because the Supreme Court's reversal of the Third Circuit's decision in *FAIR* implicates other issues raised at the district and appellate court levels, and because these issues might also be raised in future cases challenging academic freedom and the "university mission," it might prove instructive to recapitulate the analysis of those issues as well.

Aside from the "expressive association" doctrine, an association might also prove its entitlement to constitutional protection under the "unconstitutional conditions" doctrine by showing that its speech was "compelled."<sup>147</sup> This argument was also successfully raised in an earlier case (*Hurley*) where, as in *Dale*, an association argued successfully that its protected speech of discriminating against gays was infringed upon by a government nondiscrimination statute.<sup>148</sup> In that case, the Supreme Court decided that the enforcement of the statute would compel the association to express a message with which it disagreed.<sup>149</sup> In *Hurley*, as in *Dale*, the association sought constitutional protection against inclusion of gays (here, participation of gays explicitly marching as gays in a St. Patrick's parade), and the *Hurley* Court ruled that enforcement of the state law, in this context, would compel the parade organizers to accommodate and support gay advocacy.<sup>150</sup> *Hurley's* application of the "compelled speech" doctrine is only one venue for its use. The Supreme Court has identified three venues in which the doctrine is applicable: (1) where the government compels a private party to "propagate" a government message;<sup>151</sup> (2) where the

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143. *See id.* at 234–35.

144. *Id.* at 235.

145. *See id.* ("The Government has failed to proffer a shred of evidence . . .").

146. *See id.*

147. *See id.* at 229–30.

148. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566–81 (1995).

149. *See id.* at 559.

150. *See id.* at 572–73.

151. *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (holding that states cannot require state mottoes on license plates).

government compels a private party to “accommodate” another private party’s message;<sup>152</sup> and (3) where the government compels a private party to “subsidize” the speech of another that it opposes.<sup>153</sup> FAIR asserted its constitutional rights had been infringed with respect to all three kinds of compulsion under the doctrine, and the Third Circuit agreed, reversing the district court on this issue as well.<sup>154</sup> The district court held that because recruiting was not expressive activity, but only an “economic” project, FAIR could not be said to have been compelled to propagate its message.<sup>155</sup> But the Third Circuit found that “communication of information” was one of the “hallmarks of First Amendment expression.”<sup>156</sup>

Finally, the Third Circuit took issue with the district court’s finding that the Solomon Amendment required law schools to engage in “expressive conduct,” not speech. Having found that FAIR’s interest was more properly cast as “expressive conduct,” the district court went on to apply the requisite intermediate scrutiny test, rather than the strict scrutiny test, applicable for free speech infringements. Intermediate scrutiny requires that the government prove its action: (1) is constitutional; (2) furthers an important government interest that is (3) unrelated to suppressing speech and its impact on speech is (4) merely incidental and “no greater than essential” to effect the government program.<sup>157</sup> Under this test, the district court concluded the conduct required of FAIR was merely incidental and, therefore, passed the intermediate scrutiny test.<sup>158</sup> Again, the Third Circuit took issue with the district court’s analysis and, again, did so by finding *Dale* (where the Supreme Court explicitly rejected an “expressive conduct” analysis) analogous.<sup>159</sup> Moreover, the Third Circuit opined, even under the intermediate level of scrutiny, that the government failed to meet its burden of showing that the Solomon Amendment is merely an incidental restriction on FAIR’s rights—a restriction that is not greater than is essential to the furtherance of the government’s interest in recruitment.<sup>160</sup> “[I]nvoking the importance of a well-trained military is

152. See *Hurley*, 515 U.S. at 581 (the Court held, “Disapproval of a private speaker’s statement does not legitimize use of the Commonwealth’s power to compel the speaker to alter the message by including one more acceptable to others.”).

153. See, e.g., *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 235 (1977).

154. See *Forum for Academic & Institutional Rights, Inc. (FAIR) v. Rumsfeld*, 390 F.3d 219, 235–36 (3d Cir. 2004).

155. See *Forum for Academic & Institutional Right, Inc. (FAIR) v. Rumsfeld*, 291 F. Supp. 2d 269, 307–08 (D.N.J. 2003).

156. *FAIR*, 390 F.3d at 237–38 (citing *Cochran v. Veneman*, 359 F.3d 263, 275 (3d Cir. 2004) (citation omitted) (emphasizing that the private party has the right to conclude it is being compelled to propagate, endorse, or subsidize speech with which it disagrees)).

157. See *FAIR*, *id.* at 243–45 (quoting *United States v. O’Brien*, 391 U.S. 367, 377 (1968)).

158. See *FAIR*, 291 F. Supp. 2d at 309.

159. See *FAIR*, 390 F.3d at 244.

160. See *id.* at 246.

not a substitute for demonstrating that there is an important governmental interest in opening the law schools to military recruiting.”<sup>161</sup> The Third Circuit concluded: “[T]he phrase ‘war power’ cannot be invoked as a talismanic incantation to . . . remove constitutional limitations safeguarding essential liberties.”<sup>162</sup>

But it is hard to resist the conclusion that that is precisely what the Supreme Court did on appeal by reversing the Third Circuit. Furthermore, the special deference to a military engaged in the Bush Administration’s illusive “war on terror” in Iraq was entirely predictable and consistent with the stance taken by the judiciary in the past. As the dissenting judge in the Third Circuit case said, “[I]n the entire history of the United States, no court heretofore has ever declared unconstitutional on First Amendment grounds any congressional statute specifically designed to support the military.”<sup>163</sup> With that history as prologue, the Supreme Court acknowledged that “‘judicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies[.]”<sup>164</sup> and found the district court’s analysis persuasive. In sum, the Supreme Court decided that: (1) Congress has the constitutional authority to impose a military recruitment access policy on law schools;<sup>165</sup> (2) in any case, the Solomon Amendment regulates conduct, not speech;<sup>166</sup> (3) therefore the immediate level scrutiny test applied in *O’Brien* is the appropriate test;<sup>167</sup> and (4) that test requires only that “‘an incidental burden on speech is no greater than is essential, . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.’”<sup>168</sup> Applying that rendition of the intermediate scrutiny test, without requiring any evidentiary showing by the government that other, less restrictive means were unavailable, the Court found the Solomon Amendment passed constitutional muster.<sup>169</sup> Deference, indeed.

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161. *Id.* at 245.

162. *Id.* (quoting *Rostker v. Goldberg*, 453 U.S. 57, 89 (1981)).

163. *FAIR*, 390 F.3d at 247 (Aldisert, J., dissenting). Judge Aldisert emphasizes the fact-driven nature of the case, which implicates not only Congress’ constitutional power under the Spending Clause, but also its obligations under the Constitution “to support the military.” *See id.* at 247–50.

164. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. (FAIR)*, 126 S. Ct. 1297, 1306 (2006) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

165. *See Rumsfeld*, 126 S. Ct. at 1306.

166. *See id.* at 1310–11.

167. *See id.* at 1311.

168. *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

169. *See Rumsfeld*, 126 S. Ct. at 1311. The Court argued, on behalf of the government, that “[m]ilitary recruiting promotes the substantial Government interest in raising and supporting the Armed Forces—an objective that would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers.” *Id.* This is a somewhat disingenuous statement given the gravamen of FAIR’s claim that it simply wanted to hold the government to the *same* anti-discrimination policy imposed on other prospective employers. *See id.* at 1305 (taking issue

The Supreme Court's decision in *FAIR* (finding that under the "expressive association" test, any infringements on the law schools' free speech rights were minimal and temporary) distinguished *Dale* from *FAIR*. But, for purposes of this article's thesis, it is also critical to add that, like the Boy Scouts of America in *Dale*, this Supreme Court did recognize *FAIR* as an "expressive association" entitled to First Amendment protections under the "expressive association" doctrine.<sup>170</sup> The decision clearly rests on three factors: (1) the deference historically afforded legislation in support of the military; (2) the temporary and non-curricular presence of military recruiters on law school premises; (3) and the Court's conclusion that accommodation of military recruitment affected a law school's conduct but not its associational rights of free speech. Further, the Court's conclusions about the second and third factors were, arguably, influenced by the weight of the first factors. When the special deference the facts of *FAIR* commanded is eliminated from the Court's analysis, what remains is a strong foundation for doctrinal protection of academic freedom and the "university mission."<sup>171</sup>

First, *FAIR* established that universities have First Amendment rights of "expressive association." Second, those rights protect *FAIR*'s expressive mission. In the case of most colleges and universities, public and private, that mission is to expand knowledge and understanding through a system of free inquiry and dialogic negotiations and debate that rely on arguments premised upon empiricism and logical argument. That is to say, a system premised upon "academic freedom." Third, incursions, in the form of government regulation, or private individuals and groups that seek to impair these associational rights, can succeed only if they meet the difficult requirements of the strict scrutiny test.

Thus, the associational rights for colleges and universities established in *FAIR* may serve to develop a doctrinal counterpoise to check

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with the notion, assented by amici, that all that is required under *Solomon* is even-handed application of the anti-discrimination policy). Finally, the Court simply delegated the finding of less restrictive means to the government itself: "The issue is not whether other means of raising an army and providing for a navy might be adequate. . . . That is a judgment for Congress, not for the courts." *Id.* at 1311.

170. *See id.* at 1311–12.

171. Chief Justice Roberts, writing for the Court, put it this way:

In *Dale*, we held that the Boy Scouts' freedom of expressive association was violated by New Jersey's public accommodations law, which required the organization to accept a homosexual as a scoutmaster. . . . The Solomon Amendment, however, does not affect a law school's associational rights. . . . Law schools . . . "associate" with military recruiters in the sense that they interact with them. But recruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association.

*Id.* at 1312 (emphasis added).



the Religious (and political) Rights groups' attempts to foreclose open discourse in higher education. Furthermore, when following *FAIR*, it is clear that associational rights to *include* (nondiscrimination policies in *FAIR*) are entitled to the same legal protection as associational rights to *exclude* (discriminatory policies in *Dale* and in *Hurley*). This evolution of the modern associational rights doctrine must surely remind us of the enduring commitment of a system of justice premised upon the rule of law.

## VI. CONCLUSION

What goes around, comes around. Since the 13th Century, institutions of law and higher learning have appeared to be mutually reinforcing in their quest for Freedom, Justice, and Equality. But recent assaults on the "university mission" of free inquiry and academic freedom have called our attention to the absence of any judicial doctrine protecting the "university mission" and academic freedom. The Supreme Court has been solicitous of Religious Right students seeking to exclude views that offend them. It has crafted for them a "viewpoint neutrality" test under *Rosenberger* and *Southworth* that is so indeterminate that it presents a real threat to the "university mission" and academic freedom. The recent case of *Garcetti*, holding that public employees have no First Amendment rights when they speak pursuant to their public duties, appears to compound the problem and vitiate academic freedom in public universities. There is no countervailing doctrine to protect the core values of most public and private universities. Ironically, two Supreme Court cases, *Dale* and *Hurley* (where an organization's right to *exclude* prevailed under the Court's evolving "expressive association" doctrine), may offer the best doctrinal hope for the "university mission's" goal of *inclusion* and open inquiry. While *FAIR*'s attempt to employ the doctrine to protect its anti-discrimination policy failed, there is reason to believe that the strength of the Court's traditional deference to legislation in support of the military, rather than any weakness in the law school's association rights, must explain the result in *FAIR*. Thus, *FAIR* should be remembered as an important case for developing a long-overdue doctrine to protect the "university mission" and academic freedom. The next step in the process is to establish that the "viewpoint neutrality" doctrine cannot be used to infringe upon the university's "expressive association" rights.