

THE SOLOMON AMENDMENT, EXPRESSIVE ASSOCIATIONS, AND PUBLIC EMPLOYMENT

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I. INTRODUCTION

Recently-decided labor and employment law cases have given employees in the United States little reason to cheer. With the National Labor Relations Board potentially denying collective bargaining rights to large groups of private sector employees in its recent *Kentucky River* supervisor trilogy rulings,¹ and with public employees seeing First Amendment protections substantially diminished in so-called “official-capacity” speech cases in light of the United State Supreme Court’s decision in *Garcetti v. Ceballos*,² the lone bright spot for employees has been the robust interpretation given by the Supreme Court to anti-retaliation provisions under Title VII of the Civil Rights Act of 1964³ in *Burlington Northern & Santa Fe Railroad v. White*.⁴

With all of these highly important cases being decided during the past year, employment law commentators have paid little attention to the Solomon Amendment case of *Rumsfeld v. FAIR*⁵ and its discussion of the right to expressive association under the First Amendment.⁶ This is hardly

¹ See *Oakwood Healthcare, Inc.*, 348 NLRB No. 37 (Sept. 29, 2006) (finding certain charge nurses in acute-care hospital fell within the definition of “supervisor” set forth in Section 2(11) of the National Labor Relations Act (“NLRA”)); *Golden Crest Healthcare Center*, 348 NLRB No. 39 (Sept. 29, 2006) (concluding charge nurses at nursing home were not supervisors for purposes of the NLRA); and *Croft Metals, Inc.*, 348 NLRB No. 38 (Sept. 29, 2006) (holding lead persons working in manufacturing facility were not supervisors under the Act). As problematic as these decisions may become for the labor movement, at least some commentators believe the decisions could have been worse for unions. See, e.g., Jeff Hirsch, *Board Decides “Kentucky River” Cases*, WORKPLACE PROF BLOG, at http://lawprofessors.typepad.com/laborprof_blog/2006/10/board_decides_k.html (October 3, 2006) (“My personal take on these cases is that they're not great for unions, but they could have been worse.”).

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

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

⁴ 126 S. Ct. 2405, 2415 (2006) (eschewing more stringent standard in favor of one based on showing reasonable employee would have found retaliatory action materially adverse).

⁵ 126 S. Ct. 1297 (2006).

⁶ See *id.* at 1311-13.

surprising given the less than obvious employment law connections. Nevertheless, there are some very real, if unintended, employment law consequences stemming from this decision.

Since the constitutional right to association was first recognized in the civil right cases of the 1950s and 1960s,⁷ there has never been a satisfactory conception of what groups make up protected associations for First Amendment purposes. This fact has been lamented by Professor Andrew Morriss in his recent pre-FAIR piece⁸ as well as by others scholars.⁹ Together, they point out that past Supreme Court expressive association cases like *Roberts v. United States Jaycees*,¹⁰ *Bd. of Dirs. of Rotary Int'l v. Rotary Club on Duarte*,¹¹ and *Boy Scouts of Am. v. Dale*,¹² really do not say much, outside of their own examples, about how to determine who is and who is not an expressive association.¹³

Not only did FAIR not help matters in this regard, but it made matters worse by inadvertently finding that public employers, in the guise of public law school members of the FAIR association,¹⁴ have expressive association

⁷ See *infra* Part III.A.

⁸ See Andrew P. Morriss, *The Market for Legal Education & Freedom of Association: Why the "Solomon Amendment" Is Constitutional and Law Schools Are Not Expressive Associations*, 14 WM. & MARY BILL RTS. J. 415, 444 (2005) ("The Supreme Court's expressive association cases are ... of little direct guidance on the question of what constitutes an expressive association largely because that issue has not yet arisen in a case before the Court.").

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

¹⁰ 468 U.S. 609 (1984).

¹¹ 481 U.S. 537 (1987).

¹² 530 U.S. 640 (2000).

¹³ See Farber, *supra* note 9, at 1498 ("So far, the Court has given us a series of examples without any defining principle."); Mazzone, *supra* note 9, at 680 ("As the doctrine of freedom of association has developed the examples are all the rules we have."); Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 215 (2003) ("[O]ne looks in vain to *Dale* for some persuasive, principled, or even predictable limit on the First Amendment protections enjoyed by associations.").

¹⁴ FAIR includes law schools as institutions and law school faculties, but both are treated collectively as "law schools" under the Court's analysis

rights.¹⁵ Now, this point did not impact the decision in *FAIR* itself, because even though such institutions were expressive associations, it was found that the Solomon Amendment's requirement of equal access of military recruiters on law school campuses did not unconstitutionally burden law schools' expressive association rights.¹⁶ Nevertheless, the future consequences could be far reaching if public employers are considered to have First Amendment rights to expressive association like the *FAIR* public law schools. Specifically, this could mean that public employers would gain constitutional rights at the expense of public employees' civil liberties and civil rights.¹⁷

Thankfully, it is hard to imagine that the Court, if faced with the question directly, would find that public employers have First Amendment rights of any kind. This interpretation of the First Amendment is structurally unsound from the standpoint that the Bill of Rights protects the governed, not the governing.¹⁸ To the extent that public employers have interests in promoting messages consistent with their public mission and image, it is better to conceive of these interests as the same as those discussed in the *Pickering*¹⁹ line of cases concerning the need for governmental efficiency and lack of disruption in the public employment sector when discussing public employee First Amendment rights.²⁰ Moreover, in order to keep these governmental interest within reasonable bounds, the government speech doctrine discussed in *Ceballos* should be limited to those public employees who are specifically hired to promote the government's message and not too all employees who engage in conduct pursuant to their job duties.²¹

The purpose of this paper then is to point out an inadvertent error that the Court made in *FAIR* on its way to doing the heavy analytical lifting and thus, permit this judicial misstep to be corrected before the finding of public

in *FAIR*. See *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1302, 1312-13; see also *infra* note x. Of the known members of the association, four are public law school faculties. See *infra* note x.

¹⁵ See *infra* Part II.C.; see also Morriss, *supra* note 8, at 440 ("One indication that the lower courts [in *FAIR*] paid insufficient attention to this [expressive association] element is their failure to consider state law schools as members of *FAIR*.").

¹⁶ See *FAIR*, 126 S. Ct. at 1312-13.

¹⁷ See *infra* Part IV.

¹⁸ See *infra* Part V.A.

¹⁹ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

²⁰ See *infra* Part V.B.1.

²¹ See *infra* Part V.B.2.

employer expressive associations causes substantial harm to public employee civil liberties and civil rights in the workplace. The paper also hopes to spur the Court in future cases to fashion a coherent constitutional analysis in these cases by utilizing the *Pickering* doctrine and limiting the application of the *Ceballos* government speech analysis.

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

II. *RUMSFELD V. FAIR*

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

The recently-decided First Amendment case of *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*,²² also colloquially referred to as the Solomon Amendment case, stems from the very first days of the Clinton Administration in the early 1990s when a legislative compromise was struck concerning the inclusion of homosexual individuals within the American military services.²³ Whereas previously the military had more

²² 126 S. Ct. 1297 (2006).

²³ See Morriss, *supra* note 8, at 434 (discussing the history surrounding the military's DADT policy) (citing Eugene R. Milhizer, "*Don't Ask, Don't*

actively sought to exclude homosexual members from the military,²⁴ the new “don’t ask, don’t tell” (DADT) policy shielded homosexuals from being dismissed from military service as long as they did not engage in homosexual acts, state that they were homosexuals, or marry a person of the same sex.²⁵ Not surprisingly, most homosexuals and their supporters were unhappy with this compromise and continue to this day to fight to allow openly-gay individuals into military service.²⁶ Nevertheless, the DADT policy remains in effect as of the writing of this article in early 2007 and has been found to be constitutional by several federal appellate courts.²⁷

In solidarity with opponents of the DADT policy and consistent with their own non-discrimination policies which, among things, prohibits recruiters from engaging in sexual orientation discrimination,²⁸ a number of law schools began restricting access to their campuses by military recruiters.²⁹ In response to these schools placing obstacles in the way of military recruiters, Congress enacted the Solomon Amendment which prevents colleges and universities from receiving certain federal funding³⁰ if

Tell”: A Qualified Defense, 21 Hofstra Lab. & Emp. L.J. 349, 351-66 (2004)).

²⁴ *See id.*

²⁵ 10 U.S.C.A. § 654(b) (West 1998).

²⁶ For instance, the Service Members Legal Defense Network is currently mounting a campaign to persuade Congress to repeal the DADT policy and allow homosexuals to serve openly in the armed services. *See* Service Member Legal Defense Network Take Action Lobby Day 2007, <http://gal.org/sldn/events/lobbyday07/details.tcl> (last visited January 7, 2007) (setting out information for group lobbying effort in March 2007 in Washington D.C. to repeal DADT).

²⁷ *See* *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126 (9th Cir. 1997). The policy continues to be challenged on constitutional grounds, but without success. *See* *Cook v. Rumsfeld*, 429 F. Supp. 2d 385 (D. Mass. 2006) (dismissing challenge to DADT policy on Rule 12(b)(6) motion for failure to state a claim).

²⁸ As of 1990, the Association of American Law Schools requires member schools to adopt nondiscrimination policies on the basis of sexual orientation. *See* Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 6, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03 Civ. 4433 (JCL)).

²⁹ *See* *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1302 (2006).

³⁰ Although student financial assistance is not covered by the law, federal funding from the Departments of Defense, Homeland Security,

they prohibit military recruiters "from gaining access to campuses, or access to students . . . on campuses, for purpose of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."³¹

Many law schools believed that the Solomon Amendment required them to choose between abandoning their nondiscrimination policies or lose a substantial amount of federal funding.³² A group of public and private law schools and faculties, called the Forum for Academic and Institutional Rights, Inc. (FAIR),³³ sued for entry of a preliminary injunction against enforcement of the Solomon Amendment, arguing that the law impermissibly infringed on law schools' First Amendment rights of speech and association.³⁴

Transportation, Labor, Health and Human Services, and Education, among other agencies, may be lost at the university-wide level if schools do not comply with the Solomon Amendment. *See* 10 U.S.C. § 983(d)(1), (2).

³¹ *Id.* § 983(b) (Supp. 2005). In its first iteration, the Solomon Amendment withdrew federal funds from higher education institutions that prevented military recruiters "from gaining entry to campuses." However, the Department of Defense later adopted an informal policy that "entry to campus" meant that universities had to provide military recruiters access to their students equal in quality and scope as that provided to other recruiters. *See FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 283 (D.N.J. 2003). This equal access requirement was formally codified by Congress into the Solomon Amendment in 2004 as a result of litigation of this matter in the district court. *See* Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911-12 (2004).

³² *See FAIR*, 126 S. Ct. at 1303.

³³ The declared mission of FAIR is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *See id.* at 1302. According to SolomonResponse.Org, FAIR consists of 36 participating law schools, including 24 faculties and 12 institutions. *See FAIR Participating Law Schools*, SOLOMONRESPONSE.ORG, at http://www.law.georgetown.edu/solomon/participating_schools.html (last visited Jan. 14, 2007). Of these, only 24 are publicly known, as the remaining members have chosen to remain anonymous for fear of retaliation from the government and private actors for their stance on this issue. *See FAIR*, 291 F. Supp. 2d at 286.

³⁴ *FAIR*, 126 S. Ct. at 1302.

B. Rumsfeld v. FAIR

After the district court found in favor of the government³⁵ and then the Third Circuit Court of Appeals reversed in a divided opinion and found in favor of FAIR,³⁶ the United States Supreme Court unanimously³⁷ found that the Solomon Amendment did not infringe FAIR's freedoms of speech and association under the First Amendment. The Court's opinion can be divided into two parts: statutory and constitutional.

1. The Statutory Argument

In the first section, the Court considered whether the case could be disposed on statutory grounds as proposed by a brief filed by a number of law professor *amici*.³⁸ These professors believed that the equal access requirement of the Solomon Amendment could be read to allow law schools to apply a general nondiscrimination policy to exclude military recruiters. In other words, as long as law schools excluded other recruiters that violated their nondiscrimination policies, it could treat military recruiters in the same fashion.³⁹ The Court made short-shrift of this argument.

As an initial matter, both the government and FAIR did not believe this to be the meaning of the equal access requirement of the Solomon Amendment. Both read the statute to say that in order for a law school and its university to receive federal funding, the same access must be afforded to campus and students by military recruiters as that received by other non-military recruiters.⁴⁰ The Court agreed with the Government and FAIR, finding that the proper focus of the statute was not on the content of a school's recruiting policy, but instead on the result achieved by the policy.⁴¹ At the end of the day, the Court observed, the Solomon Amendment requires that military recruiters must be given the same level of access to law schools as other recruiters who comply with the law schools'

³⁵ See *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003).

³⁶ See *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004).

³⁷ Justice Alito did not participate in the decision, so *FAIR* was actually an 8-0 decision. See *FAIR*, 126 S. Ct. at 1302.

³⁸ See *id.* at 1304-05 (citing Brief for William Alford et al. as *Amici Curiae* 10-18; Brief for 56 Columbia Law School Faculty Members as *Amici Curiae* 6-15).

³⁹ *Id.* at 1305.

⁴⁰ *Id.* at 1304.

⁴¹ *Id.* at 1305

nondiscrimination policies.⁴²

2. The Constitutional Arguments

Having rejected the statutory argument, the Court next considered whether the First Amendment prevented the government from imposing the Solomon Amendment access requirements on law schools. The Court began with the proposition that Congress has great latitude in enacting legislation to raise and support armies⁴³ and requiring campus access for military recruiters falls under that power unless Congress exceeds other constitutional limitations, such as those imposed by the First Amendment.⁴⁴ Nevertheless, even though the power to raise and support armies is subject to First Amendment constraints, more deference has been historically given to Congress when it enacts military-related legislation.⁴⁵

The Third Circuit Court of Appeals, in finding for FAIR, had concluded that the conditions placed on university federal funding by the Solomon Amendment amounted to an impermissible unconstitutional condition and therefore, exceeded the constitutional limitations placed on Congress' power to raise and support armies.⁴⁶ Under the doctrine of unconstitutional conditions, "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech even if he

⁴² *Id.* ("Applying the same policy to all recruiters is therefore insufficient to comply with the statute if it results in a greater level of access for other recruiters than for the military."). The Court also pointed out that the recent amendments to the Solomon Amendment would make little sense if the *amici* professors interpretation of the statute were adopted. *See id.* at 1305-06 ("Under *amici*'s interpretation, this legislative change had no effect -- law schools could still restrict military access, so long as they do so under a generally applicable nondiscrimination policy That is rather clearly *not* what Congress had in mind in codifying the DOD policy.") (emphasis in original).

⁴³ Congress has the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy," under Article I of the Constitution. U.S. CONST. ART. I, § 8, cls. 1, 12-13.

⁴⁴ *FAIR*, 126 S. Ct. at 1306.

⁴⁵ *Id.* (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981) ("[J]udicial deference ... is at its apogee" when Congress legislates under its authority to raise and support armies)).

⁴⁶ *See id.* at 1304 (citing *FAIR v. Rumsfeld*, 390 F.3d 219, 229-243 (3d Cir. 2004)).

has no entitlement to that benefit."⁴⁷ The law schools argued that the Solomon Amendment placed an unconstitutional condition on them because it forced them to choose between forfeiting their First Amendment rights and losing federal funding for their schools.⁴⁸ The Court observed, however, that a funding condition is not unconstitutional if it could be constitutionally imposed directly,⁴⁹ and therefore considered next whether directly imposing the Solomon Amendment's access requirement would violate the law schools' First Amendment rights to free speech or association.

a. Free Speech Arguments

The Court first explored three different constitutional free speech arguments made by FAIR.⁵⁰ FAIR argued that the Solomon Amendment compelled them to speak the Government's message, required them to host or accommodate the military's speech, and unconstitutionally infringed on their right to engage in expressive conduct.⁵¹ The Court rejected all three of these arguments, finding generally that the Solomon Amendment did not require the FAIR schools to say or do anything.⁵² More specifically, the Court found that there was not a government-mandated pledge or motto that

⁴⁷ *Id.* at 1307 (citing *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003)).

⁴⁸ *Id.* at 1304.

⁴⁹ *Id.* at 1307 (citing *Speiser v. Randall*, 357 U.S. 513, 526 (1958)).

⁵⁰ Because the free speech contentions in *FAIR* are not central to the argument in this paper, it is enough to provide a cursory overview of these arguments and their resolution by the Court. The Court also cursorily rejected a fourth argument adopted by the Third Circuit that the Solomon Amendment violated the First Amendment because it compelled the law schools to subsidize government speech. *See id.* at 1307 n.4. In *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005), however, the Court made clear that citizens no longer have a First Amendment right not to fund government speech and thus, it found no basis for a First Amendment challenge on these grounds.

This article returns later to this government speech doctrine in the public employment context in discussing how employee First Amendment constitutional rights and public employer efficiency interests should be balanced. *See infra* Part V.B.2.

⁵¹ *FAIR*, 126 S. Ct. at 1307.

⁵² *Id.*

the law schools had to endorse as in *West Virginia Bd. of Ed. v. Barnette*⁵³ or *Wooley v. Maynard*,⁵⁴ there was no requirement that the law schools accommodate a government message that interfered with the law school's desired message as in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc.*,⁵⁵ *Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal.*,⁵⁶ or *Miami Herald Publishing Co. v. Tornillo*,⁵⁷ and there was no conduct that amounted to expressive conduct as in *United States v. O'Brien*⁵⁸ or *Texas v. Johnson*.⁵⁹

b. Associational Arguments

Having determined that the Solomon Amendment did not violate the law schools' freedom of speech, the Court next turned to whether the law

⁵³ 319 U.S. 624, 642 (1943) (holding unconstitutional state law that required school children to recite the pledge of allegiance in school).

⁵⁴ 430 U.S. 705, 717 (1977) (holding unconstitutional state law that required New Hampshire motorists to place on their automobiles' license plates the state motto "Live Free or Die").

⁵⁵ 515 U.S. 557, 566 (1995) (holding unconstitutional state law requiring parade to include group with message was antithetical to those of the parade organizers). With regard to *Hurley*, the Court concluded that unlike the decision surrounding who participates in a parade, allowing military recruiters on law school campuses is not inherently expressive, and does not sufficiently interfere with any message the law school wishes to send. See *FAIR*, 126 S. Ct. at 1309-10.

⁵⁶ 475 U.S. 1, 20-21 (1986) (plurality opinion) (holding unconstitutional law that allows state utility commission to place third-party newsletter in electric company billing envelopes).

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

⁵⁸ 391 U.S. 367, 376 (1968) (holding that burning of draft card expressive conduct subject to First Amendment protection).

⁵⁹ 491 U.S. 397, 406 (1989) (holding that burning American flag expressive conduct protected by the First Amendment). Even if the *O'Brien* test was appropriately applicable to the expressive conduct in *FAIR*, the Court concluded in the alternative that the Solomon Amendment was a neutral regulation that promoted a substantial governmental interest (i.e., raising and supporting armies) that would be achieved less effectively absent the regulation. See *FAIR*, 126 S. Ct. at 1311 (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

violated the schools' rights to expressive association as outlined in the case of *Boy Scouts of America v. Dale*.⁶⁰ Although neither the right to expressive association, nor any other type of "association," is found within the text of the First Amendment to the United States Constitution,⁶¹ such a right has nevertheless been implicitly found in the Constitution by the Court.⁶² This is because the ability to associate with others increases one's ability to engage in expression protected by the Constitution.⁶³ In this regard, the Supreme Court has commented that an "individual's freedom to speak, to worship, and to petition the Government for the redress of grievances could not be vigorously protected from interference by the state unless a correlative freedom to engage in group effort toward those ends

⁶⁰ 530 U.S. 640, 644 (2000) (holding New Jersey public accommodation statute unconstitutional because it violated the Boy Scouts' expressive association rights by requiring them to accept a homosexual assistant scoutmaster as a member).

⁶¹ U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

⁶² See *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984) ("[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with other in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."); see also *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449, 461 (1958) (labeling such rights as an indispensable part liberty on the same plane as the rights to speech, press, or association).

⁶³ *Patterson*, 357 U.S. at 460. Professor Chemerinsky explains more practically that because groups have resources in human capital and money, such groups enhance an individual's freedom to engage in protected constitutional activities. See Erwin Chemerinsky, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 1113 (2d ed. 2002); see also *New York State Club Assoc. v. City of New York*, 487 U.S. 1, 13 (1988) ("The ability and opportunity to combine with others to advance one's view is a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed to individuals as against the government."); Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515, 1519 (2001) ("[The First Amendment's] chief value may be the role it plays in protecting people who want to combine with others to promote common causes.").

were not also guaranteed."⁶⁴ FAIR argued that the Solomon Amendment violated the law schools' rights to expressive association by inhibiting their ability to express their message that discrimination on the basis of sexual orientation is wrong by forcing them to have military recruiters on their campuses.⁶⁵

As outlined in *Dale* and other expressive association cases, such claims require that three elements be established: (1) the group is an expressive association; (2) forced inclusion of outsiders would significantly affect the group's expression, and (3) the government's interests do not justify this intrusion.⁶⁶ In *FAIR*, the Court spent much time on the second and third elements on the law schools' expressive association claim, but very little on the first.

Finding without analysis that FAIR was an expressive association,⁶⁷ the Court concluded that the Solomon Amendment did not significantly burden the law schools' associational rights and thus, did not need to waste ink on justifying the government's intrusion on those rights.⁶⁸ More specifically, the Court concluded that although law schools associate to some extent with military recruiters in that they interact with them, these same recruiters do not come to campus seeking to become members of the schools' expressive association.⁶⁹ Moreover, even though the right to expressive association protects more than just membership decisions, the Solomon Amendment also does not make group membership in the law schools less attractive, as law school students and faculty are free to voice their disapproval of the military's DADT policy while the recruiters are on campus.⁷⁰

Having come to this determination on FAIR's expressive association

⁶⁴ *Roberts*, 468 U.S. at 622; *FAIR v. Rumsfeld*, 126 S. Ct. 1297, 1312 (2006) ("If the government were free to restrict individuals' ability to join together and speak, it could essentially silence the views that the First Amendment is intended to protect.").

⁶⁵ *FAIR*, 126 S. Ct. at 1312.

⁶⁶ *Id.* (citing *Dale*, 530 U.S. at 655-59).

⁶⁷ The missing part of the *FAIR* Court's expressive association analysis is discussed in detail *infra* Part II.C.

⁶⁸ *FAIR*, 126 S. Ct. at 1312.

⁶⁹ *Id.* In other words, there is no expressive association violation because "the Solomon Amendment does not force a law school 'to accept members it does not desire.'" *Id.* (quoting in part *Dale*, 530 U.S. at 648; *Roberts*, 468 U.S. at 623).

⁷⁰ *Id.* at 1312-13 ("A military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message.").

claims, the court concluded that the Solomon Amendment neither violated the FAIR law schools' free speech nor association rights, finding instead that FAIR "had attempted to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."⁷¹

C. *The Missing Expressive Association Analysis*

But the Court is the one who seems to have unwittingly "stretched" one First Amendment doctrine too far by not taking the time to analyze whether all members of FAIR, including its state law school members, should have expressive association rights.⁷² With regard to whether FAIR is an expressive association, all the Court stated in this regard is the following:

- "The Solomon Amendment, however, does not similarly affect a *law school's associational rights*."⁷³
- "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*."⁷⁴
- "The Solomon Amendment has no similar effect on a *law school's associational rights*."⁷⁵
- "The Solomon Amendment therefore does not violate a *law school's First Amendment rights*. A military recruiter's mere presence on campus does not violate a *law school's right to associate*, regardless of how repugnant the law school considers the recruiter's message."⁷⁶

Note that in all of these passages from the opinion the Court is not assuming *for the sake of argument* that FAIR is an expressive association, it is saying that FAIR *is* an expressive association and doing so with a glaring absence

⁷¹ *Id.* at 1313.

⁷² See Morriss, *supra* note 8, at 440 ("One indication that the lower courts [in *FAIR*] paid insufficient attention to this [expressive association] element is their failure to consider state law schools as members of FAIR.").

⁷³ *FAIR*, 126 S. Ct. at 1312 (emphasis added).

⁷⁴ *Id.* (emphasis added).

⁷⁵ *Id.* at 1313 (emphasis added).

⁷⁶ *Id.* (emphasis added).

of any analysis on this point whatsoever.⁷⁷

So what's the big deal? After all, FAIR lost the case. No harm, no foul. The issue lurking is that the Court implies that public law schools, as members of the FAIR association, have expressive association rights.⁷⁸

⁷⁷ *Accord* David Fagundes, *State Actors As First Amendment Speakers*, 100 N.W. U. L. REV. 1637, 1685 (Summer 2006) (noting in *FAIR* that, “[a]lthough the Court did not explicitly address the issue of state actors’ First Amendment rights, its decision proceeded on the premise that both public and private universities possess constitutional speech rights.”); *see also* Morriss, *supra* note 8, at 416 (arguing that the Third Circuit in *FAIR* improperly treated the law schools and their faculties as worthy of associational freedom claims).

⁷⁸ As far as public versus private members of FAIR, of the known members, there are no public institutions and four public faculties: The Faculty of the City University of NY (CUNY) Law School, The Faculty of the District of Columbia David A. Clarke School of Law, The Faculty of the University of Minnesota Law School, and The Faculty of the University of Puerto Rico Law School. *See FAIR Participating Law Schools, supra* note x. As far as institutional membership versus faculty membership, the *FAIR* Court does not make any distinction between FAIR in this regard in any part of its analysis, *see supra* note x, suggesting that recognition of FAIR law school faculties as expressive associations is tantamount to recognizing public law schools as expressive associations for purposes of the First Amendment analysis. *Accord* *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 185 (D. Conn. 2005) (finding Yale Law School Faculty members may successfully assert expressive association claim on behalf of Yale Law School in another challenge to the Solomon Amendment).

Interestingly, in the *Burt* case in an early decision by the same Court, the Department of Defense defended on the ground that, “Yale University, not the Faculty, is the proper party to bring these claims.” *Id.* at 160. But in that earlier case, the Court found that the Faculty Members “were the governing body of YLS.” *Burt v. Rumsfeld*, 322 F.Supp.2d 189, 199-200 (D. Conn. 2004). Thus, whether law faculties may be able to assert an expressive association claim on behalf of their law schools may in turn depend on whether they establish the rules, by majority, that govern and regulate their law school. *See also* Morriss, *supra* note 8, at 452 n. 161 (in discussing the membership of FAIR commenting that, “[i]t is unclear what distinction is intended by the description of ‘about half’ of FAIR’s members as ‘law schools’ and the other half as ‘law faculties.’ It may indicate something about the official position of the dean.”). For purposes of this article, it is assumed that at least one, if not more, of the FAIR public law

And even though the Court found in *FAIR* itself that those rights were not significantly burdened by the Solomon Amendment and there was not a First Amendment violation, one could foresee these public law schools and other public employers generally, arguing in future cases that their expressive association rights permit them to not accept employee members they do not desire.⁷⁹ Indeed, the *FAIR* Court's expressive association analysis hinges to a large degree on the critical point that military recruiters were not seeking to become "members" of the schools' expressive association.⁸⁰ On the other hand, employees in the form of faculty and staff seek to become such members and *FAIR*, consistent with *Dale*, suggests that expressive association rights give a group the ability not to accept members it does not want.⁸¹

Nor is there anything in past Supreme Court precedent to suggest that employers *per se* cannot be expressive associations. In fact, the Court in *Hishon v. King & Spalding* implied just the opposite.⁸² Such recognition of public employer constitutional rights could cause a seismic shift in the ongoing balancing of competing public employer and public employee interests, with the likely result being the diminishment of civil liberties and civil rights for public employees.

In order to explain how the Court arrived at this unintended state of affairs, the next section explores how previous expressive association cases have provided little clue, beyond their own examples, as to the meaning of an expressive association. The hope is that this brief review of previous expressive association cases will clarify how the *FAIR* Court could have blundered, unanimously, into this significant, inadvertent constitutional

school faculties have the same powers in this regard as the Yale Law School Faculty and could bring expressive association claims on behalf of their law schools.

⁷⁹ For a discussion of the implication of public employer expressive associations on employee civil rights and civil liberties, *see infra* Parts IV.B and IV.C.

⁸⁰ *FAIR*, 126 S. Ct. at 1312.

⁸¹ *Id.*; *Dale v. Boy Scouts of Am.*, 530 U.S. 640, 653 (2000).

⁸² 467 U.S. 69, 78 (1984) (conceding employers could have rights to association for certain purposes, such as when they make distinctive contributions to ideas and beliefs of society). That being said, not all employment decisions are necessarily expressive. *See Carpenter, supra* note 63, at 1577 (pointing out that a school might have expressive association rights when it chooses teachers, who are hired to instill children with values, but not when selecting maintenance or secretary personnel). For a more in-depth examination of *Hishon*, *see infra* Part III.A.3.

holding.

III. THE HISTORICALLY ELUSIVE MEANING OF EXPRESSIVE ASSOCIATION

The following narrative places emphasis on exactly how the United States Supreme Court has determined whether a group qualifies as an expressive association, as opposed to whether the Court found an expressive association violation. As will become clear, the Court has yet to articulate an adequate definition for this constitutional concept.

A. *Historical Foundations (1958-1984)*

1. NAACP v. Alabama ex rel. Patterson

Interestingly enough, the development of expressive association rights closely mirrors the progress of the civil rights movement of the second half of the 20th Century. Indeed, it was in the 1958 Supreme Court decision of *NAACP v. Alabama ex rel. Patterson*⁸³ that the Court first noted that the ability to associate was a necessary predicate to being able to more fully exercise one's constitutional rights, including and especially those contained in the First Amendment.⁸⁴

In *Patterson*, in furtherance of a transparent attempt to oust the NAACP from the state, Alabama sought the production of many documents including the name and addresses of all NAACP members.⁸⁵ In an opinion by Justice Harlan, the Court unanimously found that Alabama could not compel the NAACP to disclose its membership lists consistent with the NAACP's members' rights to associate with others to promote its common

⁸³ 357 U.S. 449 (1958).

⁸⁴ *Id.* at 460. Other commentators have commenced their historical exploration of the expressive association right with earlier cases. *See, e.g.*, Carpenter, *supra* note 63, at 1520-21 (starting expressive association analysis with cases surrounding Espionage Act of 1917); McGowan, *supra* note 13, at 126 (beginning historical analysis of expressive association right with the Court's opinion in *United States v. Cruikshank*, 92 U.S. 542 (1875)). Although there are plausible reasons to start the historical analysis at other places, I start with *Patterson* because it represents the first time that the Supreme Court explicitly recognized a First Amendment right to freedom of association, *see* Carpenter, *supra* note 63, at 1524, and this paper's focus is on what constitutes a constitutionally-protected expressive association.

⁸⁵ *Patterson*, 357 U.S. at 453.

integrationist views.⁸⁶ In support of this conclusion, the court noted that effective advocacy on behalf of one's cause is enhanced by group association.⁸⁷ Moreover, outing the NAACP members would make membership in the group less attractive, thereby putting a substantial restraint on the members' freedom to associate for a common cause.⁸⁸

Notably, the discussion of the right to associate in *Patterson* assumes the right to associate belongs to the members of the group, not to the group itself.⁸⁹ In other words, there is no argument in *Patterson* that the NAACP itself had a right to association as an entity. Consequently, at this early time in the development of the doctrine, there was no need for a conception of what groups constitute constitutionally protected associations.

2. NAACP v. Button

A few years later, the Supreme Court again had occasion to consider the scope of associational rights in another case concerning the NAACP, although this time the Court recognized the NAACP itself had rights to association. At issue in *NAACP v. Button*⁹⁰ was whether Virginia could prevent the NAACP from recruiting parents to participate in desegregation cases.⁹¹ The Supreme Court again found in favor of the NAACP, finding that its activities were types of expression and association protected by the First and Fourteenth Amendments.⁹²

In coming to this conclusion, the Court recognized that organizations like the NAACP possess rights to associate, separate and apart from the rights of their members, to engage in such association for the purposes of advocacy.⁹³ Perhaps because the NAACP was an expressive association

⁸⁶ *Id.* at 466.

⁸⁷ *Id.* at 460. Specifically, the Court found that, "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech." *Id.*

⁸⁸ *Id.* at 462 ("Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.").

⁸⁹ *Id.* (referring to the associational rights at issue in *Patterson* as members rights to freedom of association); *see also id.* at 466 (commenting that NAACP claiming rights to association on behalf of its members).

⁹⁰ 371 U.S. 415 (1963).

⁹¹ *Id.* at 421.

⁹² *Id.* at 428-29.

⁹³ *See id.* ("We think [the NAACP] may assert this right *on its own*

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

3. *Hishon v. King & Spalding*

After *Patterson* and *Button*, there then followed in the 1970s two cases involving racially discriminatory private schools and their rights to association.⁹⁴ In both of these cases, however, private schools were again assumed, without analysis, to constitute associations for constitutional purposes (even those such claims ended up being trumped by state interests). However, in 1984, the Court considered a question which had not been addressed before; namely, whether private employers could be considered associations due constitutional protection.

*Hishon v. King & Spalding*⁹⁵ concerned a law firm partnership decision which was alleged to be based on unlawful gender discrimination in violation of Title VII of the Civil Rights Act of 1964.⁹⁶ On the Title VII issue in contention, the Court found that such partnership decisions were rightly considered a term, condition, or privilege of employment, and therefore, a covered employment decision under Title VII.⁹⁷ One of the law firm's arguments against this finding was that such an interpretation of Title VII would unconstitutionally interfere with the law firm's rights to

behalf, because, though a corporation, it is directly engaged in those activities, claimed to be constitutional protected, which the [Virginia] statute would curtail.") (citing *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)). *Grosjean* held that "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses." 297 U.S. at 244 (citing *Covington & L. Turnpike Road Co. v. Sandford*, 164 U.S. 578, 592 (1896); *Smyth v. Ames*, 169 U.S. 466, 522 (1898)).

⁹⁴ See *Norwood v. Harrison*, 413 U.S. 455 (1973) (holding Mississippi textbook loan program unconstitutional in lending textbooks to students in racially discriminatory private schools and finding that state need not subsidize more effective exercise of private school's right to association); *Runyon v. McCrary*, 427 U.S. 160 (1976) (finding federal civil rights law prohibits racially discriminatory admission practices at private schools even assuming schools have associational rights).

⁹⁵ 467 U.S. 69 (1984).

⁹⁶ *Id.* at 71-72 (citing 42 U.S.C. § 2000e - §2000e-17 (2000)).

⁹⁷ *Hishon*, 467 U.S. at 77-78.

association by requiring it to invite unwanted members into its partnership ranks.⁹⁸

The Court, however, rejected this argument. Although conceding that employers and their member employees could have rights to association for certain purposes, such as when employees make distinctive contributions to the ideas and beliefs of society (as did the NAACP),⁹⁹ such rights do not exist when the employment decision by the association does not implicate these loftier goals.¹⁰⁰ In other words, not all employers are expressive associations. Employers only have expressive association rights to the extent that they engage in expressive activities and employing a given individual would detract from the message they seek to promote.¹⁰¹

However, because the discussion of associational rights is so short and cryptic in *Hishon*, it is difficult to say what proposition the case actually stands for beyond that employers may be associations due constitutional protections in some circumstances.

B. *The Modern Cases (1984-2006)*

1. *Roberts v. United States Jaycees*

A mere six weeks after the decision in *Hishon*, the landmark case of *Roberts v. United States Jaycees*¹⁰² broke new ground in the realm of the freedom of association by introducing an instructive dichotomy. Justice Brennan's innovation in *Roberts* is that he classified all previously-decided association cases into two categories. The right to intimate association concerns rights to personal liberty located within the due process clause of the 14th amendment.¹⁰³ The right to expressive association, on the other hand, involves association for the promotion of rights found primarily within the First Amendment.¹⁰⁴ The nature and degree of constitutional

⁹⁸ *Id.* at 78.

⁹⁹ *See id.* (citing *NAACP v. Button*, 371 U.S. 415, 431 (1963)).

¹⁰⁰ *Id.*; *see also* *Roberts v. United State Jaycees*, 468 U.S. 609, 637 (1984) (O'Connor, J., concurring) ("[O]rdinary law practice for commercial ends has never been given special First Amendment protection We emphasized this point only this term in *Hishon v. King & Spalding*.").

¹⁰¹ Carpenter, *supra* note 63, at 1577 (maintaining schools might have expressive association rights in the employment context when the employees are central to the expressive activity of the schools).

¹⁰² 468 U.S. 609 (1984).

¹⁰³ *Id.* at 618.

¹⁰⁴ *Id.*

protection depends on the type of association in which a group engages.¹⁰⁵

In *Roberts*, the state interference at issue involved the application of Minnesota's state public accommodation statute's gender discrimination provisions to the membership policies of the Jaycees, which did not grant women full membership in their organization.¹⁰⁶ The Court first explained that the Jaycees were not an intimate association because of its size, lack of selectivity in defining group membership, and its generally open, public nature.¹⁰⁷ Having eliminated intimate association from consideration, the Court recognized the Jaycees as a type of expressive association whose members affiliated with one another to advocate certain views.¹⁰⁸

However, the analysis of why the Jaycees are an expressive organization is very case specific. After making the broad statement that, "we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends,"¹⁰⁹ the Court concludes that "in view of the various protected activities which the Jaycees engage . . . the right is plainly implicated in this case."¹¹⁰ In turn, Jaycees activities are described later in the opinion as taking public positions on a number of diverse issues and regularly engaging "in a variety of civic, charitable, lobbying, fundraising, and other activities worthy of constitutional protection under the First

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 612-17.

¹⁰⁷ *Id.* at 620-21. Not surprisingly, the Court also found employers do not have rights of intimate association when selecting employees. *See id.* at 620 ("[T]he Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees.").

¹⁰⁸ *Id.* at 622. Even though the Court concluded that the Jaycees had expressive association rights and those rights were significantly burdened by the application of the public accommodation statute, *see id.* at 623 ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."), the Court nevertheless held that the State's compelling interest in eradicating gender discrimination justified the infringement on the group's rights. *Id.* (finding infringements of expressive association rights justified if state law serves "compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.").

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

Amendment."¹¹¹ Thus, in its first foray into describing what groups constitute an expressive association for First Amendment purposes, the Court gives us an example of an expressive association without any defining or limiting principles.¹¹²

In addition to Justice Brennan's majority opinion for the Court in *Roberts*, Justice O'Connor also wrote a concurrence, that while never adopted by the Court, is significant because it sets the stage in some respects for the next significant expressive association case of *Dale v. Boy Scouts of Am.*¹¹³ In particular, O'Connor's opinion places emphasis on the type of association as opposed to the content of the group message. O'Connor also advances an interesting way of thinking about whether employers should be considered to have expressive association rights.

Contrary to Justice Brennan's dichotomy, Justice O'Connor suggests that non-intimate association cases should be further broken down into expressive association cases and commercial association cases in order to accord sufficient protection to expressive associations, while at the same time placing appropriate burdens on groups claiming the protection of the First Amendment for commercial association purposes.¹¹⁴ Whereas those associations that were predominantly expressive were due substantial protection from governmental interference,¹¹⁵ O'Connor argued that commercial associations were largely non-expressive and, therefore, state regulation was permissible as long as it was rationally related to a legitimate government purpose.¹¹⁶ Indeed, this is how O'Connor characterized the *Hishon* decision: as nothing more than a large law firm engaging in commercial associations lacking expressive content.¹¹⁷ Further, Justice O'Connor suggests that most employment is part of a commercial

¹¹¹ *Id.* at 626-27.

¹¹² David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 132 (2001); Hills, *supra* note x, at 215.

¹¹³ 530 U.S. 640 (2000).

¹¹⁴ *Id.* at 632 (O'Connor, J., concurring). Nevertheless, O'Connor does recognize that "[m]any associations cannot readily be described as purely expressive or purely commercial" and that, "[t]he standard for deciding just how much of an association's involvement in commercial activity is enough to suspend the association's First Amendment right to control its membership cannot . . . be articulated with simple precision." *Id.* at 635.

¹¹⁵ *Id.* at 633.

¹¹⁶ *Id.* at 634-635.

¹¹⁷ *Id.* at 637 ("[O]rdinary law practice for commercial ends has never been given special First Amendment protection We emphasized this point only this term in *Hishon v. King & Spalding*").

association which can be readily regulated by states without fear of impinging upon any constitutional right to association.¹¹⁸

Interestingly, and based on these "radically different constitutional protections for expressive and non-expressive associations," O'Connor ends up concurring in the judgment of the Court that the Jaycees may not rely on an expressive association right to immunize themselves from the application of the Minnesota public accommodation statute.¹¹⁹ Contrary to the majority, however, Justice O'Connor finds the Jaycee primarily "promote and practice the art of solicitation and management," a distinct commercial enterprise, and thus are subject to state regulation that meets low level rational basis review.¹²⁰

Justice O'Connor thus provides a more helpful test for determining which groups constitute expressive associations, especially in the commercial/employment arena.¹²¹ It is also clearly supplies a more rigorous analysis than Justice Brennan's "I know it when I see it" approach. Nevertheless, the Supreme Court in the 23 years since *Roberts* has not made any move to expressly adopt Justice O'Connor's commercial association test.¹²² Perhaps if it had, much of the mischief caused by the *FAIR* decision's implicit finding of public employer expressive associations would have been avoided, as under Justice O'Connor's model most public employers would be considered commercial associations due limited

¹¹⁸ *Id.* at 634 ("The Constitution does not guarantee the right to choose employees . . . or those who engage in simple commercial transactions, without restraint from the State."). In this regard, O'Connor maintains: "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the market place of ideas." *Id.* at 636.

¹¹⁹ *Id.* at 638-40.

¹²⁰ *Id.* at 639.

¹²¹ *Accord* Farber, *supra* note 9, at 1498 ("The most serious effort to explain and justify the special treatment for expressive associations is found in Justice O'Connor's concurrence in *Roberts*."); *see also* Carpenter, *supra* note 63, at 1517 (extending O'Connor's *Roberts* concurrence and arguing for tripartite approach that treats associations differently depending on the predominance of protected expression in their activities).

¹²² *But see* Carpenter, *supra* note 63, at 1564 (arguing that although Court has never adopted Justice O'Connor's commercial association framework that subsequent case outcomes can be readily explained by reference to that framework).

constitutional protection.¹²³

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

In any event, the Court continued on its case-by-case approach in deciding which groups constituted expressive associations. After *Roberts*, there were three further Supreme Court cases in the late 1980s, including *Rotary Club of Duarte* and *New York State Club Assoc.*, both of which engaged in a case specific expressive association analysis of the clubs at issue.¹²⁴ Like *Roberts* itself, these two cases came out in favor of the government's right to regulate these associations even in light of the presence of expressive association rights held by some of these groups.¹²⁵

With regard to whether the groups at issue qualified as expressive associations, the Court failed again to provide a concrete framework for this constitutional inquiry. For instance, even though in *Rotary Club of Duarte* the Court concluded that the Rotary Club engaged in expressive activities which were quite limited,¹²⁶ the Court, undeterred, and with the slightest of explanations, finds the Club implicitly constitutes an expressive association.¹²⁷ Similarly, in *New York State Club Association*, the Court

¹²³ *But see Hills*, *supra* note 113, at 217 (“The difficulty with Justice O'Connor's theory ... is that it places unsupportable weight on the distinction between commercial and noncommercial organizations.”).

¹²⁴ *New York State Club Assoc. v. City of New York*, 487 U.S. 1 (1988) (finding the New York City public accommodation law did not violate expressive association rights of private clubs engaged in substantial commercial activity); *Bd. of Dirs. of Rotary Int'l v. Rotary Club on Duarte*, 481 U.S. 537 (1987) (holding that application of California Unruh Act which required California Rotary Clubs to admit women into membership did not interfere with the expressive association rights of the clubs).

¹²⁵ *New York State Club Assoc.*, 478 U.S. at 14; *Rotary Club of Duarte*, 481 U.S. at 548-49.

¹²⁶ *See Rotary Club of Duarte*, 481 U.S. at 545 n.4. For instance, Rotary Clubs do not take positions on public questions like the Jaycees do. *See id.* at 548.

¹²⁷ Actually, the Court in *Rotary Club of Duarte* never comes out and says expressly that Rotary Clubs, whose “basic goals [are] humanitarian service, high ethical standards in all vocations, good will, and peace,” are expressive associations, but merely implies it by finding that although “Rotary Clubs do not take positions on ‘public questions,’ including political or international issues,” they “engage in a variety of commendable

sidesteps what groups make up expressive associations and unhelpfully declares that the local New York public accommodation law does not infringe "the ability of individuals to form associations that will advocate public or private viewpoints. It does not require the clubs 'to abandon or alter' any activities that are protected by the First Amendment."¹²⁸

The third, and less known case from this time period, *City of Dallas v. Stanglin*,¹²⁹ does provide some much needed insight into what groups do not constitute expressive associations. In *Stanglin*, the City of Dallas adopted an ordinance restricting admission to specified dance halls to persons between the ages of 14 and 18.¹³⁰ The state court of appeals found that these teenage dance halls violated the expressive association rights of teenagers to associate with those outside of their age group.¹³¹ The Supreme Court reversed, finding that no expressive association existed among the dance hall patrons.¹³²

Specifically, the Court found that the interest in teenagers and adults interacting in a dance hall environment was associational in some respects, but importantly did not "involve the sort of expressive association that the First Amendment has been held to protect."¹³³ The Court clarified that merely being patrons of the same business establishment does not qualify a group as an expressive association. Instead, the group must take a position on public questions or engage in some of the charitable or civic activities described in the previous Supreme Court expressive association cases.¹³⁴

Although this discussion of expressive associations went further in explaining what groups do not constitute expressive associations, the court itself recognized the analytical dilemma surrounding these cases when it observed that, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes--for example, walking down the street or meeting one's friends at a shopping mall--but such a kernel is not sufficient to bring the activity within the protection of the First Amendment."¹³⁵ But having made this observation, the Court conclusorily

service activities that are protected by the First Amendment." *Id.* at 548.

¹²⁸ *New York State Club Association*, 487 U.S. at 13.

¹²⁹ 490 U.S. 19 (1989).

¹³⁰ *Id.* at 20.

¹³¹ *Id.* at 21.

¹³² *Id.* at 25.

¹³³ *Id.* at 24.

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

¹³⁵ *Id.* at 25.

states: "We think the activity of these dance-hall patrons--coming together to engage in recreational dancing--is not protected by the First Amendment."¹³⁶ Yet another example by which to analogize to subsequent cases, but not a concrete definition to apply going forward in making distinctions between expressive associations and non-expressive associations.

3. Boy Scouts of America v. Dale

Unlike *Roberts*, *Rotary Club of Duarte*, *New York State Club Association*, and *Stanglin*, the Court in *Boy Scouts of America v. Dale*¹³⁷ found in favor of a group claiming expressive association rights.¹³⁸ In an opinion written by Chief Justice Rehnquist, the court held that the New Jersey state public accommodation statute impermissibly infringed on the expressive association rights of the Boy Scouts by requiring them to have a gay assistant scoutmaster as a member.¹³⁹

¹³⁶ *Id.*

¹³⁷ 530 U.S. 640 (2000).

¹³⁸ *Id.* at 659. If one is considering expressive association cases chronologically, one may think that the case of *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557 (1995), should be discussed next. But *Hurley*, concerning the exclusion of a gay pride group from a privately-organized St. Patrick's Day parade in Boston, is not properly labeled an expressive association case. Finding parades to be inherently expressive, the *Hurley* Court concluded that the parade organizers could select "the expressive units of the parade from potential participants," so as not to broadcast a message with which they disagreed. *Id.* at 574. But as Justice Stevens correctly noted in his *Dale* dissent, *Hurley* is not an expressive association case because: "*Hurley* involved the parade organizers' claim to determine the content of the message they wish to give at a particular time and place. The standards governing such a claim are simply different from the standards that govern [the Boy Scout of America]'s claim of a right of expressive association An expressive association claim ... normally involves the avowal and advocacy of a consistent position on some issue over time." *Dale*, 530 U.S. at 696 (Stevens, J., dissenting). Consequently, although other commentators have discussed *Hurley* as an expressive association case, *see* Morriss, *supra* note 8, at 442-43, this article does not treat it as such.

¹³⁹ *See Dale*, 530 U.S. at 657-59. More specifically, after finding the Boy Scouts to be an expressive association, the Court deferred to the group's description of both its message concerning homosexuality and what

As far as whether the Boy Scouts were an expressive association, the Court states unequivocally that the first thing that a court should do in an expressive association is "determine whether the group engages in 'expressive association.'"¹⁴⁰ Next, the Court cautions that the expressive association right is not reserved for advocacy groups (such as the NAACP), "[b]ut to come within its ambit, a group must engage in some form of expression, whether it be public or private."¹⁴¹ Having set forth this rather broad definition, the Court examines the record, including the Boy Scouts' mission statement, and concludes that the group's mission is "to instill values in young people" through activities like camping, archery, and fishing.¹⁴² Based on this mission, the Court concludes: "It seems indisputable that an association that seeks to transmit such a system of values engages in expressive activity."¹⁴³ And although Justice Steven's

would impair that message and found that the New Jersey law substantially interfered with their expressive association rights by forcing the Scouts to accept a gay assistant scoutmaster. *See Dale*, 530 U.S. at 651-653. The Court then concluded that given the severity of the intrusion into the Boy Scouts' rights to expressive association by the public accommodation statute, the Boy Scouts' First Amendment rights prevailed. *See id.* at 657-659. These portions of the *Dale* opinion are discussed in more detail below. *See infra* Part IV.A.

¹⁴⁰ *Id.* at 648.

¹⁴¹ *Id.*

¹⁴² *See id.* at 649.

¹⁴³ *See id.* at 650 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 636 (1984) (O'Connor, J., concurring)). The Court's formulation that "[i]t seems indisputable" is a rather bizarre way of concluding that the Boy Scouts qualify as an expressive association, *see id.*, and wholly unconvincing when one considers that, "the Court itself implicitly disputed [the "transmits values" basis] in *Runyon v. McCrary* when it held that a racist private school had no First Amendment entitlement to exclude black children from its student body." *See Hills*, *supra* note 113, at 215 (citing *Runyon*, 427 U.S. 160, 175-76 (1976)).

Also interesting, although Chief Justice Rehnquist cites Justice O'Connor's concurrence in *Roberts* as support for his conclusion that the Boy Scouts are an expressive association, he does not adopt her expressive association/commercial association dichotomy from that same concurrence. It thus appears that the same *Dale* analysis may apply in the employment context, as long as the employer sets out to engage in some expressive activity beyond a *de minimis* level.

dissent takes the majority to task for other reasons,¹⁴⁴ he does not dispute that the Boy Scouts are an expressive association.¹⁴⁵

The *Dale* Court thus follow *Roberts* in making clear that initially determining whether a group constitutes an expressive association is essential to determine whether there has been a violation of the right to expressive association under the First Amendment.¹⁴⁶ Yet, the opinion provides no workable definition for this determination.¹⁴⁷ As before, we know that the Boy Scouts, like law firms, private schools, social organizations, and advocacy groups, are expressive associations because the Supreme Court tells us so. But again, at the risk of being redundant, there is no overarching principle.

Indeed, it is this historical inability of the Court to provide a more complete definition for expressive associations that is responsible, at least to some degree, for permitting a unanimous Court in *FAIR* to overlook the ways in which *FAIR* is, and is not, an expressive association. In turn, this state of affairs leads the Court inexorably, through omission, to its unintended conclusion that public law school members of *FAIR* have expressive association rights.

4. Post-*Dale* Circuit Court Opinions on Expressive Associations

Even with the lack of guidance from previous Supreme Court cases, the Supreme Court in *FAIR* had other potential sources for finding a principled way of determining the existence of an expressive association and might still have avoided its constitutional *faux pas*. Following the decision in *Dale*, a number of federal appellate courts tried to fill the gaps left in the

¹⁴⁴ See *infra* Part IV.B.

¹⁴⁵ See Carpenter, *supra* note 63, at 1537 ("This is a bigger concession than it first appears because what makes the [Boy Scouts] an expressive association is not the political causes it pursues. It does not pursue any, in the usual sense.").

¹⁴⁶ See *Dale*, 530 U.S. at 648.

¹⁴⁷ Accord Morriss, *supra* note 8, at 451 (arguing that Supreme Court's *Dale*-based jurisprudence fails to give much guidance about how to distinguish expressive associations from non-expressive associations); Hills, *supra* note 113, at 215 ("[T]he *Dale* majority seems to place no meaningful limits on the definition of 'expressive associations.'").

Professor Morriss explains that this lack of guidance may be due to the fact that the Court so far has decided easy cases with regard to whether a group constitutes an expressive association, and "so the examples drawn from the cases leave significant gaps unfilled" *Id.*

Court's reasoning about which groups could qualify as expressive associations.¹⁴⁸ Two in particular deserve special attention given their relative clarity of thought on the issue: *Pi Lambda Phi Fraternity v. Univ. of Pittsburgh*¹⁴⁹ and *The Circle School v. Pappert*,¹⁵⁰ both out of the Third Circuit.

The *Pi Lambda Phi* considered whether a university fraternity was an expressive association entitled to protection under the First Amendment after the university stripped it of its status as a recognized student organization after it was the subject of a drug raid at its fraternity house.¹⁵¹ As instructed by the Supreme Court in *Dale*, Judge Becker started his analysis by considering whether the fraternity was an expressive association.¹⁵² Interestingly, even after recognizing that the Supreme Court did "not set a very high bar for expressive association," it found the fraternity did not qualify.¹⁵³

More specifically, the court found that it was not enough merely to say that the group was a social association and it was necessary to inquire more deeply into the nature of the association.¹⁵⁴ Based on past language in *Roberts* and *Dale*, the court commented that there was no requirement that the group be political or even primarily expressive in order to qualify for constitutional protection.¹⁵⁵ Nevertheless, there was, in the court's words, a "*de minimis* threshold," for such expressive association claims¹⁵⁶ and not "*any possible expression*" would do.¹⁵⁷ The court concludes that the fraternity did not meet this *de minimis* threshold because "[n]othing in the

¹⁴⁸ The Third Circuit Court of Appeals in the *Pi Lambda Phi Fraternity v. Univ. of Pittsburgh* decision put it diplomatically when it said the Supreme Court's analysis in *Dale* of whether a group is engaging in expressive association was "very succinct." 229 F.3d 435, 443 (3d Cir. 2000).

¹⁴⁹ 229 F.3d 435 (3d Cir. 2000).

¹⁵⁰ 381 F.3d 172 (3d Cir. 2004).

¹⁵¹ See *Pi Lambda Phi*, 229 F.3d at 438-39.

¹⁵² See *id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 442-43.

¹⁵⁵ See *id.* at 443.

¹⁵⁶ *Id.* at 443-44 (citing *City of Dallas v. Stanglin*, 490 U.S. 19 (1989) (holding that patrons in dance hall not engaged in expressive association)).

¹⁵⁷ *Id.* at 444. (emphasis in original). Judge Becker here cites *Stanglin* for the proposition that there has to be more than just a "kernel of expression" to bring an activity within the protection of the First Amendment. *Id.* (quoting *Staglin*, 490 U.S. at 25).

record indicates the Chapter ever took a public stance on any issue of public, political, social, or cultural importance."¹⁵⁸

Circle School v. Pappert, decided four years later, also examined the expressive association issue post-*Dale*, but found that the private schools at issue were expressive associations and their rights were violated by a Pennsylvania law which required these schools to hold recitations of the Pledge of Allegiance or national anthem at beginning of each school day.¹⁵⁹ With regard to whether the private school plaintiffs were expressive associations, Judge Sloviter found that like the Boy Scouts in *Dale*, the private schools engaged in "some form of expression, whether it be public or private."¹⁶⁰ Looking at the record in the case, the court noted that each of the schools had clear educational philosophies, missions, and goals, including the mission of providing students with "freedom of choices."¹⁶¹ Indeed, the court found that schools, by their very nature, are highly expressive organizations which inculcate their students with their philosophy and values.¹⁶² Thus, combining an analysis of the type of institution being examined with a more case specific exploration of the record, the court was able to conclude that these schools were expressive associations.¹⁶³

Both *Pi Lambda Phi* and *The Circle School* provide a more specific framework for how to appropriately undertake the initial expressive association determination. By looking at the nature of the organization, the purposes for which it is claiming expressive association rights, and the actual evidence of the record, these courts are able to make a more grounded determination of the issue.¹⁶⁴ On the other side of the question, as far as limiting such rights, these cases also stand for the proposition that

¹⁵⁸ *Id.* However, the court clarifies that fraternities *per se* were not excluded from being expressive associations, but that each entity must be considered individually. *Id.*

¹⁵⁹ *Circle School*, 381 F.3d at 174.

¹⁶⁰ *Id.* at 182 (citing *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000)).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* Having thus concluded, the court held that the Pennsylvania pledge law placed a substantial burden on the schools' expressive associations without compelling justification and found a First Amendment violation. *See id.* at 182-83.

¹⁶⁴ This is not to say, however, that these cases provide defining principles, but only that their analysis is more thorough and well-supported than previous Supreme Court decisions in the expressive association area.

even though the Supreme Court has "cast a fairly wide net" in defining expressive associations;¹⁶⁵ nevertheless, a group "must do more than simply claim to be an expressive association."¹⁶⁶

Unfortunately, even this last, most basic of points did not register on the Supreme Court's radar in *FAIR*.

IV. THE DELETERIOUS CONSEQUENCES OF PUBLIC EMPLOYER EXPRESSIVE ASSOCIATIONS

A. *From Military Recruiting to Public Employment*

Of course, and as discussed in Part II, the United States Supreme Court in *Rumsfeld v. FAIR* neither followed the expressive association analysis put forth by these two Third Circuit opinions, nor did it even follow the clear three-step analysis for expressive association cases set out by *Dale* or by the Third Circuit in its *FAIR* opinion.¹⁶⁷ Had it taken the time to consider that law schools may be expressive associations for certain limited purposes, but not for others, and that private and public law schools should be treated differently for expressive association purposes given the constitutional issues at stake, it might not have stumbled into this Serbonian bog.¹⁶⁸ More

¹⁶⁵ *Pi Lambda Phi*, 229 F.3d at 443.

¹⁶⁶ *Id.* at 444.

¹⁶⁷ Unlike the Supreme Court, the Third Circuit in *FAIR* methodically set out the elements of the expressive association claim and then considered each of those elements in turn. *See FAIR v. Rumsfeld*, 390 F.3d 219, 231 (3d Cir. 2004). On whether *FAIR* was an expressive association, the Third Circuit concluded that it was because it possessed "clear educational philosophies, missions, and goals." *Id.* (citing *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 303-04 (D.N.J. 2003)). However, the Third Circuit (as well as the New Jersey District Court) also failed to appreciate the consequences of finding public law school to be expressive associations, and this fact suggests that even if the Supreme Court had engaged in a more thorough expressive association analysis, it too might have still not considered the public law school issue lurking in this case.

¹⁶⁸ *See Difelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 454 & n.1 (3d Cir. 2003) ("A gulf profound as that Serbonian bog, / Betwixt Damiata and Mount Cassius old, / Where armies whole have sunk.") (citing Milton, *Paradise Lost*, ii. 592); *see also McGowan, supra* note x, at 132 ("Neither *Roberts* nor *Dale* actually develops a theory of group expression. This lack of development is a problem. One cannot analyze expressive association cases without some underlying theory of how associations express

specifically, had the *FAIR* Court considered cases like *Pi Lambda Phi* and *The Circle School*, it might have recognized that although schools are generally highly expressive organizations; nevertheless, schools can, and do, express themselves in more ways than just inculcating their students with values.¹⁶⁹ For instance, schools also express themselves by engaging in the four essential freedoms, as termed by Justice Frankfurter in his concurrence in *Sweezy v. New Hampshire*.¹⁷⁰

Arguing for the exclusion of the government from the intellectual life of the university, Frankfurter famously stated in his *Sweezy* concurrence: "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university--to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹⁷¹ Each of these freedoms is arguably a type of expression, including the ability of the university to determine for itself who shall teach. Consequently, the Court's finding in *FAIR* is not necessarily limited to the law schools' advocacy against the DADT policy, but could also be seen as protecting the law schools in deciding whom they wish to teach at their institutions.¹⁷²

This is because the *FAIR* court does not indicate that *FAIR* has been found to be an expressive association for the limited purpose of protesting military recruiters on campus, and there is no reason to think that a public

themselves.”).

¹⁶⁹ Perhaps in this regard the *FAIR* Court was merely deferring, consistent with *Dale*, to *FAIR*'s own assertions concerning the character of its expressive association. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000). In its trial brief to the Court, *FAIR* claimed the control over on-campus law school recruiting was "about the freedom of law schools to shape their own pedagogical environments and to teach, by word and deed, the values they choose, free from government intrusion." See Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 1, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03 Civ. 4433 (JCL)); see also *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 304 (D.N.J. 2003) ("The record reveals that the law schools ... seek to inculcate a certain set of values and principles in their students.").

¹⁷⁰ 354 U.S. 234 (1957).

¹⁷¹ *Id.* at 263 (Frankfurter, J., concurring in the result).

¹⁷² Like other groups and associations, employers may engage in some form of expressive activity. Cf. *Boy Scouts of America v. Dale*, 530 U.S. 640, 678-79 (2000) (Stevens, J., dissenting) (discussing employers as expressive associations and limits on such associational rights).

law school's expressive association rights cannot equally extend to the employment context.¹⁷³ Indeed, the *Hishon* case suggests that employers who have expressive purposes may be deemed expressive associations.¹⁷⁴ Finally, to recognize that all public employers have expressive association rights like the Boy Scouts in *Dale* is simply a matter of acknowledging that public law schools are just one potential type of public employer.¹⁷⁵

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

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

In discussing the nature of the right to expressive association in *Boy Scouts of America v. Dale*,¹⁷⁶ the Supreme Court gave some important additional powers to expressive associations to be free from government regulation that did not exist previously under *Roberts v. United States Jaycees*¹⁷⁷ and which could have sweeping consequences for federal and state antidiscrimination laws.¹⁷⁸ Indeed, as Justice Stevens comments in his

¹⁷³ Although employment relationship are not directly discussed, the *FAIR* decision does indirectly suggest that covered membership decisions might include employment ones. *Cf. FAIR*, 126 S. Ct. at 1312 ("Law schools ... 'associate' with military recruiters in the sense they interact with them. But recruiters are not part of the law school."); *id.* at 1313 ("The Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their approval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable.").

¹⁷⁴ *Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984).

¹⁷⁵ *Accord* Carpenter, *supra* note 63, at 1564 (maintaining expressive associations like the Boy Scouts in *Dale* should be protected in their selection of members and employees). This is not to say that all employment decisions undertaken by an expressive association are subject to associational freedoms. As Professor Carpenter points out, a school might have expressive association rights when it chooses teachers, but it might not have such a right when selecting maintenance or secretary personnel. *See id.* at 1577. Whereas the former employees are central to the expressive activity of the schools, the latter are not.

¹⁷⁶ 530 U.S. 640 (2000).

¹⁷⁷ 468 U.S. 609 (1984).

¹⁷⁸ McGowan, *supra* note 13, at 125 (maintaining that, "[t]he Court's

Dale dissent, the amount of deference given to the Boy Scout's assertions concerning the nature of their expressive activities is simply astounding.¹⁷⁹

For instance, once a group is considered an expressive association, a court must determine the nature of the group's expression.¹⁸⁰ However, the scope of that inquiry is limited and the Court indicated in *Dale* that it was proper not only to give deference to an association's assertions regarding the nature of its expression, but also to the association's view of what would impair that expression.¹⁸¹ So, in *Dale*, even though the evidence was extremely thin that the Boy Scouts were actually promoting an anti-homosexual message,¹⁸² the Court deferred to its anti-homosexual assertions and also to the claim that inclusion of a gay assistant scoutmaster would force the organization to send a message inconsistent with the Boy

stated deference [in *Dale*] was inconsistent with its analysis in prior cases.”).

¹⁷⁹ See *Dale*, 530 U.S. at 686 (Stevens, J., dissenting) (“Once the organization ‘asserts’ that it engages in particular expression ‘[w]e cannot doubt’ the truth of that assertion. This is an astounding view of the law.”) (internal citations omitted); *id.* (“It is an odd form of independent review that consists of deferring entirely to whatever a litigant claims.”); see also *Hills*, *supra* note 113, at 215 (“[O]ne looks in vain to *Dale* for some persuasive, principled, or even predictable limit on the First Amendment protections enjoyed by associations.”).

¹⁸⁰ See *Dale*, 530 U.S. at 650.

¹⁸¹ See *id.* at 653. Going even further, the Court went on to say that, “associations do not have to associate for the ‘purpose’ of disseminating a certain message in order to be entitled to the protections of the First Amendment. An association must merely engage in expressive activity that could be impaired in order to be entitled to protection.” *Id.* at 655. Consequently, in the employment context, an employer could claim that hiring a certain individual as a member of its organization is inconsistent with its views on a certain controversial topic, even though it did not engage in that hiring for the purpose of taking a stance on that topic.

¹⁸² See *id.* at 670 (Stevens, J., dissenting) (“In light of [the Boy Scouts of America]’s self-proclaimed ecumenism . . . it is even more difficult to discern any shared goals or common moral stance on homosexuality.”); see also *id.* at 675 (“Beyond the single sentence in these policy statements, there is no indication of any shared goal of teaching that homosexuality is incompatible with being ‘morally straight’ and ‘clean.’”); *id.* at 684 (“There is no shared goal or collective effort to foster a belief about homosexuality at all—let alone one that is significantly burdened by admitting homosexuals.”).

Scout's stance on homosexuality.¹⁸³ Indeed, based on the Boy Scouts' assertions, it found that the New Jersey public accommodations law, which would have required inclusion of the gay assistant scoutmaster, caused a "severe intrusion" on the Boy Scouts' rights to freedom of expressive association that outweighed any countervailing compelling interest that the state had in eradicating sexual orientation discrimination from society.¹⁸⁴ *Dale* thus establishes that the expressive association determination is fraught with significant legal implications for those who seek to become members of these expressive groups, including their ability to rely on federal and state antidiscrimination laws.¹⁸⁵

It may first appear that *FAIR*, which does not concern a membership situation like *Dale*,¹⁸⁶ does not have much to add to *Dale* as far as the

¹⁸³ *See id.* at 648 ("Forcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express. Thus, '[f]reedom of association . . . plainly presupposes a freedom not to associate.") (citing *Roberts*, 468 U.S. at 623). Justice Stevens rightly criticized the majority decision for kow-towing to the litigation posture of the Boy Scouts, rather than conducting an independent analysis of whether the Boy Scouts were in fact expressing an anti-homosexual lifestyle message. *See id.* at 686 (Stevens, J., dissenting). Stevens would require instead that a group adopt and advocate an unequivocal position before permitting assertions of an expressive association right. *See id.* at 687; *see also id.* at 696 ("An expressive association claim . . . normally involves the avowal and advocacy of a consistent position on some issue over time."). *But see* Carpenter, *supra* note 63, at 1542-63 (criticizing Justice Steven's message-based approach on four different grounds).

¹⁸⁴ Although *Dale* appears to imply that the state has a compelling interest in eradicating sexual orientation discrimination, it does not come out and say it expressly as in previous cases. *See id.* at 658. Furthermore, the Court lessens the importance of that compelling interest by saying that, "the association interest in freedom of expression has been set on one side of the scale, and State's interest on the other." *Id.* at 658-59.

¹⁸⁵ *See* Farber, *supra* note 9, at 1492-93 ("[T]he upshot of the majority opinion seems to be that once an association is identified as expressive, any colorable claim of interference with its activities is enough to block application of anti-discrimination laws (at least in cases where the Court does not find the particular state interest particularly compelling).").

¹⁸⁶ *See* Rumsfeld v. FAIR, 126 S. Ct. 1297, 1312 (2006); *see also* Morriss, *supra* note 8, at 451. Professor Morriss argues that whereas previous cases have dealt with the expressiveness of association, the

consequences of labeling an organization an expressive association. But as discussed above, *FAIR* can be read as providing expressive association rights to public law schools.¹⁸⁷ In fact, combining the holdings in *FAIR* and *Dale* leads to the startling conclusion that public employers can engage in expressive activities, define the nature of their expressive association, determine which prospective or current employees impair the message of their association, and then disassociate from those individuals (by not hiring or taking other adverse employment action), all without violating potentially applicable federal and state antidiscrimination law.¹⁸⁸ To make these consequences more concrete, take just a few hypotheticals.

First, consider a city police force that fires a female police officer on the grounds that rather than carry a fetus to term, she has an abortion. The police department wishes to propound a particular point of view that abortion is inconsistent with its mission of protecting the lives of the innocent and believes that the continued employment of the female police officer would impair that message. As will be discussed in more detail below,¹⁸⁹ that female police officer might have substantive due process arguments in her favor in light of *Lawrence v. Texas*,¹⁹⁰ but it is anyone's guess whether those interests would be considered compelling enough to overcome the "severe intrusion" on the police force's expressive association rights occasioned by having to maintain the employment of that police officer. Moreover, to the extent that the female police officer counters with a claim of sex discrimination, it is likely that such a claim will be trumped

Supreme Court in *FAIR* should have focused on the associational nature of the expressiveness, *see id.*, and found that law schools and law faculties are not such independent associations. *See id.* at 457. As it turns out, the Supreme Court chose not to utilize Professor Morriss' argument in its analysis.

¹⁸⁷ *See supra* Parts II.C, IV.A.

¹⁸⁸ As Justice Stevens observes in his *Dale* dissent, this aspect of *Dale* seems completely at odds with previous expressive association cases which found that right to expressive association did not mean "that in every setting in which individuals exercise some discrimination in choosing associates, their selective process of inclusion and exclusion is protected by the Constitution." *See Dale v. Boy Scouts of Am.*, 530 U.S. 640, 678 (2000) (Stevens, J., dissenting) (citing *New York State Club Assn. Inc. v. City of New York*, 487 U.S. 1, 13 (1988)); *see also* Farber, *supra* note 9, at 1492-93 (suggesting *Dale* could mean that associational rights trump contrary civil rights under antidiscrimination law).

¹⁸⁹ *See infra* Part IV.C.2.

¹⁹⁰ 539 U.S. 558 (2003).

by the police department's associational rights under the *Dale* analysis.¹⁹¹

Second, contemplate for a moment the hypothetical brought up by Justice Souter in his *Dale* dissent, in which an individual becomes "so identified with a position as to epitomize it publicly."¹⁹² Once a group is recognized as an expressive association, Justice Souter indicates that such high profile individuals may be excluded by those expressive groups to maintain the effectiveness of their message, even if such exclusions would normally run afoul of otherwise applicable federal and state antidiscrimination laws.¹⁹³ Needless to say, Justice Souter's hypothetical could easily apply to the employment context.

Finally, reflect on the lower court decision in the *FAIR* case itself. The district court concluded that since the law schools had adopted official policies with respect to sexual orientation, the law schools qualify as expressive associations.¹⁹⁴ In coming to this conclusion, the court noted that FAIR law schools believe that "invidious discrimination on the basis of sexual orientation is a moral wrong, and that 'judgments about people bearing no relation to merit harm and inhibits students, faculty, and eventually society at large.'"¹⁹⁵ Given the nature of the law schools' expressive association, and *Dale*'s notion that courts should defer to group's notion about what would impair their expression,¹⁹⁶ it would appear that a FAIR law school could argue that hiring a prospective faculty member with a background in the military's JAG Corp. would be tantamount to hiring a person with anti-gay views and refuse to hire such a person. As absurd as that claim may sound to some, remember that *Dale* counsels extreme deference to both the nature of an association's expression, as well as what

¹⁹¹ See *Dale*, 530 U.S. at 659 (finding Boy Scouts' expressive association rights outweigh any competing state interests in eradicating discrimination).

¹⁹² See *Dale*, 530 U.S. at 672 (Souter, J., dissenting).

¹⁹³ See *id.* ("When that position is at odds with a group's advocated position, applying an antidiscrimination statute to require the group's acceptance of the individual in a position of group leadership could so modify or muddle or frustrate the group's advocacy as to violate the expressive associational right."). Justice Souter also makes clear that the popularity or unpopularity of the group's message will be irrelevant in such situations. See *id.* ("[I]t is at least clear that our estimate of the progressive character of the group's position will be irrelevant to the First Amendment analysis if such a case comes to us for decision.").

¹⁹⁴ *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 304 (D.N.J. 2003).

¹⁹⁵ *Id.*

¹⁹⁶ See *Dale*, 530 U.S. at 653.

would impair that expression.¹⁹⁷ And if that member of the military makes a claim of discrimination based on veterans' status under a state employment antidiscrimination statute, he or she would probably lose as a result of the law school's contrary associational claims.

In short, and as these examples make clear, the recognition of expressive association rights for public law schools, and by extension all public employers, would entail a vast accretion of employer power to potentially exclude unpopular, controversial, or just plain disagreeable, employees from the public sector. Even more troubling, this power to exclude employees would be largely immunized from antidiscrimination laws.¹⁹⁸

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

As detrimental as *Dale* expressive association rights might be in the public employment context for employee civil rights, this constitutional development also bodes ill for already vastly diminished constitutional rights of public employees. Even under the present state of affairs, since public employee free speech rights reached their apogee in *Pickering v. Bd. of Education*,¹⁹⁹ such rights have been greatly weakened in the last forty years as a result of the "public concern" test of *Connick v. Myers*,²⁰⁰ and the more recent "official capacity speech" test of *Garcetti v. Ceballos*.²⁰¹

But the situation would become even worse with the recognition of public employer expressive association rights. Quite simply, it is a zero-sum game and whatever additional leverage the government obtains to make employment decisions through these new expressive association rights must necessarily lead to public employees having less constitutional protection against such decisions. A couple real world examples, one academic in the First Amendment context and one non-academic in the

¹⁹⁷ *Id.* at 653.

¹⁹⁸ There is a counter-argument that since *Dale* was decided in 2000 there has not been many private employers advancing associational claims with a related reduction of employee civil rights in the private sector. However, whereas *Hishon* did not clearly establish employer expressive association claims (and even seems to argue against them under the facts of that case), *FAIR* may be more readily interpreted to provide for such claims in both the public and private employment sector. Only time will tell.

¹⁹⁹ 391 U.S. 563 (1968).

²⁰⁰ 461 U.S. 138 (1983).

²⁰¹ 126 S. Ct. 1951 (2006).

substantive due process context, will suffice to illustrate the point.

1. The Case of Robert Delahunty

A controversy erupted at the University of Minnesota Law School²⁰² in late Fall 2006, involving the hiring of a visiting constitutional law professor from the University of St. Thomas Law School, Robert Delahunty.²⁰³ Professor Delahunty held a previous position in the Justice Department's Office of Legal Counsel, where he co-authored the now-infamous torture memo on war prisoners.²⁰⁴ When word got out that Minnesota planned to appoint Professor Delahunty to this position, a number of Minnesota law professors sent an open letter²⁰⁵ and a significant number of students circulated a petition, both protesting the appointment as being antithetical to the core values held by the institution.²⁰⁶ Specifically, the student petition stated: "We would like to make clear that we are supportive of an ideologically diverse faculty, we would simply prefer that the University be extremely protective of its reputation by hiring faculty that are beyond question ethically."²⁰⁷ As it turns out, the interim co-dean of the University

²⁰² Interestingly, the Faculty of the University of Minnesota Law School is one of the public law school members of FAIR. *See supra* note x.

²⁰³ *See* Paul D. Thacker, *Appointment Roils a Law School*, INSIDE HIGHER ED, at <http://insidehighered.com/news/2006/11/29/delahunty> (November 29, 2006).

²⁰⁴ *See id.* The memo "concluded that the Geneva Convention did not cover al-Qaeda suspects captured in Afghanistan, and helped lay the foundation for the Bush administration's handling of prisoners captured during the war on terror." *Id.*; *see also generally* Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB POL'Y 487 (2002).

²⁰⁵ *See* Thacker, *supra* note 206 (link to faculty letter available in article).

²⁰⁶ *See id.*

²⁰⁷ *See Petition to Ask the Deans to Reconsider the Hiring of Robert Delahunty*, available at <http://insidehighered.com/news/2006/11/29/delahunty> (November 29, 2006) (click on "circulating a petition" link in article). The petition went on to state: "We place a considerable value on the reputation that comes with being in a law school with this level of prestige, and we would like to avoid any negative connotations that will result from hiring a person with such a negative and divisive reputation as Delahunty." *See id.*

of Minnesota did not to bow to the pressure not to appoint Delahunty and Delahunty began teaching classes at Minnesota Law in mid-January 2007.

Nevertheless, the story provides an opportunity to consider what the detrimental impact would be on public employees' First Amendment rights if a public law school had constitutional rights of expressive association.²⁰⁸ In this regard, *Roberts v. United States Jaycees* makes clear that expressive associations have the right to be free from "intrusion into the[ir] internal structure of affairs,"²⁰⁹ and such groups cannot be forced, without compelling justification, to accept members they do not desire.²¹⁰ And although compelling justifications may have existed for the Jaycees and Rotarians to be forced to have female members,²¹¹ it is unlikely that the same level of justification exists to force Minnesota Law School to

²⁰⁸ Now, it may be that the First Amendment rights of public employees like Delahunty are already, without any consideration of expressive association rights, severely circumscribed by the "government speech" doctrine, under which the government employer may claim, without First Amendment concern, the ability to hire only those individuals willing to transmit its values or propound its chosen point of view. *See* *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 559 (2005) ("[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate and its own policies. We have generally assumed...that compelled funding of government speech does not along raise First Amendment concerns."); *Rust v. Sullivan*, 500 U.S. 173, 192-93 (1991) ("[G]overnment may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'") (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)). As will be explored below, however, the government speech doctrine is probably most tenuous in the public university professor context. *See infra* Part V.B.2.

²⁰⁹ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984) (citing *Cousins v. Wigoda*, 419 U.S. 477, 487-88 (1975)). The Court notes in *Roberts* that associational rights can also be unconstitutionally infringed by governmental action in one of two other ways: (1) by imposing penalties or withholding benefits from individuals because of their membership in a disfavored group, *see id.* at 622 (citing *Healy v. James*, 408 U.S. 169, 180-84 (1972)); and (2) requiring disclosure of the fact of membership in a group seeking anonymity. *Id.* at 622-23 (citing *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 91-92 (1982)).

²¹⁰ *Roberts*, 468 U.S. at 623. In other words, the freedom of association plainly presupposes a freedom not to associate. *Id.*

²¹¹ *See id.* at 624; *Bd. of Dirs. of Rotary Int'l v. Rotary Club on Duarte*, 481 U.S. 537, 549 (1987).

associate with Delahunty.

Furthermore, the Court in *Boy Scouts of America v. Dale* gave great deference to not only the group's assertions about the nature of their expression, but also to its views about what would impair that expression.²¹² Thus, in a world where a public law school has expressive association rights, the school might not hire a Professor Delahunty in order to transmit a certain set of values, and not others.²¹³ Indeed, the student petition against Delahunty relied on an argument of this type when it requested that the Minnesota Law School not affiliate with anyone of questionable ethical background.²¹⁴ Finally, recall that Justice Souter indicated in his *Dale* dissent that in cases where a high profile individual becomes the public embodiment of a certain controversial position, like Delahunty has on the torture issue, expressive associations should be able to insulate their expression by disassociating from such individuals.²¹⁵

Professor Delahunty would likely respond to this invocation of expressive association rights by the law school by claiming that his past stance on matters of public concern are protected from adverse employment actions by the First Amendment. Indeed, cases like *Pickering v. Bd. of Education*²¹⁶ and *Connick v. Myers*²¹⁷ stand for the proposition that public employees have certain rights to speech and expression for which they cannot be retaliated against, unless the public employer can point to

²¹² *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

²¹³ Stanley Fish, for one, does not agree that, "schools should[] have values, except in a very narrow sense," and "should avoid taking a political stance at all cost." Indeed, Fish brought up the *FAIR* case to illustrate his point. See Elia Powers, *A Freewheeling Academic Freedom Debate*, INSIDE HIGHER ED, at <http://insidehighered.com/news/2007/01/05/acfreedom> (January 5, 2007) (describing remarks Fish made during the 2007 Annual Meeting of the Association of American Law Schools (AALS)).

²¹⁴ See *supra* note x and accompanying text.

²¹⁵ See *Dale*, 530 U.S. at 672 (Souter, J., dissenting). Of course in Justice Souter's hypothetical, he was suggesting that such expressive association rights of a group would overcome any contrary antidiscrimination mandates. See *id.* Because Professor Delahunty is not likely to be able to claim the protection of such laws (as ideological discrimination is not a protected statutory category), it is less likely that his hiring decision would be even more susceptible to a expressive association claim.

²¹⁶ *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

²¹⁷ *Connick v. Myers*, 461 U.S. 138 (1983).

overriding and legitimate efficiency interests.²¹⁸ But *Pickering* First Amendment claims are rather weak ones in the constitutional hierarchy of rights, given the needs of government employers to run their workplaces.²¹⁹ Such rights, even under present doctrine, may be overcome by the mere showing by the employer that the employee's expression would substantially disrupt their enterprise.²²⁰ On the other hand, expressive association rights are much more sacrosanct and may be overcome only "by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly, less restrictive of associational freedoms."²²¹

Consequently, if one were to balance public employer expressive association rights against public employee *Pickering* First Amendment rights, given the nature of the interests involved, it is more than likely that the government employer would prevail in the vast majority of these cases. Put differently, it is unlikely that the somewhat attenuated public employee right to free speech would qualify as the compelling state interest necessary to overcome the public employer's expressive association rights. In short, this hypothetical exercise indicates that recognition of public law school expressive association rights in a case like Delahunty's would almost certainly diminish individual public employee's rights to free speech and expression.²²²

²¹⁸ *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 143-44.

²¹⁹ See Paul M. Secunda, *The (Neglected) Importance of Being Lawrence: The Constitutionalization of Public Employee Rights to Decisional Non-Interference in Private Affairs*, 40 U.C. DAVIS L. REV. 85, 97 (2006) (hereinafter, Secunda, *Neglected Importance*) ("Yet even though the government employer does have unfettered discretion when it comes to impinging upon the exercise of its employee's constitutional rights, it does retain substantial latitude when setting the terms and conditions of its employees' employment, a discretion which is not available in its dealing with the same individuals as citizens.") (citing *Garcetti v. Ceballos*, 126 S. Ct. 1951, 1960 (2006); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996); *Waters v. Churchill*, 511 U.S. 661, 671-72 (1994) (plurality opinion)).

²²⁰ See *id.* at 101 (discussing substantial disruption theory of *Pickering* line of cases) (citing Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1018 (2005)).

²²¹ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

²²² Now, some might like this outcome because they do not agree with Professor Delahunty's views on torture. But one could easily imagine a similar case involving a public employee with more progressive views

2. The Case of Debora Hobbs

The impact of *FAIR* expanding expressive association rights would not be limited to either public law schools or to the First Amendment, as the next example illustrates. In a previous piece, I wrote about a female sheriff dispatcher, Debora Hobbs, in Penders County, North Carolina, who was told by her supervising sheriff, Carson Smith, to marry her live-in boyfriend, move out, or lose her job.²²³ The sheriff based his actions on a state cohabitation statute from 1805 and, in fact, the female dispatcher lost her position when she refused to comply.²²⁴ Without there being an expressive association right upon which the sheriff department could rely, the dispatcher sued in state court and won based on the court finding, in light of *Lawrence v. Texas*,²²⁵ that her firing unconstitutionally infringed her liberty interests under the due process clause of the Fourteenth Amendment.²²⁶ Although the state court's exact reasoning does not appear to have been published, it is likely that its decision is based on the proposition that a public employer must have a substantial and legitimate interest before interfering with an employee's off-duty private and personal decisions in matters pertaining to sex.²²⁷

But what if the Penders County Sheriff could claim a right to expressive association on behalf of the sheriffs' department based on the

being excluded from the association of a more conservative public law school. Suppose like the Boy Scouts, a conservative public university does not want to hire a gay rights activist? Again, the rights afforded to expressive associations under *Roberts*, *Dale*, and similar cases, would seem to permit the university to take this action even though this would appear to be an instance of a governmental entity interfering with a public employee's First Amendment rights.

²²³ See Secunda, *supra* note 222, at 131-32 (citing Steve Hartsoe, *ACLU Challenges N.C. Cohabitation Law*, WASH. POST, May 10, 2005, at A06).

²²⁴ See *id.*

²²⁵ 539 U.S. 558 (2003) (striking down Texas anti-sodomy statute based on liberty interest individuals have in making decisions about their personal and private lives).

²²⁶ See Paul M. Secunda, *North Carolina Cohabitation Law Struck Down in Case of Female Sheriff Dispatcher*, WORKPLACE PROF BLOG, at http://lawprofessors.typepad.com/laborprof_blog/2006/07/north_carolina_.html (July 21, 2006). I refer to this liberty interest recognized in *Lawrence* as a public employee's right to decisional non-interference in private affairs. See Secunda, *Neglected Importance*, *supra* note 222, at 115-19.

²²⁷ See Secunda, *Neglected Importance*, *supra* note 222, at 116.

holding in *FAIR*? The argument would go that central to maintaining the image and credibility of a law enforcement agency in a socially conservative part of the country is the ability to hire only those individuals who hold the traditional values of their community, including the values surrounding traditional forms of marriage. Thus, requiring the sheriff's department to maintain in employment those who choose to express other values by cohabitating without being married (whether they be heterosexuals and homosexuals) could be seen as forcing the department to promote non-traditional conduct outside of marriage as a legitimate form of behavior.

Dale stands for the proposition that expressive associations have the right not to be forced to send a message that is contrary to their chosen beliefs.²²⁸ As discussed previously, *Dale's* notion is also that a court must defer to the organization's characterization of its expression, as well as the organization's belief as to what would impair it.²²⁹ These principles suggest that a court reviewing Penders County's decision to fire Debora Hobbs for cohabitation would have little ability to inquire into the bona fides of the County's putative values and would have to take the County at its word that its expressive association would be harmed by having as members those with nontraditional values such as Hobbs.

Nor would a reading of *Lawrence v. Texas* that recognizes a heightened liberty interest in decisional non-interference in private affairs make a difference once public employers were endowed with expressive association rights. Although the modified *Pickering* analysis that I previously proposed would not permit a public employer to interfere with its employee's private and personal life (especially in matters pertaining to sex) without legitimate and substantial justification,²³⁰ the public employers' right to expressive association, to choose not to propound a point of view contrary to its belief, would certainly suffice as such a substantial and legitimate justification. Thus, recognition of public employer expressive association rights would also turn the clock back on public employee civil liberties outside of the academy and retard newly emerging substantive due process rights for public employees before they even had the chance to take root and flourish.

²²⁸ See *Dale*, 530 U.S. at 653; see also *Roberts v. United States Jaycees*, 468 U.S. 609, 633 (1984) (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

²²⁹ See *id.*

²³⁰ See Secunda, *Neglected Importance*, *supra* note 222, at 118-19.

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

A. *The Structural Argument Against Public Expressive Associations*

Although there are a number of normative reasons illustrated above which counsel against recognizing public law schools and public employers as expressive associations, the most persuasive argument against the Supreme Court's inadvertent holding in *Rumsfeld v. FAIR* is a structural one. It is simply this: the Bill of Rights is about protecting the rights of the governed, not the governing.²³¹

In this regard, the discussion in the recent case of *Coalition to Defend Affirmative Action v. Granholm* is instructive.²³² The *Coalition to Defend Affirmative Action* case concerned whether the court should preliminarily enjoin the recently-adopted Michigan anti-racial-preferences amendment from going into effect, especially that part that applies to public universities.²³³ The court denied the sought after injunctive relief based on

²³¹ Justice Stewart made this very point in his concurrence in *Columbia Broadcasting System v. Democratic National Committee*, 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press from governmental interference; it confers no analogous protection on the Government."). As David Fagundes has pointed out in his recent piece on government speech, and though he himself thoughtfully challenges this notion, Stewart's concurrence remains the majority view in this area of the law. See Fagundes, *supra* note 78, at 1643 ("[W]hen the question of whether the First Amendment applies to government speech has arisen, judges have typically acknowledged Justice Stewart's concurrence without critical reflection ... resulting in what one district court called 'the well-settled point of law that the First Amendment protects only citizens' speech rights from government regulation, and does not apply to government speech itself.'") (citing *Sons of Confederate Veterans, Inc. v. Holcomb*, 129 F. Supp. 2d 941, 944-45 (W.D. Va. 2001)); see also Morriss, *supra* note 8, at 440 ("These [state law school members of FAIR], as instrumentalities of state government, have no First Amendment rights.").

²³² No. 06-2640, 2006 WL 3831217 (6th Cir. Dec. 29, 2006).

²³³ See *id.* at *1. "On November 7, 2006, the people of Michigan approved a statewide ballot initiative--Proposal 2--which amended the Michigan Constitution to prohibit discrimination or preferential treatment based on race or gender in the operation of public employment, public education, or public contracting in the State. Under the Michigan Constitution, the proposal was scheduled to go into effect on December 23,

its holding that the First and Fourteenth Amendment permit states to use certain forms of affirmative action, but does mandate that they do so.²³⁴

In its losing argument, the public universities in Michigan²³⁵ argued that, "they have an academic freedom right, based in the First Amendment to the Constitution of the United States, to select their students and that they may, in the course of doing so, give some consideration to such factors ... as race."²³⁶ Dismissing this argument, the Sixth Circuit made the point that their "interests" in selecting a diverse student body should not be confused with them having actual First Amendment rights.²³⁷ After all, the court observed, it is not at clear "how the Universities, as subordinate organs of the State, have First Amendment rights against the State or its voters."²³⁸ In other words, the Constitution protects the people from the state, not the state from the people.²³⁹

2006." *Id.*

²³⁴ *Id.*

²³⁵ The public universities are the University of Michigan, Michigan State University, and Wayne State University. *Id.*

²³⁶ *Id.* at *3; *see also id.* at *9. Interestingly, with regard to an institutional academic freedom right, Professor William Van Alstyne of the William & Mary College of Law observed at a recent panel discussion on academic freedom at the 2007 Annual Meeting of Association of American Law Schools (AALS) that although there were some 30 decisions from the Supreme Court using the doctrine of institutional academic freedom, not one of them relied directly on that right for its holding, choosing instead to rely on other constitutional bases. (Notes of Talk on File with Author -- podcast of talk should be posted soon).

²³⁷ *See id.* at *9 ("The Universities mistake interests grounded in the First Amendment-- including their interests in selecting student bodies--with First Amendment rights.").

²³⁸ *Id.* (citing *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819)).

²³⁹ *See id.*; *see also* Fagundes, *supra* note 78, at 1638 ("[T]he Speech Clause is typically understood as a bulwark of protection against--rather than a source of rights for--government."); *see also id.* at 1639 ("Courts have varied in their receptivity to the notion that the First Amendment may extend to government speech. The majority of courts have reflexively rejected the notion, relying on the assumption that the First Amendment can only restrict, not protect, state actors.") (citing *Muir v. Ala. Educ. Television Comm'n*, 688 F.2d 1033, 1038 n.12 (5th Cir. 1982) (en banc)). *But see* *Nadel v. Regents of the University of California*, 34 Cal. Rptr. 2d 188, 197 (Cal. Ct. App. 1994) (recognizing speech rights for government

Nor does the analysis change when considering one of the points emphasized in *Grutter v. Bollinger*,²⁴⁰ that universities' academic decisions should be given a substantial degree of deference by the courts.²⁴¹ The Sixth Circuit in *Coalition to Defend Affirmative Action* points out that the *Grutter* Court more specifically stated that this degree of deference should only be granted "*within* constitutionally prescribed limits"²⁴² and "[o]ne of those 'constitutionally prescribed limits,' . . . is the separate requirement of narrow tailoring-- an inquiry that no one maintains may be satisfied simply by invoking a university's legitimate, but hardly dispositive, interest in academic freedom."²⁴³ Based on this line of reasoning, the court concludes that the universities have no First Amendment right to continue their racial preferences as part and parcel of their rights to institutional academic freedom.²⁴⁴

It then follows that if universities do not have a First Amendment right

actors); *County of Suffolk v. Long Island Lighting Co.*, 710 F. Supp. 1387, 1390 (E.D.N.Y. 1989) (same).

²⁴⁰ 539 U.S. 306 (2003).

²⁴¹ *See id.* at 328-29 ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition.").

²⁴² *Coalition to Defend Affirmative Action*, 2006 WL 3831217, at *9 (emphasis added).

²⁴³ *Id.*

²⁴⁴ *See id.* at *10. *But see* Fagundes, *supra* note 78, at 1662 (maintaining that, "[t]he majority rule proscribing constitutional status for government speech . . . fails to account for a scenario in which the federal government wrongly attempts to restrict the speech of another sovereign, or where government speech merits application of a statute or common law doctrine that is designed to safeguard constitutional speech interests."). Although Fagundes' thoughts on the First Amendment rights of state actors are thought-provoking, his categories for when government speech should be constitutionally protected nonetheless do not appear to cover instances in which state public universities or public employers seek to assert constitutional rights against the contrary First Amendment rights of their public employees. In other words, public employment does not raise the more difficult question of whether a state sovereign should have constitutional rights against the federal sovereign under some combination of the 1st and 10th Amendments, *see Grutter*, 539 U.S. at 328, but rather the relatively easy question concerning whether the states should have constitutional rights against individuals.

to select diverse student bodies, then surely the university even has less of a right to such constitutional protections when selecting members of its faculty and its staff. Although deciding whom to teach is one of the four essential freedoms discussed by Justice Frankfurter in his concurrence in *Sweezy* just as much as deciding who to admit to study,²⁴⁵ the Supreme Court has historically given less deference to non-academic decisions by universities because courts are considered to have more experience with dealing with issue of the non-academic variety, such as disciplinary decisions.²⁴⁶ Thus, if the public universities in *Coalition to Defend Affirmative Action* do not have First Amendment rights to select their students, they certainly should not have those rights to select their faculty.

Given the strength of these structural arguments, it is very likely that if the Supreme Court were to consider the issue head on, it would not deem the FAIR public law schools, or any other public employer, to be expressive associations. This inadvertent holding appears to have occurred as a result of the Court spending most of its analytical energies on more difficult areas in *FAIR*, such as the doctrine of unconstitutional conditions, the Congressional power to raise and support armies, and a number of obtuse First Amendment speech doctrines, including the doctrines of compelled speech and expressive conduct.²⁴⁷ Even in the expressive association portion of the case, the Court seems unconcerned about the nature or the constituents of the FAIR expressive association and focuses instead on whether having military recruiters on law school campuses significantly burdens law school rights to expressive association (answering that question

²⁴⁵ See *supra* note x and accompanying text.

²⁴⁶ See *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985) ("When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment."); *Bd. of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 89-90 (1978) ("Academic evaluations of a student, in contrast to disciplinary determinations, bear little resemblance to the judicial and administrative factfinding proceedings to which we have traditionally attached a full hearing requirement the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

²⁴⁷ *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1306-11 (2006).

in the negative).²⁴⁸

In any event, because of the confusion surrounding this area of the law, the Court should not merely correct this oversight in the next case in which it has the opportunity to discuss expressive association rights, but it should set out a coherent understanding of what type of rights public employers, including public universities acting in that capacity, have in deciding how best to convey certain messages to the public and protect their institutions' core values. In this vein, the Court should take their cue from the Sixth Circuit and deem such important claims to be "interests" rather than "rights" and analyze these interests with other governmental efficiency concerns under the *Connick/Pickering* First Amendment free speech framework. At the same time, the Court should step back from the abyss it reached in *Garcetti v. Ceballos* and not too quickly assume that all government employees are engaged in government speech without First Amendment protection every time they speak or express themselves in line with their job duties.

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

1. *Pickering* Efficiency Interests

To reiterate a point made in the last section, the current deference that courts pay to university academic judgments are better conceived of as interests grounded in the First Amendment, rather than constitutional rights. This conception of the academic employer having certain interests in exercising discretion in deciding who to hire and retain as employees is consistent with similar governmental efficiency interests already discussed in the *Pickering* line of cases.

*Pickering v. Bd. of Education*²⁴⁹ was most recently revisited by the Court in *Garcetti v. Ceballos*.²⁵⁰ In *Ceballos*, a deputy district attorney for Los Angeles County, Richard Ceballos, was subjected to adverse employment actions for speaking out about an allegedly defective search warrant in a criminal case.²⁵¹ The question presented to the Supreme Court was whether Ceballos had engaged in protected speech under the First Amendment, such that he could not be retaliated against for his actions with

²⁴⁸ *Id.* at 1312.

²⁴⁹ 391 U.S. 563 (1968).

²⁵⁰ 126 S. Ct. 1951 (2006).

²⁵¹ *See id.* at 1955-56.

regard to the search warrant.²⁵²

In its analysis in *Ceballos*, the Court noted that the *Connick/Pickering* analysis requires courts in public employee free speech cases to consider whether the employee spoke on a matter of a public concern in his or her capacity as a citizen²⁵³ and if so, then balance the First Amendment interests of the employee against the governmental interests of the employer to run an efficient governmental service.²⁵⁴ The governmental interests recognized in *Pickering* are not in any sense constitutional rights, but rather a recognition of the interests a government employer has in maintaining "a significant degree of control over their employees' words and actions" because "without it, there would be little chance for the efficient provision of public services."²⁵⁵ The balance undertaken in *Pickering* is required because even though the government employer performs "these important public functions,"²⁵⁶ and consequently far broader powers in its employer capacity than in its sovereign capacity;²⁵⁷ nevertheless, "a citizen who works for the government is nonetheless a citizen"²⁵⁸ and the First

²⁵² *Id.* at 1955. As far as answering that question, the Court found in *Ceballos* that because Ceballos was engaged in expression consistent with his job duties, he was not speaking *as a citizen* on a matter of public concern, but only as a government employee. As such, the Court concluded that Ceballos did not have any First Amendment protection and there was no need to conduct a *Pickering* balancing of interests. *See id.* at 1960 ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

²⁵³ *See Connick v. Myers*, 461 U.S. 138, 146-47 (1983).

²⁵⁴ *See Pickering v. Bd. of Education*, 391 U.S. 563, 568 (1968). I have recently argued that this same type of *Pickering* analysis should be extended to the substantive due process area in the context of sexual privacy rights in light of the Supreme Court's landmark decision in *Lawrence v. Texas*, 539 U.S. 558 (2003). Under this reasoning, employees should also be free from decisional interference by their employers in their private and personal affairs, unless the government can point to overriding efficiency interests. *See Secunda, Neglected Importance, supra* note 222, at 122-24.

²⁵⁵ *Ceballos*, 126 S. Ct. at 1958 (citing *Connick*, 461 U.S. at 143).

²⁵⁶ *See id.* at 1959 (citing *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)).

²⁵⁷ *See id.* (citing *Waters v. Churchill*, 511 U.S. 661, 671 (1994) (plurality opinion)).

²⁵⁸ *Id.*

Amendment therefore limits the ability of the employer to condition employment of that employee on the forfeiture of his or her constitutional rights.²⁵⁹

Similarly, the interests that public employers have in sending and advocating certain views and policies and maintaining the core values of their institutions may be seen as more akin to *Pickering* efficiency interests than a First Amendment right to expressive association.²⁶⁰ As the *Ceballos* Court observed: "Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and *promote the employer's mission*."²⁶¹ In setting out the relevant interests, the Court utilizes the language of efficiency interests, not of employer expressive association rights. This is particularly telling, since *Garcetti* was decided only about three months after *Rumsfeld v. FAIR*, and one would have expected some comment about expressive association rights if the Court had recognized the implications of its own statements in *FAIR*. Clearly, however, the Court did not so understand its *FAIR* decision.

In any event, based on this governmental interests analysis, if a public employer wishes not to hire a prospective employee because that employee has engaged in controversial expression through the written word, like Delahunty,²⁶² or through non-traditional living arrangements, like Hobbs,²⁶³ the proper analysis is not to suggest that the government has a constitutional right as an expressive association to disassociate itself from those individual it deems promoting an antithetical message, but to determine whether the constitutional rights of the individual cannot be recognized without substantially disrupting the public employer's enterprise.²⁶⁴ Again, this

²⁵⁹ See *id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)). This doctrine is commonly referred as the doctrine of unconstitutional conditions, and figures prominently in *Rumsfeld v. FAIR*, 126 S. Ct. 1297, 1307 (2006) ("Under this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.").

²⁶⁰ See *Ceballos*, 126 S. Ct. at 1960 ("Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity.").

²⁶¹ *Id.* (emphasis added).

²⁶² See *infra* Part IV.C.1.

²⁶³ See *infra* Part.IV.C.2.

²⁶⁴ I do not mean to suggest that the *Pickering* balance does not have its own shortcomings. Its reliance on determining constitutional rights based

analysis is more consistent with constitutional doctrine in the public employer area and does not take the unprecedented step of suggesting that government employers have First Amendment rights.

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

As much as *Pickering* provides a proper understanding of how public employer interests to promote certain messages should be conceived, that is to the degree to which the government speech doctrine has the ability to wreak havoc on public employees' remaining constitutional rights in a large sub-category of official capacity speech cases. Specifically, in coming to its conclusion in *Garcetti v. Ceballos* that Ceballos did not have First Amendment rights because he was acting in accordance with his job duties, the Court commented that Ceballos' speech "owed its existence to [his] professional responsibilities" and "simply reflects the exercise of employer control over what the employer itself has commissioned or created."²⁶⁵ In making this point, the Court cites to the case of *Rosenberger v. Rector and Visitors of Univ. of Va.*²⁶⁶ with a parenthetical that, "when government appropriates public funds to promote a particular policy of its own it is entitled to say what it wishes."²⁶⁷ This language in turn was taken from similar language in the abortion funding case of *Rust v. Sullivan*,²⁶⁸ which is considered part of the Court's ever-expanding government speech

on whether a public employee's conduct causes his or her employer substantial disruption is close to approaching the constitutionalization of the heckler's veto. See Kozel, *supra* note 223, at 1018-19 ("Such a test is inconsistent with the notion of robust exchange of divergent ideas, as it leaves vulnerable the speech that is most likely to have a strong effect.").

²⁶⁵ See *Ceballos*, 126 S. Ct. at 1960. However, *Ceballos* leaves open the question of whether this holding should apply to public university professors, like Delahunty, as the result of their enjoying some degree of constitutionally protected academic freedom. See *id.* at 1962 ("There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.").

²⁶⁶ 515 U.S. 819 (1995).

²⁶⁷ *Id.* at 833.

²⁶⁸ 500 U.S. 173, 174-75 (1991).

doctrine.²⁶⁹

Under this doctrine, individuals can be compelled to subsidize government speech without implicating any individual First Amendment rights.²⁷⁰ The Court in *Ceballos* thus seems to be suggesting that characterizing Ceballos' expression as government speech helps to explain why he has no First Amendment rights when speaking in his official capacity, whereas normally under the *Connick/Pickering* framework, he would. Such a broad notion of public employee speech as government speech, however, could all but wipe out a significant portion of public employee First Amendment rights.²⁷¹

Fortunately, it does not appear that the Court is willing to take the government speech doctrine in the public employment context to that length quite yet. Instead, the cite to the *Rosenberger* case in *Ceballos* was a "cf." cite, suggesting that the "cited authority supports a proposition different from the main proposition, but sufficiently analogous to lend support."²⁷² In other words, there is still room to doubt that the government speech doctrine applies in its adulterated form to all public employee speech cases in which there are statements made pursuant to official duties.

Justice Souter in his *Ceballos* dissent suggests ample reason why the government speech analysis should be mostly extraneous to the *Pickering* doctrine. He notes that, "[s]ome public employees are hired to 'promote a particular policy' by broadcasting a particular message set by the government, but not everyone working for the government, after all, is hired to speak from a government manifesto."²⁷³ Indeed, as Justice Souter points

²⁶⁹ See *id.* at 192-93 ("[G]overnment may 'make a value judgment favoring childbirth over abortion, and . . . implement that judgment by the allocation of public funds.'") (quoting *Maher v. Roe*, 432 U.S. 464, 474 (1977)).

²⁷⁰ See *Johanns v. Livestock Marketing Assn.*, 544 U.S. 550, 559 (2005) ("[I]t seems inevitable that funds raised by the government will be spent for speech and other expression to advocate its own policies. We have generally assumed . . . that compelled funding of government speech does not alone raise First Amendment concerns.") (citing *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000)).

²⁷¹ See *Ceballos*, 126 S. Ct. at 1969 (Souter, J., dissenting) ("The fallacy of the majority's reliance on *Rosenberger's* understanding of *Rust* doctrine . . . portends a bloated notion of controllable government speech going well beyond the circumstances of this case.").

²⁷² THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 1.2(a), at 46 (Columbia Law Review Ass'n at al. eds., 18th ed. 2005).

²⁷³ *Ceballos*, 126 S. Ct. at 1969 (Souter, J., dissenting) (citing *Legal*

out, there is no evidence that Ceballos himself was hired to "broadcast a particular message set by the government," and instead, was hired "to enforce the law by constitutional action."²⁷⁴ Similarly, returning to the higher education context for a moment, no one would seriously argue that public university professors are hired to send a particular government message.²⁷⁵

In short, although even Justice Souter concedes that there may be some public employees who are hired to advance specific governmental policies and thus fall under the government speech doctrine, a large number of such employees, including government lawyers, do not. Souter is right that "*Rust* is no authority for the notion that the government may exercise plenary control over every comment made by a public employee in doing his job."²⁷⁶ Here's hoping that future Courts recognize *Ceballos'* error in this regard and takes a mere "cf." cite for what it is.

CONCLUSION

Neither public law schools nor public employers have the constitutional right to expressive association as *Rumsfeld v. FAIR* mistakenly suggests. This inadvertent holding will eventually be rectified given the strong constitutional structural arguments in opposition to such an interpretation. But such a modification should be accompanied by a unifying theory about how government efficiency concerns in maintaining core values and promoting certain messages should be balanced against the First Amendment rights of public employees to engage in protected constitutional activities. In some cases then public employers will be permitted to adhere to core values and promote certain messages as a part of their *Pickering* efficiency interests in running their organizations as they see fit. Even so, these efficiency interests in the last analysis must be balanced against employee constitutional rights and do not simply override such interests. Furthermore, the government speech doctrine should not be read expansively into the public employment context to strip public employees

Services Corporation v. Velazquez, 531 U.S. 533, 542 (2001)).

²⁷⁴ *Id.*

²⁷⁵ *See id.* ("This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of a public university professor...."). The majority grants that different considerations might apply when the academic freedom concerns of professors engaged in teaching and scholarship are involved, but does not decide that issue since *Ceballos* itself does not concern academic freedom. *See id.* at 1962.

²⁷⁶ *Id.* at 1969.

of constitutional right when they are acting pursuant to their official duties. Instead, that doctrine should be limited to instances where a public employee has been hired to actually promote a specific governmental message.

In the end, only in this way will an unprecedented aggrandizement of constitutional power by public employers, to the detriment of public employees' constitutional and civil rights, be avoided.