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Academic Freedom: Disciplinary Lessons from Hogwarts

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ACADEMIC FREEDOM: DISCIPLINARY LESSONS FROM HOGWARTS

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INTRODUCTION

What does the Hogwarts School of Witchcraft and Wizardry[1]—a very different place of learning from the one in which most of us work, to be sure—have to do with academic freedom? Superficial appearances notwithstanding, Hogwarts is like our universities in one critical respect relevant to academic freedom: it has its own rules and ethic for learning to "do" magic in the proper way.

As readers of the Harry Potter stories well know, the rules and ethics of magic distinguish it from the "dark arts," whose practitioners form a distinctly separate normative community. Furthermore, each specialty within Hogwarts—Charms, Potions, Transfiguration—has its own disciplinary constraints. Transfiguration is not, for example, to be used as punishment: reprobate students must not be changed into ferrets.[2] Moreover, the rules of the discipline are fiercely defended. Anyone who does not adhere to the constraints will not be included in the discipline for long. As Professor Minerva McGonagall tells her students in Transfiguration, "Anyone messing around in my class will leave and not come back."[3] In other words, Hogwarts is recognizable as a community in which people learn how to live in the special world of magic.[4]

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1. *See generally* J.K. ROWLING, HARRY POTTER AND THE SORCERER'S STONE (Arthur A. Levine Books 1998).

2. J.K. ROWLING, HARRY POTTER AND THE GOBLET OF FIRE 204–06 (Scholastic Books 2000).

3. ROWLING, *supra* note 1, at 134.

4. *See* Robert M. Cover, *The Supreme Court, 1982 Term: Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 6 (1983) (to be part of a normative community, one must "know how to *live* in it"). *See also* THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 174–210 (2d ed. 1970) (describing a scientific paradigm and ways of doing science within a particular community); James Boyd White, *Legal Knowledge*, 115 HARV. L. REV. 1396 *passim*

Hogwarts offers us a simple reminder that faculty in our universities also live their professional lives within disciplinary constraints and norms. Physicists have one methodological approach to studying automobile accidents; professors of journalism and law will each have their own approved disciplinary perspective on the important questions to ask about such events, as will social scientists. Any given professor's academic research and teaching are constrained by disciplinary limitations on content, viewpoint, and subject matter; research and teaching are expected to be pursued in accordance with accepted disciplinary methods and behaviors. The discipline links faculty physically located at different sites throughout the world and is arguably more important to faculty than any specific university home.

Despite its importance in academic life, the academic freedom debate frequently neglects the discipline. In this article, I will bring the discipline to the foreground in order to show how the academic freedom debate might change were the discipline a more central figure in it. This is not to say that the discipline per se is the holder of a right of academic freedom. Rather, my thesis is simply that if we frame the academic freedom debate with reference to the reality of the discipline, the rights of professors and universities will be open to a more vigorous defense against external threats.[5]

Focusing on the empirical reality of the discipline shifts the academic freedom argument away from a consideration of First Amendment speech rights and toward First Amendment associational rights. As the

(2002) (asserting that those who do law use rules to claim meaning for experience and thereby make law their own).

5. Contemporary events provide a variety of examples of external threats that put the integrity of the academic discipline at risk. The University of Colorado, for example, staved off a bill based on David Horowitz's Academic Freedom Bill of Rights by preemptively entering into a Memorandum of Understanding providing that the university was committed to ensuring that the academic freedom rights of students are respected. For examples of creation-science mandates, see Edwards v. Aguillard, 482 U.S. 578 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968); and Kitzmiller v. Dover Area School District, 379 F. Supp. 2d 680 (M.D. Pa. 2005).

The Bush administration's national commission on higher education has recently proposed that student achievement tests be used to measure performance of university students. *See* Kelly Field, *Educators Cast a Wary Eye at U.S. Panel*, CHRON. HIGHER EDUC., Oct. 14, 2005, at 1. *See also* Robert M. O'Neil, *Academic Freedom and National Security in a Time of Crisis*, 89 ACADEME 21, 21–24 (2003) (discussing federal regulation of classified research, regulation of export licenses for cryptography, the treatment of "sensitive but unclassified" information, and visa restrictions), *available at* http://www.aaup.org/statements/REPORTS/911report.htm; Diana Pullin, *Accountability, Autonomy, and Academic Freedom in Educator Preparation Programs*, 55 J. TCHR. EDUC. 300 (2004) (discussing the federal government's imposition of accountability requirements and mandates concerning what "counts" as good evidence for evaluating school performance, and their influence on higher education curricula and teaching practices).

other articles associated with the White Center conference show, speech rights are critically important to the academic freedom debate.[6] Yet they are not the only rights that matter.

Because the discipline is, by definition, the artifact of a collective, expressive enterprise, associational interests are properly considered alongside free speech in the academic freedom debate. Indeed, a disciplinary-based, associational rights analysis has some potential advantages over a free speech analysis. Associational rights, for example, may be more fact-sensitive than category-driven and thereby afford constitutional protection to unique institutions such as academia; in contrast, free speech doctrine has generally been thought not to extend special privileges to preferred speakers.[7] An associational rights analysis may avoid the paradoxes and difficulties of free speech precepts such as content and viewpoint neutrality, which seem difficult to reconcile with the regulated academic marketplace.[8]

To illustrate my arguments, I will draw examples from *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*[9] *FAIR* involved a challenge to the federal Solomon Amendment, which effectively requires law schools to give military recruiters access to their placement services.[10] The controversy thus raised academic freedom issues in a single discipline. The plaintiffs in *FAIR* employed an associational rights analysis as part of their academic freedom debate. They did not, however, adequately and cohesively conceptualize the discipline and, as a result, relinquished the potential for an illuminating associational rights perspective on the controversy. For that reason, the Supreme Court of the United States concluded that FAIR "plainly overstates the expressive nature of [its] activity and the impact of the Solomon Amendment on it."[11]

This article attempts to show how a discipline-based, associational rights analysis might have enriched the understanding of the academic freedom debate at the heart of the *FAIR* dispute. With respect to *FAIR*, a disciplinary perspective would have ensured that core associational val-

6. *See, e.g.*, J. Peter Byrne, *Constitutional Academic Freedom After* Grutter: *Getting Real About the "Four Freedoms" of a University*, 77 U. COLO. L. REV. 929 (2006); Alan K. Chen, *Bureacracy and Distrust: Germaneness and the Paradoxes of the Academic Freedom Doctrine*, 77 U. COLO. L. REV. 955 (2006); Robert M. O'Neil, *Bias, "Balance," and Beyond: New Threats to Academic Freedom*, 77 U. COLO. L. REV. 985 (2006); Frederick Schauer, *Is There A Right to Academic Freedom*, 77 U. COLO. L. REV. 907 (2006).

7. *See* Schauer, *supra* note 6. Much of the discussion pertaining to the other papers in the Conference addressed fixed doctrinal categories employed in First Amendment analysis.

8. *Id.*

9. 126 S. Ct. 1297 (2006) [hereinafter *FAIR*].

10. *See infra* text accompanying notes 70–92.

11. *FAIR*, 126 S. Ct. at 1313.

ues pertaining to the role obligations of those who "do" law in different settings are not neglected, trivialized, or seen as "small potatoes."[12] I also hope that the *FAIR* examples will show, more generally, how a disciplinary perspective might enrich the academic freedom debate in other disputes.[13]

I. THE ROLE OF THE DISCIPLINE IN ACADEMIC LIFE

The discipline has a role to play in the academic freedom debate and deserves reflection.[14] A university consists of academic units organ-

12. 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, 469 (2005) (disagreeing with the disciplinary perspective of this article).

13. *FAIR*, 126 S. Ct. 1297, dealing as it does with topics and activities that tend to evoke passionate reaction, is an especially useful controversy for my purposes, precisely because it puts my thesis to a rigorous test.

14. This article does not undertake an empirical study of the role of the discipline in academic life. It only offers sufficient evidence of the role to support the thesis that a discipline-based academic freedom argument is one that should be pursued in constitutional analysis. I adhere to the view that constitutional analysis will rest on a sounder footing if it is grounded in empirical reality. *See* Jason Mazzone, *Freedom's Associations*, 77 WASH. L. REV. 639 (2002) (particularly recommending empirical perspectives in dealing with the right of association); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84 (1998) (arguing that a focus on factual reality of institutions rather than categories of First Amendment speech might lead to better constitutional analysis and behavior); Timothy Zick, *Constitutional Empiricism: Quasi-Neutral Principles and Constitutional Truths*, 82 N.C. L. REV. 115 (2003) (describing constitutional law as an empirical enterprise).

Much legal scholarship purporting to deal with reality rests more on assumption than empirical fact. *See, e.g.*, Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327 (2002). Too much judicial analysis similarly finds its basis more in assumptions than empirical fact. *See, e.g.*, David L. Faigman, *"Normative Constitutional Fact-Finding:" Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541 (1991); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771 (1999). I agree that full confirmation of the validity of this article's argument may require additional empirical study. I am certainly mindful of Professor Alan Chen's reminder during this Conference that the Harry Potter stories have another lesson: that one must avoid taking as truth what is only an illusory reflection of dreams in the Mirror of Erised. *See* ROWLING, *supra* note 1, at 213–14 (Professor Dumbledore explains that those who have relied on reflections seen in the Mirror of Erised have "wasted away before it, entranced by what they have seen, or been driven mad, not knowing if what it shows is real or even possible"). There are certainly reasons to suspect that the discipline of law—which is the specific focus of this article—may not have as fixed or firm a core set of principles as do other disciplines. *See, e.g.*, J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL ED. 315 (1993) (commenting that law may perhaps be considered the least scientific or the most humanistic of disciplines); Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615, 621–23 (1992) (commenting that law may not have the same institutional, consensus-building mechanisms that other disciplines have). *See also*, Larry Alexander, *Academic Freedom*, 77 U. COLO. L. REV. 883 (2006) (arguing that post-modernism has so tainted many disciplines that one can no longer believe in the existence of any disciplinary standards).

ized by discipline.[15] It contains, for example, departments of English, Classics, Microbiology, Chemistry, Mathematics, and Mechanical Engineering; it also is home to schools of Music, Education, and Law. Within any one of these academic units, there are also disciplinary subspecialties. Within a psychology department, for example, there are both clinical and behavioral psychologists. Thus, any given discipline is smaller than its home university.

At the same time, the discipline is larger than and transcends the university. It includes persons drawn from all universities (both public and private). It includes those who practice the discipline outside the academy and who collaborate through learned societies and other institutions. It even transcends the national, geographic boundaries of any specific constitutional regime.[16] Indeed, the discipline may be considered an artifact of a consensus reached among all of its affiliates—within the university and without—on important matters. The consensus is informal and may be reflected more in how disciplinary affiliates interact with each other in a mutual spirit and method of inquiry than in their agreement on the substance of disciplinary issues.[17] Even when affiliates do not agree with each other substantively, they remain within the discipline insofar as they continue to work cooperatively on their differences, in accordance with the norms of the discipline.

For an analysis of the *FAIR* controversy that has a completely different take on what legal education is all about, see Morriss, *supra* note 12, which argues that law schools, the ABA, and the AALS are a commercial oligopoly that engages in cartel behavior. If Morriss' oligopoly analogy is valid, the disciplinary focus of this article is ill-conceived. Even Morriss, however, notes that law schools have chosen to attach themselves to universities precisely because they have shunned a student-as-consumer model of legal education in favor of a more academic model that stresses "law reform and scholarship." *Id.* at 432–33.

15. A department (or a professional school or college) is itself distinct from a discipline. It is organized along disciplinary lines but, as a constituent unit of a larger university, serves values and pursues objectives that are not necessarily those of the discipline itself. A discipline benefits from its connections to the university, for a specialty needs to engage with the whole of knowledge to have meaning. KARL JASPERS, THE IDEA OF THE UNIVERSITY 44–46 (Karl W. Deutsch ed., Beacon Press 1959) (1946). *See also* William G. Tierney & Robert A. Rhoads, *Faculty Socialization as a Cultural Process: A Mirror of Institutional Commitment*, *in* ASHE-ERIC HIGHER EDUCATION REPORT, at 12 (ASHE-ERIC Higher Education Report No. 6, 1993) ("[A] French physicist and a Canadian chemist . . . are socialized to share common work-related languages and customs more than would the French physicist with a countryman who is a banker.").

16. I am indebted to Professor Sienho Yee for this reminder, which is so important to how one might think about the associational rights and interests that are implicated by efforts of the government to limit the discourse and consensus-building processes of a discipline. For a discussion of the right of association in international law, *see* HUMAN RIGHTS *FIRST*, THE NEGLECTED RIGHT: FREEDOM OF ASSOCIATION IN INTERNATIONAL HUMAN RIGHTS LAW (1997), http://www.humansrightsfirst.org/pubs/descriptions/neglrt.htm.

17. For this way of phrasing significant disciplinary connections, I am again indebted to Professor Yee.

As other scholars have observed, "[t]he culture of the discipline is the primary source of faculty identity and expertise and typically engenders stronger bonds than those developed with the institution of employment, particularly in large universities."[18] Disciplines are, for the most part, the final arbiter of what "counts" to a faculty member.[19] The discipline purports to dictate everything important to what individual professors will "do" and how they will "live" within their discipline.[20] The discipline determines what "counts" as an important question or topic to pursue in research or teaching, how questions should be asked, what methods can validly be used to find answers, and what criteria are used to judge the legitimacy of conclusions. Although all disciplines share a commitment to honesty and truth,[21] each discipline is permitted to define the concept of truth and how best to reach it in discipline-specific ways.[22] A given discipline inculcates its own norms for determining what counts or is valuable and when one can trust in the truth of a particular matter. For example, scientists and lawyers may use entirely different methods and standards for determining whether a causal relationship has been established between exposure to a toxic substance and a particular disease.[23]

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18. *See* George D. Kuh & Elizabeth J. Whitt, *The Invisible Tapestry: Culture in American Colleges and Universities*, *in* ASHE-ERIC HIGHER EDUCATION REPORTS (ASHE-ERIC Higher Education Reports No. 1, 1988), quoted in Tierney & Rhoads, *supra* note 15, at 14. It is commonplace within academia that disciplinary connections give faculty the wherewithal to cope with non-disciplinary controversies and politics at their home institutions.

19. Tierney & Rhoads, *supra* note 15, at 13 (setting forth some classic definitions of a discipline: a discipline may be defined in terms of organizational form; with reference to shared concepts, methods, and fundamental aims; or by bodies of ideas, values, and professional styles).

20. *See* General Report of the Committee on Academic Freedom and Academic Tenure, 1 AAUP Bull. 17 (1915), *reprinted in* 53 LAW & CONTEMP. PROBS. 393 (1990) (in identifying what is important to academic freedom, the AAUP stresses the central role of the discipline, fellow-experts, specialists, and fields of expertise throughout, and notes that the responsibility of the university teacher relates to the judgments of his own profession).

21. *See* BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS: AN ESSAY IN GENEALOGY (2002) (discussing this feature of academic life). Williams observes, for example, that the important market forces in academia are processes that support a search for truth, as seen by disciplines. *Id.* at 214. He notes that the integrity of all disciplines rests heavily on transparency rather than "opacity, mystification, [or] large-scale deception." *Id.* at 232.

22. Enterprises, academic or otherwise, dealing with truth can be structured differently. As WILLIAMS, *supra* note 21, at 213, says, one can debate "what systems favour truth-discovery in a given area."

23. *See, e.g.*, Joëlle Anne Moreno, *Beyond the Polemic Against Junk Science: Navigating the Oceans that Divide Science and Law with Justice Breyer at the Helm*, 81 B.U. L. REV. 1033, 1060–65 (2001). White, *supra* note 4, at 1398, 1431, observes that the ends of law are perhaps justice as much as truth, and that the methods of law are adversarial, both of which constitute significant differences between law and science.

Disciplines also set standards of behavior and establish role obligations for disciplinary affiliates. Indeed, a discipline takes its identity from an internal, disciplinary consensus on ethical norms and professional behavior.[24] If disciplinary affiliates conform to their role obligations, they can be said to live appropriately within the discipline. If not, they are in trouble, even if they have brilliantly and effectively made use of a complicated body of theoretical knowledge. These role obligations are the reason for the standard assertion that privileges, such as academic freedom, entail responsibilities.[25]

Faculty members build their reputations within their discipline and do substantial work outside the university where they are employed.[26] They spend significant time developing close disciplinary associations through conferences, inter-institutional collaborative research, and visits and informal consultation with disciplinary peers employed at other institutions. As they do their work, an informal and ongoing process of peer review occurs. Through discussions, seminars, and meetings—and as graduate students mentored by faculty at one university assume professorships at other institutions—faculty within a given discipline come to know and judge the merits of a given professor's contributions to the discipline. More formal methods of establishing reputation within a discipline also exist. For example, publication in most disciplinary journals is conditioned on review and acceptance of the merits of submitted work by highly-regarded members of the discipline. In addition, it is frequently impossible for faculty to secure research funding from government or other external sources without first securing the approval of disciplinary peers.[27]

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24. *See* Tierney & Rhoads, *supra* note 15, at 13.

25. This disciplinary fact of life is especially important in professionally-oriented disciplines. *See, e.g.*, CHARLES BOSK, FORGIVE AND REMEMBER: MANAGING MEDICAL FAILURE (1979) (describing what "counts" as an error in the medical subspecialty of surgery; discussing the background norms, understandings, and values invoked in teaching hospitals to categorize errors as either blameworthy or mere misfortune; and holding that normative error, *i.e.*, a failure of physicians to discharge their role obligations conscientiously, is every bit as, if not more important than, technical error, i.e., a failure to apply a theoretic body of knowledge correctly). *See also* Byrne, *supra* note 14, at 339 ("An account of academic freedom for law schools that ignores our professional obligations must become either a platitude or a denial of responsibility.").

26. Tierney & Rhoads, *supra* note 15, at 46 ("The disciplinary . . . culture is where meetings, journals, book publishing, and scholarly networking occur.").

27. For descriptions of the formal and informal processes of peer review, see Brief Amici Curiae of The American Association of University Professors et al., in Support of Appellees at 5 *passim*, Edwards v. Aguillard, 482 U.S. 578 (1987) (No. 85–1513) [hereinafter *Edwards* AAUP Brief]; Brief for The American Association for the Advancement of Science et al., as Amici Curiae in Support of Respondent at 14–15, Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1995) (No. 92-102) [hereinafter *Daubert* AAAS Brief]. *See also* Tierney & Rhoads *supra* note 15, generally and at 50 (one becomes known in one's field via publications,

Acceptance in the scholarly discourse of a discipline is critical to faculty. The discipline consists of a continuing conversation and disputation, which is how knowledge is developed and truth is established.[28] An individual professor's reputation is established insofar as he or she is deemed qualified to participate in the continuing discussion of the discipline. Simply by refusing to debate a pretender to the discipline, an esteemed member of the discipline can thwart introduction of a particular idea or approach to a way of "doing" or "living" within the discipline. Stephen Jay Gould and Richard Dawkins, for example, famously refused even to debate so-called "creation scientists" because they believed that engagement in a debate—in and of itself, irrespective of which side might win or lose the debate—would lend disciplinary, that is, scientific, legitimacy to creation "science" and its advocates.[29]

The university takes significant direction from the discipline.[30] The education of graduate students destined to become part of the professorate is organized around disciplinary specialties that socialize students into the norms of a discipline.[31] At hiring, individuals are brought into departments organized by disciplinary specialty. Curricular development

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reviewing articles of others, presentations, committee work, external reviews at tenure time, and drafts of articles). For an example of government funding standards, see National Institutes of Health, *NIH Research Planning: Scientific Peer Review*, NIH, Apr. 27, 2005, http://www.nih.gov/about/researchplanning.htm.

28. *See, e.g.*, JASPERS, *supra* note 15, at 64 (scholarship is maintained through discussion and disputation); WILLIAMS, *supra* note 21, at 225 (discussing the nature of the scholars' continuing conversation and positing that a statement is true if it is the one on which everyone would agree if they discussed freely for an unlimited period of time). *See generally Edwards* AAUP Brief, *supra* note 27; *Daubert* AAAS Brief, *supra* note 27, at 12 ("[science is] a process for proposing and refining theoretical explanations;" it is an "endless search for universal laws and a more inclusive coherent system of hypotheses;" and "only through a process of continual challenge" can there be confidence in scientific validity).

29. *See* Richard Dawkins, *Why I Won't Debate Creationists*, 23 FREE INQUIRY 12 (2002) (noting that creation science advocates would see mere participation in a debate with an honored representative of the sciences as a victory for creation science because participation would signal legitimacy). For another perspective on this issue, see Stephen Jay Gould, *Darwinian Fundamentalism*, 44 THE NEW YORK REVIEW OF BOOKS, June 12, 1997, at 34 (setting forth the conditions under which debate should occur).

30. Why universities defer to disciplinary influence in their internal affairs is something of a mystery (and beyond the scope of this article). One might speculate that they acquiesce in—and even protect—the influence of the discipline because they understand that their own standing and reputation derive from the disciplinary standing and reputation of individual faculty members. Perhaps they defer to the discipline because administrators are drawn from faculty ranks, retain connections to their home departments and disciplines, and expect to return to their discipline at some point in their career. Perhaps they defer because of the accrediting power of formally organized disciplinary entities.

31. *See* Tierney & Rhoads, *supra* note 15, at 13–14 (referencing T. BECHER, ACADEMIC TRIBES AND TERRITORIES: INTELLECTUAL ENQUIRY AND THE CULTURES OF DISCIPLINES (1989)). Graduate students take into account the prospects of having their work approved and selected for publication by disciplinary peers as they select and pursue their dissertations.

is dependent on the disciplinary research and teaching agendas of individual professors.[32]

The university especially acquiesces in the influence of the discipline in its tenuring processes, which rest heavily on a system of disciplinary peer review.[33] The opinions of established scholars in the discipline are a more important measurement of quality and accomplishment than the opinions of administrators or faculty from other disciplines within the tenuring institution.[34] Even the criteria for what counts as valid scholarly work are not established institution by institution, except in the most general of terms,[35] and changes to a university's system of tenure are usually possible only if acceptable to and compatible with the discipline.[36] Moreover, it is not easy for a university to fire a tenured professor.[37] Tenured professors can generally be terminated only for

32. I am indebted to John C. Calhoun, Jr. for the following reminders. New courses are typically the brainchild of individual professors responding to new disciplinary directions and developments external to the university. Moreover, the faculty who come together to offer interdisciplinary courses are typically driven by disciplinary demands. Perhaps, for example, upper-division courses in a variety of disciplines require an understanding of math that can be provided only if a basic math course for undergraduates is tailored to respond to the needs of each of the disciplines. Of course, the influence of the discipline can have less positive effects as well. Consider the possibility that because of the influence of the discipline, universities are notoriously poor organizers of knowledge.

33. The discipline affects more than tenured or tenure-track faculty. Within universities, there are also adjunct professors, clinical professors, and lecturers. *See, e.g.*, JOE BERRY, RECLAIMING THE IVORY TOWER: ORGANIZING ADJUNCTS TO CHANGE HIGHER EDUCATION 5 (2005) (sometime during the 1990s, the majority of faculty became "contingent," *i.e.*, not full-time, tenure-track, or tenured). Notwithstanding different categories of faculty, faculty within given disciplines are held together by a commitment to disciplinary norms.

34. *See, e.g.*, Memorandum from the Office of Faculty Affairs of the University of Colorado at Boulder on Reappointment, Tenure and Promotion of Tenure Track Faculty (2005) (emphasizing external letters of recommendation in the University of Colorado's tenuring process), *available at* http://www.colorado.edu/facultyaffairs/deskref/part5reappoint_teure_promo_ ttrack.htm. The University of Colorado's tenure and tenure-related policies are typical of other research universities. *See* Independent Report on Tenure-Related Processes at the University of Colorado 23 (Apr. 24, 2006) (concluding that "with few exceptions, University of Colorado processes align with consensus/best practices among the benchmark institutions").

35. *See, e.g.*, University of Colorado Board of Regents, *Laws of Regents Appendix A: Standards, Processes, and Procedures Document*, (adopted 1974, last amended 2000) (detailing the University of Colorado's criteria of excellence), *available at* http://www.cusys.edu/regents/Laws/AppendixA.html; Memorandum from the Office of Faculty Affairs on Reappointment, Tenure, and Promotion of Tenure Track Faculty, *supra* note 34 ("[T]he definition of the terms 'meritorious' and 'excellence' are, of course, discipline specific.").

36. *See* Scott Jaschik, *A Tenure Reform Plan with Legs*, INSIDE HIGHER ED, Jan. 5, 2006 (comparing a failed university proposal for tenure reform to the much better prospects for reform initiated by the Modern Language Association), *available at* http://insidehighered.com/news/2006/01/05/tenure.

37. *See, e.g.*, Stanley Fish, *Chickens: the Ward Churchill and Larry Summers Story*, CHRON. HIGHER EDUC., May 13, 2005, at B9 (noting the citizen's mistaken view of the university's power to rid itself of a troublesome professor), *available at* http://chronicle.com/weekly/v51/i36/36b00901.htm.

cause, which, other than egregious misbehavior such as sexual harassment, requires some sort of conduct deemed unprofessional by the discipline.[38]

The influence of the discipline is not, of course, without challenge. Just as the bureaucratic apparatus of the Ministry of Magic frequently intrudes on Hogwarts, so do external factors affect our universities and the disciplines within them. For example, the university frequently and necessarily pursues broad objectives, such as maintaining athletic programs, sustaining profitable connections to the business community, and responding to legislative bodies, whose fulfillment can put pressure on specific disciplines. Legislators may wish to constrain the way in which professors interact with the larger community; the commercial world may entice entrepreneurial faculty to seek commercial gains from their intellectual creations; and private or public donors to research may have their own, extra-disciplinary goals in mind. These pressures can put the integrity of the discipline at risk, especially insofar as the discipline purports to be concerned with the intrinsic value of knowledge and the pursuit of research for its own sake.[39]

Notwithstanding these pressures, the discipline is still a significant—although some would argue weakening—force in academic life.[40] It undeniably and closely continues to constrain the professor who claims an affiliation with it. Although in the conventional view, a university "undertakes to stimulate the whole universe of speech and ideas,"[41] ideas

38. *See, e.g.*, David A. Groth, *Misconduct in Research and Authorship*, UNIVERSITY OF COLORADO, Dec. 31, 1998, http://www.cu.edu/policies/Academic/misconduct.html (defining research misconduct at the University of Colorado as conduct involving a serious deviation from practices "commonly accepted in the research community for proposing, conducting, or reporting research").

39. For an interesting discussion of these external pressures, see Suzy Harris, *Rethinking Academic Identities in Neo-Liberal Times*, TEACHING IN HIGHER EDUCATION, 421–33 (2005). Harris, addressing the experiences and structures of education in the UK, notes that although the university was historically the sole physical site of knowledge production, others are now challenging who can define what counts as useful knowledge. For example, "[p]rofessional expertise and intellectual property are increasingly based on market definitions," and "[t]he distinction between corporate identities and academic identities is no longer very clear." *Id.* at 424.

40. Compare the formal commitment to policies that seek to protect professors from external pressures in government-funded research, *e.g.*, AAUP, *On Preventing Conflicts of Interest in Government-Sponsored Research at Universities*, *in* AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS POLICY DOCUMENTS & REPORTS 158–60 (1984), and in judicial doctrine, Rust v. Sullivan, 500 U.S. 173, 200 (1991) ("Similarly, we have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

41. Bd. of Regents v. Southworth, 529 U.S. 217, 232 (2000).

are pursued in an extremely structured way.[42] Marketplace-of-ideas metaphors notwithstanding,[43] professors do not throw ideas out, willy-nilly, into a *laissez-faire* market.

I like Bernard Williams' description of the type of regulated market that operates within the discipline and academia itself. Williams calls it an "idealized market" in which the worth of ideas is measured by disciplinary acceptance rather than dollars.[44] In other words, in the idealized market, a faculty member's work is deemed worthy not because some miscellaneous, external consumer of information might choose to buy it—because it suits some external consumer's preferences—but because the affiliates of a discipline as a whole choose to accept it. According to Williams, international scientific inquiry is a good example of the idealized market.[45] There is "an increasingly high entry fee in terms of training," and the market contains "a powerful filter against cranks."[46] For example, "the vast majority of suggestions which an uninformed person might mistake for a contribution to science will, quite properly, not be taken seriously and will not find their way to discussion or publication."[47] As Williams notes, if everything were taken seriously, "science would grind to a halt."[48]

Thus, we must accept that the norms of different disciplines clearly do govern how professors live their lives and do their work. The "idealized market" of the academy cannot be described as either indiscrimi-

42. This structure is reflected in how Justice Harlan famously described the four essential academic freedoms: "to determine who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957). The structure is reflected in scholarly literature. *See, e.g.*, Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 186 (2003) (portraying universities as "private governments" that use their resources—and the threat of their denial—to coerce behavior).

43. Even the academic world invokes "marketplace" metaphors that divert attention from the highly structured nature of the academic environment. *See, e.g.*, Brief of Amici Curiae the Thomas Jefferson Center for the Protection of Free Expression, et al., in support of the Respondent at 4, Garcetti v. Ceballos, 126 S. Ct. 1951 (2006) (No. 04-473) (AAUP joins in arguing that the university is an "intellectual experiment station").

44. WILLIAMS, *supra* note 21, at 214. For further discussion of the importance of disciplinary consensus, see also KUHN, *supra* note 4; JASPERS, *supra* note 15; *Edwards* AAUP Brief, *supra* note 27, at 19 ("a theory gains acceptance in science not through the power of its adherents to persuade a legislature, but through its intrinsic ability to persuade the discipline at large"). *Cf.* Schauer, *supra* note 14, at 115–16 (art is not art unless and until it is accepted as such by the proper arbiters). The importance of acceptance and consensus is linked to the commitment to truth within academia. Lying or a failure of truth is incompatible with an academic discipline because lying attempts to persuade through power rather than through reason. WILLIAMS, *supra* note 21, at 146–47.

45. WILLIAMS, *supra* note 21, at 217.

46. *Id.*

47. *Id.*

48. *Id.*

nately open or egalitarian.[49] Yet, the essentially conservative force of the discipline within academia[50] is an extremely potent guard against external pressures. It is this paradox—that the inherently conservative institution of the discipline can be used to protect quite non-conservative thought and behavior within academia—to which I now turn.

II. ACADEMIC FREEDOM AND THE DISCIPLINE

Conventional academic freedom debates feature neither the existence of the discipline nor its importance to faculty. Instead, they tend to emphasize either free-standing individual liberty or university autonomy.

When debate focuses on a professor's individual liberty, it typically devolves into arguments that a given professor has a free speech right to say what he wants to say, to teach what he wants to teach, and to choose his own research agenda. At its most extreme, the individual liberty perspective conjures up an academic world portrayed in satiric novels where academic freedom and the tenure system are described as routinely protecting eccentric, even rogue, behavior of university faculty. These satiric portrayals completely miss the constraining—indeed, profoundly conservative—nature of the disciplinary association. They convey no sense of the possibility that when academic freedom is threatened, it is because the integrity of a discipline, not only individual liberty, is at risk.[51]

The university autonomy perspective typically consists of a claim for deference to the judgments made by universities about policy and

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49. *Cf.* Evelyn Brody, *Entrance, Voice, and Exit: The Constitutional Bounds of the Right of Association*, 35 U.C. DAVIS L. REV. 821, 857–58 (2002) (noting that in some organizations "voice power" is not egalitarian).

50. The conservative force of the discipline should not, however, be overstated. The discipline is not immune to change. *See* KUHN, *supra* note 4 (explaining how normal science evolves and paradigm shifts occur). As Williams notes, there is—and must be—flexibility within the discipline, so that "new questions can be asked." WILLIAMS, *supra* note 21, at 265. For an argument that there may be more structure—and coercion—in academia than there ought to be, see Jeffrey Williams, *The Other Politics of Tenure*, 26.3 COLLEGE LITERATURE 226 (1999) (highlighting how the discipline can constitute a professional monopoly that exercises power through fear and abuse of the tenure process). Untenured faculty must pay attention to all sorts of pressures, from within the discipline and without. On the other hand, tenured professors may more readily push disciplinary boundaries.

51. *See* William G. Tierney, *Academic Freedom and Tenure: Between Fiction and Reality*, 75 J. HIGHER EDUC. 161 (2004). In these novels, the research-dependent tenure system may be portrayed as permitting—or even pressuring—professors to take unethical research shortcuts or as making the teaching of students irrelevant. Indeed, the primary teacher-student relationship may be portrayed as sexual. As Tierney notes, some novelists do note the constraining influence. See, for example, the portrayal of the central character in John Kenneth Galbraith's *A Tenured Professor,* described in Tierney, *id.* at 171 (*quoting* JOHN KENNETH GALBRAITH, A TENURED PROFESSOR 38 (1990)).

other matters,[52] such as whom to admit as students[53] or whom to hire or tenure as faculty members.[54] Justifications for university autonomy derive, in part, from an assumption that the faculty, collectively, run universities; we are to believe that deference respects collective faculty governance and, therefore, necessarily, faculty expertise and independence.[55] However, university decisions are not always driven by faculty expertise or independence, or by academic or disciplinary values.[56] Universities

52. *See, e.g.*, RONALD BARNET, THE IDEA OF HIGHER EDUCATION 136–146 (1990) (the historic roots of academic freedom lie in institutional protection from coercion by other institutions, not individual freedom). For recent scholarship dealing with deference to educational institutions, see, e.g., Hills, *supra* note 42 (arguing that private, non-governmental institutions like universities have a superior capacity to make good decisions); Paul Horwitz, *Grutter's First Amendment*, 46 B.C. L. REV. 461, 472–81, 523–29 (2005) (arguing that universities themselves are institutional rights-holders and are given deference to make ultimate determinations about the balance to be struck between governmental interests and First Amendment values); John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485 (2002) (deference is an ideologically appropriate adjunct to the Rehnquist Court's decentralization efforts); Wendy Parker, *Connecting the Dots: Grutter, School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1706–08 (2004) (discussing federalism and *Brown v. Board of Education*, where the Supreme Court deferred to the expertise of local officials in finding effective ways to desegregate public schools).

53. *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (the University of Michigan defended its use of race in the admissions process as a pedagogical choice to which courts should defer). *See also* the White Center conference articles also appearing in this issue.

54. *See* George R. Kramer, Note, *Title VII on Campus: Judicial Review of University Employment Decisions*, 82 COLUM. L. REV. 1206 (1982).

55. See the basis for the argument in the Brief for Amicus Curiae The American Association of University Professors in Support of Respondents, *FAIR*, 126 S. Ct. 1297 (2006) (No. 04–1152) [hereinafter *FAIR* AAUP Brief].

56. *See supra* text accompanying note 39. The institutional autonomy concept of academic freedom is in considerable tension with the individual faculty freedom concept. *See, e.g.*, Horwitz, *supra* note 52, at 477–78. For examples which pertain to efforts to provide "balance" within universities, see Fish, *supra* note 37. According to Fish, university administrators try to provide "balance" as a way to satisfy critics of controversial opinions. To Fish,

> [t]he idea is to inoculate the institution from criticism by multiplying the points of view represented so that no one of them seems to be endorsed or valued. . . . [But t]he academy flourishes when it takes ideas seriously; turning the occasion of a talk on a particular topic or question into a pledge of allegiance to balance and . . . neutrality blunts the edge of any of the arguments that might be made and makes them theatrical in the pejorative sense. . . . It may look like the protection of academic inquiry, but in fact it is the evacuation of academic inquiry.

Id. See also Joan Wallach Scott, *Joan Wallach Scott on Threats to Academic Freedom*, ACADEME, Sept.-Oct. 2005, at 39, 40. Scott asks whether David Horowitz's academic bill of rights, which turns on the idea of "balance," would require professors to give "creationism and the denial of the Holocaust . . . equal time in science and history courses. . . . [This would suspend] the judgments of quality and the ethical commitments that are part of academic discourse." *Id.* Some university administrators, of course, share the views of Fish and Scott. *See, e.g.*, Lee C. Bollinger, *The Value and Responsibilities of Academic Freedom*, CHRON. HIGHER EDUC., Apr. 8, 2005 (arguing that balance is not the answer), *available at* http://chronicle.com/weekly/v51/i31/31b02001.htm.

may be influenced by political and financial pressures that the discipline itself eschews.[57] The assumption that a university might always adequately represent the interests of a discipline that transcends the university is puzzling.

To get a sense of the role that the discipline might properly play in the academic freedom debate, one must turn to Establishment Clause litigation challenging creation-science or intelligent-design legislation. Consider, for example, *Edwards v. Aguillard*,[58] which involved a controversy about the constitutionality of a Louisiana law known as the "Balanced Treatment for Creation-Science and Evolution Science in Public School Instruction." The law forbade the teaching of evolution unless creation science was also taught. In their amicus brief, the American Association of University Professors ("AAUP") and the American Council on Education ("ACE") expressed an interest in preventing a legislative, creation-science mandate from impairing the "soundness of scientific education."[59] The AAUP and ACE linked academic freedom not only to an "individual teacher's freedom to teach, research, and publish,"[60] but also to "an even older wellspring . . . , the autonomy of the institutions themselves and of the disciplinary groups within them."[61] The brief repeatedly referred to the disciplinary group, invoking the freedom of a community of scholars to determine what is or is not authentic to their disciplines;[62] to hire faculty based on departmental assessments of the scientific merit of subjects and candidates;[63] and to assess value,

57. The argument against FAIR's position in Morriss, *supra* note 12, which is based on a description of law schools as commercial enterprises, is much more understandable if one ignores the discipline. From Morriss' frame of reference, career services become a consumer "good" furnished by the law school. The discipline is not, however, commercial in any respect; from the perspective of the discipline, career services activities have to do with role obligations central to the discipline.

58. Edwards v. Aguillard, 482 U.S. 578 (1987).

59. *Edwards* AAUP Brief, *supra* note 27, at 14 ("science and its boundaries must be defined by the collaborative and competitive work of minds devoted to its study"). *See also id.* at 6 (arguing that what is taught should be determined by scholarly discussion and consensus, not by legislative fiat). That the work of science is done through processes that lead to consensus within the discipline is the primary theme of the brief. The brief referenced disciplines other than science. *See id.* at 10 n.4 (discussing the controversy within law regarding the "critical legal studies" movement and the ultimate authority of law professors to judge its merits). It should be noted that, in this brief, the educational institution is implicitly assumed to stand for the discipline.

60. *Id.* at 12.

61. *Id.*

62. *Id.* at 5, 13.

63. The brief is concerned about how departmental hiring decisions might be affected by the non-discrimination provisions of the Louisiana law, as hiring is an essential part of academic freedom and the "autonomy of institutions of higher learning to determine for themselves on professional grounds who may teach on their campuses." *Id.* at 5. The brief objects

such as "what constitutes scholarly work worth doing, of what approaches in the subject matter are likely to be productive, even deep presuppositions about the nature of the discipline . . . [which] it is the judgment of the disciplinary body to make."[64] The brief referred (1) to the possibility that a "department as a whole may have concluded, in the best exercise of its professional judgment, [that scientific creationism] is unscientific," (2) to the possibility that an "overwhelming consensus of [a] discipline" may find creation-science to be only religion, and (3) to the fact that "[a] theory gains acceptance in science . . . through its intrinsic ability to persuade the discipline at large."[65] By dictating what counts as a theory worthy of scientific attention, the statute would take time away from other, more worthy matters.[66]

Although the nature of a discipline and the threat to it posed by legislative requirements to teach creationism as science are clearly described in cases like *Edwards v. Aguillard*,[67] the discipline does not get similar treatment in the non-religious academic freedom cases. In *Rumsfeld v. FAIR*,[68] for example, the academic freedom debate has unfolded without giving prominence or clarity to the discipline.[69]

The *FAIR* lawsuit challenged the validity of the federal Solomon Amendment, which tells university recipients of federal funds that they, and all of their "sub-elements," must give the military access to campus placement services.[70] The Solomon Amendment has created consider-

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to a statute that "adopt[s] an ideological litmus test that insulates an incumbent or a candidate from disqualification on purely academic grounds." *Id.* at 11.

64. *Id.* at 8.

65. *Id.* at 10, 14.

66. *Id.* at 14–15, 17.

67. See also the extensive presentation of these points in *Kitzmiller v. Dover Area School Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005). Readers interested in a summary of the arguments and evidence in *Kitzmiller* might wish to consult Margaret Talbot, *Darwin in the Dock*, NEW YORKER, Dec. 5, 2005, at 66.

68. *FAIR*, 126 S. Ct. 1297 (2006).

69. In this article, I cannot do justice to all of the excellent arguments made in *FAIR*, which included Declarations filed by numerous law professors and individuals seeking to explain, in their own words, why the Solomon Amendment is a threat to them and to their interests. I particularly like the Declaration of Dean Richard Matasar, who comes close to offering a cohesive disciplinary argument. My wish for a more fully developed disciplinary argument should not be taken as a judgment that the case was poorly litigated. It was not. Most of the documents filed in *FAIR*, including the Matasar Declaration, are available through SolomonResponse.Org at www.law.georgetown.edu/solomon/documents/Matasar.pdf [hereinafter Matasar Declaration]. For another extended and institutional analysis of *FAIR*, see Horwitz, *supra* note 52.

70. 10 U.S.C.A. § 983(b) (West. Supp. 2005) provides:

> No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either

able difficulty for law schools and their parent institutions because law schools typically do not extend the services of their placement offices to prospective employers who discriminate on the basis of sexual orientation.

An employer like the military, which adheres to the "Don't Ask, Don't Tell" policy regarding homosexuals, would ordinarily not be given access to law school placement facilities. Nonetheless, for many years law schools and the military found a way of informally reconciling the mandate of the Solomon Amendment with law school non-discrimination policies. Some law schools, for example, permitted military recruiters to use part, but not all, of their placement services. Others arranged for the military to conduct interviews outside law school premises.[71] No law school, of course, ever told its graduates that they would not be permitted to use their skills within the military.

These reconciling practices continued until some time in late 2001, after which the Defense Department began interpreting the current version of the Solomon Amendment to impose the significant sanction of a cut-off of federal funds to any university with "sub-elements," such as law schools, that denied full access to military recruiters.[72] Responding to this pressure, law schools around the country effectively suspended their non-discrimination policies for military recruiters.[73] In relatively short order, a group of individuals and entities challenged the constitutionality of the Solomon Amendment claiming, in part, that the Amend-

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prohibits, or in effect prevents—(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.

71. *See* Brief for the Respondents at 7–8, *FAIR*, 126 S. Ct. 1297 (2006) (No. 04–1152) [hereinafter *FAIR* Respondents' Brief] (providing examples of law school accommodation). *See also* Brief for the Association of American Law Schools as *Amicus Curiae* in Support of Respondents at 13–14, *FAIR*, 126 S. Ct. 1297 (2006) (No. 04–1152) [hereinafter *FAIR* AALS Brief] (affording an excellent source of information about the Solomon Amendment; the history of non-discrimination policies in law schools, especially the policy regarding sexual orientation; and the ameliorative efforts and compromises taken by some law schools).

72. The Department of Defense took the position that federal funds would be cut off unless schools treated military recruiters exactly the same as other employers. *FAIR* Respondents' Brief, *supra* note 71, at 10–11.

73. The difficulty was faced by the parent institutions of law schools, which would suffer from a cut-off of funds if a law school defied the Solomon Amendment. The potential monetary penalties for universities are substantial. *Id.* at 6 (estimating the hundreds of millions of dollars that several institutions stand to lose by a cut-off of federal funds). As the *FAIR* AAUP Brief, *supra* note 55, at 25, pointed out, law schools themselves receive almost no funds from the federal government, except for student financial aid, which is exempt from the Solomon Amendment.

ment infringes on academic freedom. The lead plaintiff was the Forum for Academic and Institutional Rights.[74]

One would expect the discipline of law to feature prominently in the *FAIR* litigation. After all, the academic freedom interests of those associated with a single discipline—law—are said to be at stake. The case, FAIR argued, was about the jealously-guarded autonomy of law schools, which, although part of the larger university, are not in a "command-and-control" relationship within the university.[75] FAIR posited that the Solomon Amendment threatens the "nature" of law, and that the integrity of law will be compromised if law schools become a tool of orthodoxy.[76] It made the unexceptionable point that the integrity of a collective enterprise will be compromised if a law school announces that it stands for a principle to which it fails to adhere in practice because of the Solomon Amendment mandates.[77] From the very earliest stages of litigation, FAIR—like any defender of a discipline's ways of behaving and being in relation to a particular subject matter—referenced core values that the plaintiffs wished to inculcate in law students.[78] However, there was no comprehensive or developed disciplinary-based argument for academic freedom in *FAIR* that would show why values or interests essential to the very identity of law are at risk if law schools are forced to give the military full and unqualified cooperation in the recruitment of law graduates.[79] Individuals or institutions of a very different nature can interact

74. FAIR had a membership of miscellaneous law schools and faculty members who, by majority vote at their institutions, agreed to join the litigation. Second Amended Complaint, *FAIR*, 126 S. Ct. 1297, (No. 04 Civ. 4433), *available at* http://www.law.georgetown.edu/solomon/FAIRvRumsfeld.html [hereinafter *FAIR* Second Amended Complaint].

75. *See* Declaration of E. Joshua Rosenkranz in Opposition to Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint at 2, *FAIR*, 126 S. Ct. 1297 (No. 03 Civ. 4422), http://www.law.georgetown.edu/solomon/documents/Rosenkranz.pdf.

76. *FAIR* Respondents' Brief, *supra* note 71, at 20 (an organization needs to be true to its own nature).

77. *Id.* at 28–29.

78. See *infra* text accompanying notes 103–05 for a discussion of the values of equality and justice.

79. A few of FAIR's allies attempted to highlight the discipline. For example, the primary thrust of the *FAIR* AAUP Brief, *supra* note 55, at 9, was that the academy selects and monitors everything that goes on in it so as to ensure that its values are not undermined and can be effectively imparted to students. The AAUP reminded the Court that, although the government may not impose a "strait-jacket" or "orthodoxy" on the university, a university itself operates according to a set of constraining values. *Id.* at 10. It asked for protection for the associated, collective, and expressive effort of law faculty to transmit its chosen values. *Id.* at 19. It did not, however, focus on values unique to the discipline of law. The expertise of the AAUP is in articulating general principles of academic freedom, and its brief stuck to those principles. In a section entitled "Core Areas of Academic Policy and Expertise," *id.* at 8–15, it identified and discussed activities—for example, faculty governance, structuring the proper educational setting, establishing criteria for grading and rewarding students, selecting appropriate extramural activities, and teaching through a variety of methods—protected by academic

without losing their essential identity or integrity. FAIR needed to identify those things that must be protected and shielded from interference, at all costs, in order for the law to retain its identity and integrity.[80]

Instead, FAIR—understandably, from a free-speech, academic freedom perspective—focused on a specific message.[81] It argued that law schools must retain the ability to send a message of non-discrimination.[82] A non-discrimination message is certainly a worthy goal (and when seen from a simple free-speech standpoint might be constitutionally protected), but it is not clear that the specific message that condemns sexual orientation discrimination is part and parcel of, or essential to, the discipline of law. The proper scope of non-discrimination principles is a subject of much debate. What types of discrimination are invidious? What, on occasion, justifies even invidious discrimination? The *issue* certainly "counts" within the discipline, but should we conclude that non-discrimination on the basis of sexual orientation is a substantive precept, inextricably bound up with the identity of law? We need to know more before we will be persuaded to conclude that a law school's or a law professor's specific non-discrimination message is integral to the discipline of law.

FAIR also invoked the idea that the "hallmark of the academy" is "free and open discourse."[83] The argument for an open, pedagogical en-

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freedom, but it did not explicate how law as a unique discipline would be adversely affected by intrusion into these matters. *Cf. Edwards* AAUP Brief, discussed at notes 59–66, *supra*, and in the accompanying text.

80. The failure of FAIR in this respect came through clearly in the Supreme Court's decision. As the Court described the impact of the Solomon Amendment on the plaintiff, it saw law schools as only "interact[ing]" with military recruiters. *FAIR*, 126 S. Ct. 1297, 1312 (2006). Recruiters are "mere[ly] presen[t]," *id.* at 1313, "outsiders," *id.* at 1312, who have no intention of trying to become a member of any association. See also the description of the impact of the Solomon Amendment in Morriss, *supra* note 12. According to Morriss, government already has a rather significant presence in career services programs, *id.* at 430; faculty do not have an interest in a career services office, *id.* at 456; and law schools are concerned only with the "small potatoes" issue of minimizing military access to career services, *id.* at 469.

81. References to different messages pervaded the briefs of FAIR and its allies. *See, e.g.*, *FAIR* AAUP Brief, *supra* note 55, at 19; *FAIR* AALS Brief, *supra* note 71, at 17 et seq. (the associational rights argument emphasizes that law faculties are engaged in an expressive activity—the transmission of values—through a collective effort). *See also FAIR* AAUP Brief, *supra* note 55, at 4; *FAIR* AALS Brief, *supra* note 71, at 14; Transcript of Supreme Court Oral Argument, *FAIR*, 126 S. Ct. 1297 (No. 04–1152) [hereinafter Transcript of Oral Argument] (arguing that the current version of the Solomon Amendment was adopted precisely in response to efforts of law schools to express disagreement with the military's policy); Brief Amici Curiae of the American Civil Liberties Union et al. in Support of Respondents, *FAIR*, 126 S. Ct. 1297 (No. 04-1152) (sticking with a straightforward speech analysis).

82. *FAIR* Respondents' Brief, *supra* note 71, at 34.

83. *See, e.g., id.* at 3–4 (emphasizing that the non-discrimination policy is needed to ensure an open debate about all topics); *FAIR* AALS Brief, *supra* note 71, at 2–3 (discussing the

vironment is important, especially for free-speech doctrine, but it is not a disciplinary argument. Indeed, what defines a discipline are its *constraints* on methods and norms of inquiry. Moreover, with respect to this value, nothing in the military's recruitment practices bans a debate—on academic terms satisfactory to the law school world—of the legitimacy or wisdom of military policy.[84] Thus, FAIR could not argue convincingly that the specific external intrusion represented by military on-campus recruiting would put the discipline at risk.[85]

FAIR also argued that the Solomon Amendment is incompatible with the principle that people are to be judged on the merit of their ideas and not on extraneous matters.[86] Merit defined in these terms is certainly a norm that informs the work done within the academic world.[87] The military is not the academy, though, and there are a variety of quali-

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importance of free expression from persons with a variety of view-points and personal experiences).

84. This obvious rebuttal to FAIR's argument was not neglected by defenders of the Solomon Amendment. *See, e.g.*, Brief of Center of Individual Rights et al. as Amici Curiae in Support of Petitioners and in Support of Reversal, *FAIR*, 126 S. Ct. 1297 (No. 04–1152) [hereinafter *FAIR* Center for Individual Rights Brief]; Brief for the Petitioners at 21, *FAIR*, 126 S. Ct. 1297 (No. 04–1152) (no one could possibly believe that law schools advocate discrimination simply because they permit the military to use their placement services) [hereinafter *FAIR* Petitioners' Brief]. See also the district court's reaction to FAIR's argument, *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 303 (D.N.J. 2003) (the Solomon Amendment leaves professors "free to speak and teach as they please," and "it does not interfere with academic discourse by condemning or silencing a particular ideology or point of view").

85. One might have given the argument a truly disciplinary cast by linking it to disciplinary standards. Each discipline has its own laboratory within which the pursuit of truth is conducted, and each sanctions certain methods of inquiry and the relevance of certain types of data. Law, as a discipline, relies heavily on the adversarial laboratory of the common law and on individuals as a source of information and understanding. Law schools might, therefore, be concerned about any policy or practice that would undermine the ability of students to work with such sources of information in the academy. Although the topic of sexual orientation is no longer effectively *verboten* within law schools, the need for information—and critical debate—about sexual orientation is as strong as it ever was. Gay law students need to be willing to speak up without fear of penalty, as well as other students who might, for example, fear repercussions from being viewed as homosexual if they advocate for gay rights. Thus, from a disciplinary perspective, a non-discrimination policy protecting all students from potential employment penalties is arguably critical. *See FAIR* AALS Brief, *supra* note 71, at 5–6 (noting that once Yale adopted its non-discrimination policy in 1978, it became a center for thinking about issues of sexual orientation). *See* Declaration of Erwin Chemerinsky, *FAIR*, 126 S. Ct. 1297 (No. 03 Civ. 4422), http://www.law.georgetown.edu/solomon/documents/Chemerinsky.pdf (regarding the requirement of critique in law) [hereinafter Chemerinsky Declaration].

86. *See, e.g., FAIR* Respondents' Brief, *supra* note 71, at 1.

87. *See FAIR* AAUP Brief, *supra* note 55, at 3–4, 9–12 (discussing the interest in rewarding all students with respect to merit in their opportunities for employment). The AAUP argued that a core value at stake in *FAIR* is preserving merit-based judgments, a value that extends throughout the university, *id.* at 1, and explains why a university might wish to ensure that career opportunities, as well as grades, are made available to students solely on the basis of merit. *Id.* at 9.

fications that the military says are important to it and its job openings. In this respect, the military is like a lot of employers. Workplace merit is not assessed with reference simply to the quality of ideas, but also, for example, with respect to how a job candidate presents himself in an interview, or whether the candidate seems to be a team player. It is surely problematic to assume that the "merit" that affects career opportunities is—or ought to be—the same "merit" reflected in the assignment of grades. Further, there is no reason necessarily to assume that the activity of recruiting with reference to the military's employment criteria will undermine the criteria used to assess merit in the entirely separate, academic world of the law school.

Other arguments made by FAIR could be interpreted to cut against a disciplinary focus. For example, FAIR placed in the judicial record many individual declarations that emphasized individual choice rather than affiliations with the discipline.[88] Specific law schools were said to have adopted non-discrimination policies because of their unique historical traditions,[89] and specific professors were said to have chosen to teach at specific law schools because they agreed with the school's non-discrimination policies.[90] These references to "choice," standing alone and without reference to the discipline, provide fodder for persons who would see any non-discrimination policy as a product of a decision to be liberal or pacifist or a product of mere "starry-eyed idealism"[91] rather than an inherent and necessary value of the discipline. They also provided no justification for rejecting competing arguments of defenders of the Solomon Amendment who claimed to represent academic freedom interests as well.[92]

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88. Examples of these declarations can be found through SolomonResponse.Org at http://www.law.georgetown.edu/solomon/FAIRvRumsefeld.html (last visited Sept. 7, 2006).

89. *See, e.g.*, Matasar Declaration, *supra* note 69, at 5–7, 9, 11 (suggesting that NYU has chosen to link law and justice in a particular way and that specific law schools have a right to choose their mission).

90. *See, e.g.*, Chemerinsky Declaration, *supra* note 85, at 5. See also the allegations of the Society of American Law Teachers (SALT), whose membership consists of individual professors who want to foster a respectful, open dialogue on fundamental questions of law and justice. *FAIR* Second Amended Complaint, *supra* note 74.

91. *FAIR* AAUP Brief, *supra* note 55, at 3 (quoting 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (Rep. Pombo)).

92. Other law professors and students contested the way in which the *FAIR* plaintiffs described academic freedom interests. For example, the *FAIR* Center for Individual Rights Brief, *supra* note 84, at 1, 11, represented the interests of students against the "politically correct" views of university faculty and administration that military recruiters should not be allowed the same access to law school placement services as other prospective employers. Students, the Center argued, are the "primary beneficiaries of academic freedom." *Id.* at 4, 12. They have a "right to listen" to the military's message. *Id.* at 8. Administrators are merely fiduciaries of the students' right. *Id.* at 12. The Center argued that academic freedom will not be served by university regulations that preserve the kind of environment and limited "market"

The umbrella of the discipline—within which choice assumes a particular significance—might give us some help in sorting through multiple and contested ways of characterizing or claiming legitimacy for academic freedom interests. It would certainly help us understand how, if at all, various claims are related to the integrity of law as a discipline. Yet the discipline had only a tenuous toehold, at best, in *FAIR*. One can discern threads for a promising disciplinary argument in disparate portions of the *FAIR* briefs,[93] but these threads were not woven together. The discipline, its patterns and integrity, remained a shadowy figure.

III. A PROPOSAL FOR A DISCIPLINE-BASED ACADEMIC FREEDOM ARGUMENT

A cohesive disciplinary argument in the context of the *FAIR* controversy would be twofold.[94] First, it would describe the structure of law as a discipline, in which a variety of disciplinary affiliates pursue a truthful understanding of law and its practice within disciplinary constraints and expect that, out of their disparate work, a disciplinary consensus will arise. Second, it would explain how the essential integrity of this disciplinary work is threatened by the Solomon Amendment.

Consider first the structure of the discipline of law. Paradoxically, the strength of a discipline-based academic freedom argument will be

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deemed appropriate by the university but, rather, by a marketplace of ideas completely free of any authoritative regulation. *Id.* at 9–10. It argued that deference should not be accorded to the judgment of university administrators but, rather, to the judgment of the legislators who passed the Solomon Amendment. *Id.* at 29. Other amicus briefs are listed at www.supremecourtus.gov/docket/04-1152.htm.

93. Perhaps this is by design. It is not an unusual Supreme Court strategy to enlist different *amici* to present different facets of an argument. Typically, though, there will be one place where one can find the overarching story. *See, e.g.*, Paul M. Collins, Jr., *Friends of the Court: Examining the Influence of Amicus Curiae Participation in U.S. Supreme Court Litigation*, 38 LAW & SOC'Y REV. 809 (2004); Thomas G. Hansford, *Information Provision, Organizational Constraints, and the Decision to Submit an Amicus Curiae Brief in a U.S. Supreme Court Case*, 57 POL. RES. Q. 219 (2004); Kelly J. Lynch, *Best Friends? Supreme Court Law Clerks on Effective Amicus Curiae Briefs*, 20 J. L. & POL. 33 (2004).

94. This article presents only one disciplinary take on the Solomon Amendment debate. There might be others. One *might*, for example, wish to argue that the military's "Don't Ask, Don't Tell" policy weakens the discipline of law because it excludes the talents and energies of homosexuals without regard to whether they have important contributions to make to the discipline and development of law. By resisting military recruitment under this policy, law schools hope to pressure the military to change its ways, but the Solomon Amendment interferes with the ability of law schools to exert this pressure. FAIR's arguments might easily take this direction. *See, e.g.*, Matasar Declaration, *supra* note 69, at 8, 11 (asserting that, although the military's "Don't Ask, Don't Tell" policy is legal, it is "wrong as applied to the hiring of lawyers . . . [for] invidious discrimination within the profession weakens the institution that is charged with preserving government of, for and by the people").

enhanced by reminders that the discipline of law transcends any given university or, indeed, the academy in general.

Law, as a discipline, exists because of the collective efforts and contributions of many disciplinary affiliates: practicing attorneys, judges acting through courts, law professors acting through law schools, and other professional organizations. It is inhabited by a variety of persons playing different roles but dedicated to a common practice: realizing the rule of law.[95] In other words, the discipline of law is not merely academic. From a *disciplinary* perspective, there is no gap between the academic study and the practice of law.[96] There is simply dialogue and interaction among people committed to living within the same normative community. Scholars in the discipline of law must pay attention to all of the contexts in which law is practiced.[97] The *academic* manifestations and products of life within the discipline of law, such as footnoted law review articles, may not look like the manifestations and products of disciplinary life outside the university, such as an argumentative brief, but all disciplinary affiliates, within a university and without, "do" law in accordance with the norms of the discipline and its consensus about what "counts" as an important question. What goes on in law schools is significantly dependent on how law is practiced and how substantive law develops and evolves in law offices and in the courts. Ethical precepts that govern the practice of law are also ever-present in legal education,[98]

95. Post, *supra* note 14, at 616, 618, 622. *See also supra* note 4 (sources citing the nature of interpretive communities); Rosa Ehrenreich Brooks, *The New Imperialism: Violence, Norms, and the "Rule of Law,"* 101 MICH. L. REV. 2275 (2003) (discussing the way in which rule-of-law concepts are formed); Kristin Booth Glen, *The Law School In and As Community*, 35 U. TOL. L. REV. 63, 67 (2003) (discussing the community of affinity that is law).

96. *See, e.g.*, Symposium, *Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278 (2002) (the discipline and the profession are used as interchangeable terms). With respect to the school and the practice, see Byrne, *supra* note 14, at 328–29 (describing the connections between the academy and the practice of law, especially with respect to professional obligations), and AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Am. Bar Ass'n Section of Legal Educ. and Admissions to the Bar, ed., 1992) [hereinafter The MacCrate Report]. *But see* Post, *supra* note 14, at 618 (those who inhabit the institution of law have traditionally shared common practices and argumentative methods, but—tempted by other disciplinary forces within the academy—perhaps do not still agree that the ultimate purpose of legal scholarship is to assist in the realization of the rule of law).

97. Rhode, *supra* note 14, at 1330. *See also* Glen, *supra* note 95, at 67 ("The professional community is important to law schools and vice versa.").

98. The *FAIR* Respondents' Brief, *supra* note 71, at 9, 13, for example, argued that as non-discrimination has become an essential value of the profession and is reflected in codes of professional conduct, law schools have moved to inculcate the professional norm in their students. They also wish their graduates to carry the non-discrimination value back into their professional employment. *Id.*

affecting even teaching styles.[99] Even the ongoing debate about the relative weight law schools should give to how law works in the real world versus policy-oriented aspirations for change confirms the disciplinary understanding that anyone "doing" law must take both into account.[100]

Moreover, within the disciplinary community whose consensus dictates what "counts," the contributions of each affiliate are important. As James Boyd White reminds us, legal knowledge is "constantly created and recreated[] differently by different minds on different occasions" out of disagreement on key issues.[101] No subgroup of affiliates controls the discipline—not law schools, law professors, the Association of American Law Schools, attorneys, or judges. Even the Supreme Court of the United States does not pretend to enjoy a monopoly within the discipline. Indeed, the Court has protected practitioners of law from state efforts to exert a monopoly over the way law will be developed within the discipline. It has invalidated state regulations that might have limited the ability of attorneys to consult about appropriate strategies of legal representation or the ability of attorneys to represent groups as they see fit.[102] In other words, the Court has refused to disable practicing attorneys as full participants in the project of "doing" and forming a disciplinary consensus about law. The Court has kept disciplinary dialogue open to all ideas and questions that "count" within the discipline, most recently in the context of political gerrymandering claims.[103]

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99. *See FAIR* AAUP Brief, *supra* note 55, at 3–4 (stressing how important modeling is, as a method of teaching, in a professional school); *FAIR* AALS Brief, *supra* note 71, at 20 (regarding the connection between classroom teaching and other things that happen in the law school). *See also* Emily M. Calhoun, *The Professional Schools: The Influence of a Professional Ethic on Teacher Styles*, *in* ON TEACHING 77, 84 (Mary Ann Shea, ed., 1987) (describing how teachers model ethical precepts associated with the practice of law in their teaching for the Faculty Teaching Excellence Program at the University of Colorado at Boulder).

100. For a review of different types of scholarship that compete within the academy, see Rhode, *supra* note 14 (discussing, for example, doctrinal, empirical, and theoretical scholarship).

101. White, *supra* note 4, at 1400 (disagreement is where debate occurs); *id.* at 1401 (the creation of legal knowledge).

102. *See, e.g.*, *In re* Primus, 436 U.S. 412 (1978) (protecting associational, litigation activity); United Mine Workers v. Ill. State Bar Ass'n, 389 U.S. 217 (1967) (although states have broad power to regulate the profession, they cannot impair associational freedoms, even if they relate to litigation that is not about political matters of acute social comment); Bd. of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) (protecting the right of individuals to consult within an organization, to select their own spokesperson to give legal advice); NAACP v. Button, 371 U.S. 415, 431 (1963) (associations for litigation may be the most effective form of political association, especially for minority groups).

103. The Court refused to absolutely close debate on political gerrymandering claims, in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), despite Justice Scalia's complaint that an eighteen-year failure to identify proper standards for evaluating these claims ought to result in a decision to shut off dialogue within the courts.

Within law, one of the most significant questions is each disciplinary affiliate's role obligations. There is a consensus that disciplinary affiliates should pay attention to role obligations. There is also a consensus that the elusive but central concepts of "equality" and "justice," to which FAIR and its allies frequently referred, bear on the proper discharge of role obligations. Although a comprehensive discussion of these concepts is beyond the scope of this Article, it is generally accepted that equality and justice are central to role obligations, in part, because lawyers enjoy an unusual position of largely self-regulated power[104] and, in part, because their work is integral to securing the rule of law and ensuring that "discrete and insular minorities" are protected against the tyranny of pure majority rule.[105] Nevertheless, disciplinary agreement on these two matters—that affiliates must pay attention to role obligations with reference to principles of equality and justice—does not entail a consensus on the proper fulfillment of obligations.[106]

In particular, there is especially no consensus on how an affiliate should fulfill role obligations when asked to practice or "do" law in a normatively different—and from the perspective of the discipline, arguably degraded—system of law. Consider, for example, the different perspectives on role obligations reflected in Paul Finkelman's account of the

104. Indeed, attorneys are actually relieved of personal responsibility for some consequences of conduct that would be seen as immoral or reprehensible if attributed to a nonprofessional. An attorney, for example, can successfully defend an accused murderer without needing to accept personal responsibility for the fact that a culpable person might escape punishment. Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 3–6 (1975).

105. The Matasar Declaration, *supra* note 69, does a good job of explaining the ethical mindset associated with this role. Dean Matasar explained that non-discrimination is "of the greatest importance [to law] because of the central role the American legal profession plays in the functioning of American democracy, which rests on the rule of law, and at the heart of which is the constitutionally guaranteed promise of equal protection of the laws." *Id.* at 7. The district court in *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 280 (D.N.J. 2003), picked up on the idea of the rule of law, characterizing it—and its equality corollary—as essential to the law school mission.

106. In *FAIR*, 126 S. Ct. 1297 (2006), the plaintiffs repeatedly emphasized equality and justice and undertook a difficult effort to persuade the Court that there is agreement on the meaning of these substantive principles. *See supra* notes 78–101 and accompanying text. There is no doubt that the discipline is concerned with these values. *See, e.g.*, The MacCrate Report, *supra* note 96, at 4 (the discipline should strive to promote justice and fairness, to treat others with dignity, and to enhance the capacity of law to do justice). But there is no agreement on precisely what these concepts mean. The constitutional story of equality is ongoing and evolving. *See, e.g.*, Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982). This article rests only on disciplinary agreement that affiliates must grapple with the complexities of their role obligations given the evolving and competing ways of thinking about justice and equality.

rendition of Anthony Burns, a slave, by Judge Edward Loring.[107] Loring was appointed to serve as a commissioner in slave rendition hearings conducted under the federal Fugitive Slave Law, which prescribed a procedure that most of us would agree did not satisfy due process. The unfortunate Loring was thus required to find a way to "balance the demands of the Fugitive Slave Law with the demands of *law*."[108]

Loring's way of dealing with his role obligations was deemed unsatisfactory to some contemporaries and disciplinary affiliates of the twentieth century and satisfactory to others.[109] For example, Loring apparently chose to emphasize "his . . . responsibility as a professional evaluator of proof."[110] He limited his role to that of "providing . . . the statutory protection of verifying identity, making certain that the right person was being taken out of state, cruel as this fate was."[111]

For the purpose of understanding the discipline-based argument that might be made in *FAIR*, the validity of Loring's choice is not the point. The point is that the discipline agrees that its affiliates should pay close attention to their role obligations. Disciplinary affiliates should attempt to find proper ways of "preserv[ing] some kind of autonomy for one's clients, even with degraded systems of law."[112] They should attempt to construct a proper "hermeneutic of resistance" that will ensure that lawyers do not fall victim to "the proclivity [to] . . . [become] ensnared within the technical trappings of the law [of bad legal systems]."[113] They should be wary of the perverse effects that can arise from efforts to find a way of negotiating the sometimes conflicting demands of law and a specific statutory command.[114] By virtue of a disciplinary consensus, questions pertaining to role obligations "count," and the questions "count" significantly.[115]

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107. Paul Finkelman, *Legal Ethics and Fugitive Slaves: The Anthony Burns Case, Judge Loring, and Abolitionist Attorneys*, 17 CARDOZO L. REV. 1793 (1996).

108. *Id.* at 1812.

109. Judge Loring, for example, lost his position at Harvard Law. Finkelman says that "[s]ome people interested in legal education wondered if a fugitive slave Commissioner—a man who would enforce such a blatantly unfair law—was fit to teach future lawyers." *Id.* at 1834. Yet the Harvard Law faculty supported Loring. As the symposium illustrates, Loring's story is complex, and different persons might draw a number of different lessons from it.

110. Ruth Wedgwood, *Ethics Under Slavery's Constitution: Edward Loring and William Wetmore Story*, 17 CARDOZO L. REV. 1865, 1867 (1996).

111. *Id.* at 1868.

112. Sanford Levinson, *Allocating Honor and Acting Honorably: Some Reflections Provoked by the Cardozo Conference on Slavery*, 17 CARDOZO L. REV. 1969, 1978 (1996).

113. Owen M. Fiss, *Can a Lawyer Ever Do Right?*, 17 CARDOZO L. REV. 1859 (1996).

114. Finkelman, *supra* note 107, at 1820 (discussing Loring's attempts to reach a "happy result for all" concerned in the rendition).

115. In exchange for the special position which an attorney enjoys, she is under an obligation "to test, continually, the legitimacy of the ethic that relieves her" of ordinary moral con-

These features of the discipline of law are the foundation of an argument that the Solomon Amendment constitutes a threat to the discipline.

The integrity of the discipline is most obviously put at risk simply because the Solomon Amendment interferes with decisions of key disciplinary affiliates—law schools and law professors—about how to think about and truthfully address an issue that "counts" to the discipline. The issue, in the context of the *FAIR* dispute and the military's "Don't Ask, Don't Tell" policy, has to do with equality, justice, and role obligations. Direct interference with a key disciplinary affiliate's effort to address this issue—as that affiliate sees it—undermines the structural integrity of the discipline. The discipline, by definition, consists of a consensus formed over time out of the evolving, aggregate activities of affiliates beholden only to the dictates of the discipline. The disciplinary argument is not about protecting a particular disciplinary affiliate's message because of the worth of the message per se; it is about protecting the discipline's process of reaching a true consensus on an issue central to the integrity of the discipline.[116]

The Solomon Amendment poses a less obvious threat to the discipline of law because it is not directed solely at law schools and law professors. Its ultimate aim is to ensure that the military is able to freely recruit law graduates to "do" law in a "Don't Ask, Don't Tell" environment in which they might find it difficult to satisfactorily fulfill disciplinary role obligations related to equality and justice. It asks law schools, through their career services policies, to act as if "doing" law within the military's "Don't Ask, Don't Tell" environment presents no special difficulties. The Solomon Amendment thus creates a situation in which law graduates may feel free to disregard or compromise the norms of the discipline that has accredited them. Over time, "doing" law in this way may alter what law is seen to be.[117] This is no less a threat to the

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siderations. Calhoun, *supra* note 99, at 84. *See* Byrne, *supra* note 14, at 326; White, *supra* note 5, at 1402 (emphasizing how important it is to pay attention to how the law is used because "law is capable of great evil").

116. *See* Levinson, *supra* note 112, at 1974 (discussing the criteria for deciding whom to honor as lawyers, even John Marshall despite his decision in *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825)). One can ask the question in terms of outcomes—who gets to be honored—or in terms of "precisely *who* gets to say whether he deserves the honor or not." *Id.* at 1974. To Levinson, the latter is the "far more interesting, and important" question. *Id.*

117. *See, e.g.*, Seana Valentine Shiffrin, Essay, *What Is Really Wrong With Compelled Association*, 99 NW. U. L. REV. 839, 855–57 (2005) (presenting studies that confirm that one's thinking about a topic will be affected if one is compelled to say or practice something regularly). The *FAIR* AAUP Brief, *supra* note 55, at 9, emphasized that the academy selects and monitors everything that goes on in it so as to ensure that its values are not undermined. *See also Daubert* AAAS Brief, *supra* note 27, at 1, 2–3, 5–6, 9 ("[s]cientists have an interest in assuring that the fruits of their labors are understood and properly used by others [including

integrity of the discipline of law than would be the threat posed should practitioners of "magic" accredited by Hogwarts decide to ignore their disciplinary responsibilities. Professor Dumbledore surely would refuse Lord Voldemort permission to freely recruit Hogwarts students to use their knowledge and skills in furtherance of the "dark arts." Let me be clear about this less obvious threat of the Solomon Amendment.

First, the disciplinary concern is not with recruitment per se: it is about recruitment to practice law in a problematic environment.[118] Nor is the concern only that an *individual member* of any given profession might find herself seriously at odds with and harmed by an employer's demands. Nor is the disciplinary concern that important affiliates like law schools should not be required to aid and abet a policy that they consider immoral in the abstract. The concern is that, under some circumstances, if a discipline accredits graduates to "do" law, and then aids or encourages them to do it in an environment in which the norms of the discipline cannot be satisfied, the *discipline itself* risks being undermined and corrupted. If the risk is realized, the harm to the discipline will be significant.[119]

Second, the disciplinary approach to the Solomon Amendment does not accuse the military of being the equivalent of the evil Lord Voldemort or of having an immoral policy. It does not reflect disrespect for the military. The disciplinary concern is self-referential and, if judg-

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courts] in society," and wish courts to be rigorous in responding to offers of claimed scientific evidence).

118. During this Conference, there was some discussion about whether career placement services are germane to the academic mission. *Cf.*, Chen, *supra* note 6 (discussing the general concept of germaneness as it relates to First Amendment guarantees). It is difficult to argue that career services functions are germane to a university, but it is not difficult to argue that the conditions under which a university provides career services can be quite important to the integrity of a discipline that transcends the university.

119. For one reason or another, perhaps because of the recurring confrontations between science and religion, see generally *Kitzmiller v. Dover Area School District*, 379 F. Supp. 2d 680 (M.D. Pa. 2005), I suspect that most of us understand the signature traits—the methods and ethical stance—that give the sciences their disciplinary integrity. Because of that understanding, we would understand why a science department might resist—as a threat to the integrity of the discipline—permitting a creation-science institute to participate in a science department employment service for graduating students. Extending the argument, we would equally understand, given the medical profession's disciplinary commitment to "first do no harm," how a government mandate requiring medical schools to affirmatively aid military recruiters to enlist medical students into the military for the purpose of facilitating effective torture sessions might threaten the integrity of the medical discipline. Older readers will perhaps recall the court-martial of Dr. Howard B. Levy, a dermatologist who was assigned to train Special Forces personnel at Fort Jackson, during the Viet Nam War. Levy refused to do so, citing the ethics of the medical profession and his opinion that those enlisted in the Special Forces were, among other things, murderers of women and children. *See* Robert N. Strassfeld, *The VietNam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839 (1994). *See also infra* text accompanying notes 122–27.

mental about any entity, focuses on its own institutional character. The differences that exist between the normative world of the military and the world of law are a point of reference for thinking about the integrity of the discipline, not the integrity of the military.

We cannot deny that there are differences between the military on the one hand and civilian law and society on the other.[120] Because of these differences, some professional activities undertaken within the military—a quite distinctive normative community—might generate difficulties for persons credentialed to "do" law. The norms of the discipline of law may generally be in tension with a military or executive branch that wishes to ignore separation of powers principles, the traditions of the writ of habeas corpus, or the principle that an individual is presumed innocent until proven guilty.[121]

The disciplinary consensus about role obligations has special importance for attorneys practicing in a military environment for, unlike Judge Loring, military attorneys cannot just walk away from a task in conflict with disciplinary norms. Military attorneys are in the military. To see the potential problem, take note of the Supreme Court decision in *Parker v. Levy*.[122] In that case, the Court upheld the court-martial of a physician who tried to walk away from an order to give medical training to Special Forces members. Levy's defense was, in part, that physicians were bound by a commitment to "first do no harm" and that Special Forces personnel might use medical training for improper purposes.[123] The Court reasoned, however, that military society is "a society apart from civilian society,"[124] just as "military law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."[125] Military customs and usages and norms of conduct "are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties."[126] There is simply not the same

120. *See, e.g.*, Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002).

121. More concretely, for example, the tension between the norms of the discipline of law and those of the military community are currently being played out in the debate arising out of restrictions put on attorneys defending enemy combatants before military commissions. *See* Mary M. Cheh, *Should Lawyers Participate in Rigged Systems: The Case of Military Commissions* (Geo. Wash. Law Sch. Pub. Law & Legal Theory Working Paper, Paper No. 136, 2005), *available at* http://ssrn.com/abstract=699085. *See also* Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1 (2006).

122. 417 U.S. 733 (1974).

123. *Id.* at 761.

124. *Id.* at 744

125. *Id.* (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

126. *Id.* at 748–49 (quoting Swaim v. United States, 28 Ct. Cl. 173, 228 (1893)).

autonomy in military as in civilian life.[127] A medical professional like Dr. Levy must, notwithstanding professional ethics, obey military orders or risk imprisonment for three years at hard labor.[128]

Why would law schools and law professors—important disciplinary affiliates—resist the Solomon Amendment? Perhaps they wish to ensure that the persons they credential will be able to practice, do, and live law as demanded by the discipline. Perhaps they have reasonably chosen to stop short of trying to prevent their graduates from practicing law in a difficult environment, and have instead attempted to put their graduates on notice that the military environment will complicate their ability to fulfill disciplinary role obligations.[129] Perhaps law schools are signaling this fact by modifying the conditions under which military recruitment will take place. Perhaps they are also reasonably using such modifications to pressure an employer who will fund and direct the practice of law to rethink stereotyped views that are out of synch with, or potentially compromise, the ethical mandates of the profession.[130] Any given law school's non-discrimination policy, seen from this perspective, is simply a self-defense measure taken by a disciplinary affiliate to preserve disciplinary integrity against what it sees as a significant threat.

IV. THE DOCTRINAL HOME OF THE DISCIPLINE: THE RIGHT OF ASSOCIATION

The reconfiguration of arguments in *FAIR* illustrates some difficulties of bringing the discipline more clearly into an academic freedom debate. Yet the effort is worthwhile, for there is a constitutional home for disciplinary interests in academic freedom debates. That home is the right of association.

At the most superficial level, association would seem to be a useful concept for dealing with a discipline-based academic freedom argument. The discipline is, after all, an intrinsically collective endeavor. More im-

127. *See generally id.* at 749–50.

128. *Id.* at 736.

129. Of course, the signal may discourage graduates from practicing law in the military. At oral argument, Justice Scalia—and the government—expressed concern that law students will be "driven off." Transcript of Oral Argument, *supra* note 81, at 24. And one might wish to debate whether it is wise to discourage the best and the brightest among law graduates from practicing and bringing their influence to bear on the military environment. *See* Jane Mayer, *The Memo: How an Internal Effort to Ban the Abuse and Torture of Detainees Was Thwarted*, NEW YORKER, Feb. 27, 2006, at 32 (describing the efforts of Alberto J. Mora, former general counsel of the United States Navy, to persuade the government to adopt a policy consistent with his understanding of legal obligations). This is an important question for affiliates to address.

130. *FAIR* Respondents' Brief, *supra* note 71, at 4–5.

portantly, however, the values served by a right of association are applicable to the discipline.[131] In particular, the right of association protects the freedom of lay communities to work cooperatively on projects of self-definition[132] and to create and interpret norms which serve as a check on any governmental attempt to establish itself as the sole progenitor of norms.[133] Disciplinary norms of truth can be a powerful countervailing force to the way government would have us see and live in the world.[134]

As a constitutional home, the right of association is also pragmatically suited to a discipline-based academic freedom argument because analysis of associational rights claims appears to be fact-sensitive and not rigorously category-driven. Conventional wisdom typically posits that, despite its venerable origins, the right of association has not been satisfactorily developed in constitutional doctrine.[135] That wisdom is undoubtedly accurate if one measures the sufficiency of an analytical framework solely by whether the analysis employs doctrinal categories. Because we each enjoy many overlapping relationships that take multiple

131. For excellent discussions of the values served by the right of association, *see, e.g.*, FREEDOM OF ASSOCIATION (Amy Gutmann ed., 1998); David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 S. CT. REV. 203, 204 (arguing that non-political, social associations are valuable in that they make political association possible); Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1842–43 (2001) (discussing how associations shape our souls, character, and values); Mazzone, *supra* note 14 (identifying the instrumental values of associations as, among other things, being a training ground for political engagement, teaching habits of cooperation, and producing social capital, i.e., the trust, norms, and networks that make society function well); McGinnis, *supra* note 52, at 542–43 (explaining that associations generate a complex and beneficial network of social norms that are needed to support republican government); Shiffrin, *supra* note 117, at 865–70 (discussing social associations and cooperation and arguing that what happens inside them, insofar as they foster creativity, is significant). *See also*, Cover, *supra* note 4, at 32 (noting that freedom of association is important because it protects the liberty of communities to create and interpret informal law).

132. Shiffrin, *supra* note 117, at 869.

133. *See, e.g.*, Cole, *supra* note 131, at 229 (citing Tocqueville); Garnett, *supra* note 131, at 1853–55 (explaining that associations are the hedgerows of civil society and the wrenches in the works of government's hegemonizing ambitions); Mazzone, *supra* note 14, at 739 (arguing that the state fears associations as a threat to the status quo or to its efforts to gin up patriotic fervor); McGinnis, *supra* note 52, at 491 (discussing the mediating features of associations).

134. Cover, *supra* note 4, at 61–62 (arguing that government efforts to specify meaning in educational institutions are especially dangerous because the capacity to generate law begins in educational institutions).

135. The doctrine is open to different interpretations, as attested to by scholars, *see, e.g.*, Shiffrin, *supra* note 117, and Brody, *supra* note 49; and courts, *see, e.g.*, FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 302 ("The difficulty in evaluating the constitutional significance of Plaintiffs' claim to academic freedom is that the precise contours of this First Amendment interest are somewhat unclear."). For discussion of the history of the right of association, see the sources cited *supra* in note 129, especially Mazzone.

forms,[136] the right of association cannot easily be categorized after the fashion of standard constitutional analysis.[137] This very feature of associational rights analysis enhances the value of the analysis in a discipline-based academic freedom argument. It ensures that facts unique to the discipline will carry special weight in the academic freedom debate.[138]

Thus, I make no attempt to argue that there is an existing category of doctrine that *precisely* fits the *only* way of framing the academic freedom debate in associational rights terms. I merely offer a way of framing academic freedom disputes—with reference to the empirical reality of the discipline—that highlights associational interests that have been protected by the Supreme Court. The objective is to turn the academic freedom debate temporarily away from a focus on speech and to establish that associational rights should not be a throw-away issue in the debate.[139] A strong case for academic freedom can be based on associational rights and the unique nature and value of the discipline.[140]

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136. Brody, *supra* note 49, at 857–59 (offering an excellent description of different organizational structures and stakeholders within those structures and reminding that some organizations advocate for individual member views, some suppress individual voice, some are democratic, and some are rigidly hierarchical).

137. *FAIR* illustrates that in any given controversy there are multiple ways of framing associational rights to comport with doctrinal categories. *FAIR* might be framed, for example, as a dispute in which the federal government seeks affiliation with and the right to use the resources of a particular association. *See* Respondents' Oral Argument *in* Transcript of Oral Argument, *supra* note 81, at 26–55. It might as easily be framed as a dispute in which the federal government has paid its dues through university funding and been accepted into an association only to find that its university affiliation comes with restrictions on its speech and expressive activities. *See FAIR* Petitioners' Brief, *supra* note 84, at 12 (noting that law schools wish to associate with the government's money but not the rest of the government's activities); Transcript of Oral Argument, *supra* note 81, at 3 (characterizing the government as a donor desiring access to law schools). Or it might be framed as a dispute in which law schools have joined the federal government's funding network only to find that their affiliation comes with the attached strings of the Solomon Amendment. *See FAIR* Respondents' Brief, *supra* note 71, at 17–18 (arguments based on Rust v. Sullivan, 500 U.S. 173 (1991)). These examples do not exhaust the framing options for the *FAIR* dispute.

138. In pressing its free speech constitutional claims, FAIR repeatedly rejected any claims to unique status. *See, e.g.*, Transcript of Oral Argument, *supra* note 81, at 49 (rejecting exceptionalism) and at 35–36 (asserting that its principles would also apply to the university). This opened the door to slippery-slope arguments that FAIR's theories would result in limitless claims for constitutional protection against anyone in uniform. *See, e.g.*, *id.* at 34 (regarding the hypothetical about persons in uniform in the cafeteria), *and* at 60 (suggesting there is no limit to the respondents' argument).

139. *See, e.g.*, *Edwards* AAUP Brief, *supra* note 27, at 17–18 n.8. This brief's reference to associational rights comes in the following throw-away footnote:

> Even beyond the Establishment Clause issues at stake in the instant appeal, we note the statute's additional deficiency of infringing the associational rights of teachers. Their associational freedoms under the First Amendment may be violated by the requirement that they provide instruction in doctrines which they, together with the

The Supreme Court's decision in *Boy Scouts of America v. Dale*[141] offers an associational rights analysis receptive to both the facts in *FAIR* and a disciplinary perspective on the academic freedom debate. The dispute in *Dale* arose when New Jersey attempted, through its public accommodations law, to prohibit organizations like the Boy Scouts from discriminating on the basis of sexual orientation. The Boy Scouts insisted that it had an associational right to exclude gays from leadership positions in the organization.

As a first step in its analysis, the Court in *Dale* held that the Boy Scouts and its members would have constitutional protection against the New Jersey law only if it engaged in an expressive "activity" of a collective or associational nature.[142] In evaluating the expressive nature of the Boy Scouts' activities, the Court considered activities that were internally directed as well as those that might be directed to the wider world.[143] It repeatedly referenced its intent to protect the "public *or* private" expression of view-points or values.[144] The Court's conclusion that "it seems indisputable that [the Boy Scouts organization] . . . engages in expressive activity"[145] was premised on a discussion of how the Boy Scouts, by expression and by example, instills values internally in

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responsible academic community, consider to be wholly antithetical to responsible scholarship.

Id. *See also* Runyon v. McCrary, 427 U.S. 160 (1976) (treating associational rights claim with astonishing brevity). In *FAIR*, 126 S. Ct. 1297 (2006), an associational rights argument was comprehensively developed early in the litigation and even adopted by the court of appeals. In the Supreme Court, FAIR defended the court of appeals analysis in its brief, but in oral argument association was mentioned only two times. Transcript of Oral Argument, *supra* note 81, at 11, 57. *See also id.* at 29 (expressing a concern for aiding discrimination, which implicates rights of association).

140. Scholars who discuss academic freedom through the lens of associational rights largely ignore the discipline, *see, e.g.*, Horwitz, *supra* note 52 (focusing on the university), or do not appreciate its full significance. For example, Hills, *supra* note 42, at 186, argues that a faculty member is entitled "to a particular sort of decision-making institution and process: peer review by members of his or her faculty applying the discipline's standards as they are understood by the larger community of scholars within the relevant discipline." But he focuses on "the bureaucratic context of university-wide tenure decisions" and develops a concept of academic freedom as a process right that fits only the tenure decision point and is located in the university. *Id.*

141. Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

142. *Id.* at 648.

143. If expressive association analysis were to focus only on external messages, a discipline might have difficulty using *Dale* to its advantage.

144. *Id.* at 648, 650. *See also id.* at 653 (describing messages to both youth members and to the world).

145. *Id.* at 649.

its youthful members.[146] In assessing the collective nature of the expression, the Court took note of general policies reflecting an internal, although not unanimous, associational consensus.[147] Expressive activities endorsing the consensus would be protected, according to the Court, even though the Boy Scouts might not have organized itself solely or primarily for the purpose of promoting that policy.[148] Moreover, protection would be extended to expression by example as well as through verbal advocacy. Because the Boy Scouts chose to use its membership and leadership qualifications as a vehicle for ensuring that it did not "promote homosexual conduct as a legitimate form of behavior,"[149] the Court shielded those qualifications against New Jersey's anti-discrimination laws. Although the Court employed a formal "expressive association" category in *Dale*, its interest was not in protecting the external, amplifying effects of collective speech. Instead, it desired to protect the integrity of key, internal structures (*i.e.*, the leadership positions) of an organization, the Boy Scouts.

Once the existence of an associational, expressive activity was established, the Court's next analytical step was to consider whether the New Jersey law significantly affected the Boy Scouts' activities.[150] Accepting at face value what the Boy Scouts identified as the values it wished to inculcate in its youthful members, the *Dale* majority also said that it was appropriate to give great weight—if not absolutely to defer—to the Boy Scouts' "view of what would impair its expression."[151] Concluding that there was a direct and immediate, rather than a merely incidental, effect on associational rights, the Court held that even New Jer-

146. *Id.* at 649–650. Shiffrin, *supra* note 117, at 880 (the Scouts is organized to "influence and to teach [its members, internal to the organization] how to think and act" and "to influence . . . character").

147. *Id.* at 655 (searching for a policy that counts as an "expressive association" notwithstanding the fact that all members do not agree on every point).

148. *Id. Compare* Stevens, J., dissenting, 530 U.S. at 675 (the Boy Scouts should have to link its policy of exclusion to "its central tenets or shared goals"), *with* Souter, J., dissenting, 530 U.S. at 701 (the Boy Scouts should have to show that they have unequivocally advocated a clear position to receive constitutional protection). For discussions of whether messages must be unequivocal to gain associational rights protection, see Shiffrin, *supra* note 117, at 847, and Hills, *supra* note 42, at 208–12 (discussing how conventional doctrine may give less protection to associations that tolerate dissension within their ranks than to associations that require all members to adhere, in lock-step and consistently, over time, to a particular ideology).

149. *Dale*, 530 U.S. at 653 (asserting that Dale's presence in the organization would send the message that homosexuality is legitimate); *id.* at 654–56 (emphasizing repeatedly the importance of leadership positions within the organization).

150. *See id.* at 659 (using other phrases, for example, "significantly burden" or "severe intrusion").

151. *Id.* at 651, 653 ("We need not inquire" beyond the Boy Scouts' assertion). The dissenters disagreed with the degree of deference accorded the Boy Scouts. *Id.* at 686.

sey's compelling interest in eradicating discrimination would not shield its law from constitutional invalidation.[152]

Dale's way of addressing associational interests, or a variant of it, seems well-suited to thinking about the interests of the discipline in the academic freedom debate and in *FAIR*.[153] Like the Boy Scouts, the discipline of law is internally and collectively expressive. The discipline, of course, does not internally express itself in fixed leadership criteria and policies of the sort adhered to by the Boy Scouts, but it nonetheless has its own form of internal integrity and collective expression. The discipline of law is a "site[] for the generation and germination of thoughts and ideas"[154] which exists only because of the shared norms and interactions, over time, of scholars, practitioners, and other disciplinary affiliates. It holds itself together and develops through recurring acts of disciplinary affiliates that affirm the norms about what counts within the discipline. Moreover, disciplinary interests are "private," thereby enjoying protection against governmental intrusion. Although public law schools and law professors employed at public law schools may, like private learned societies and practitioners, affiliate themselves with a discipline, the discipline itself remains private.[155]

The discipline is, of course, more amorphous in structure than the Boy Scouts. Perhaps the Supreme Court will deem this difference to have constitutional significance,[156] but persons relying on a discipline-

152. *Id.* at 659.

153. See *supra* text accompanying notes 75–92 for the argument that FAIR did make.

154. Shiffrin, *supra* note 117, at 840–41.

155. A recurring issue in academic freedom debate is whether public and private universities and professors will be treated differently, given that constitutional doctrine distinguishes between state and private actors. *See, e.g.*, David E. Bernstein, *The Right of Expressive Association and Private Universities' Racial Preferences and Speech Codes*, 9 WM. & MARY BILL RTS. J. 619 (2001) (private universities are protected if they adopt hate speech codes); David P. Gearey, *New Protections After Boy Scouts of America v. Dale: A Private University's First Amendment Right to Pursue Diversity*, 71 U. CHI. L. REV. 1583 (2004) (private universities may implement race-based policies). *Cf.* Brody, *supra* note 49, at 882–85. The disciplinary focus of this article pulls public and private entities under an umbrella structure that should be considered private under constitutional doctrine set forth in, for example, *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288 (2001). *See* Halberstam, *supra* note 14, at 834 (because "[t]he professional is understood to be acting under a commitment to the ethical and intellectual principles governing the profession and is not thought of as free to challenge the mode of discourse or the norms of the profession while remaining within the parameters of the professional discussion," the First Amendment protects the speech practices of the profession against government regulation).

156. Brody, *supra* note 49, at 856 (noting that "the 'who?' aspect of association and group speech" has been lost in constitutional analysis). For example, the issue of who or what entity is entitled to litigate associational rights was not directly addressed in *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984). In *Dale*, the issue of who is entitled to litigate was also not addressed, perhaps because the lawsuit began as a complaint by Dale against the Boy Scouts under New Jersey public accommodations law. The Supreme Court also ducked the issue in *FAIR*. *See*

based associational rights argument will insist that their associational interests do not require embodiment in a corporate structure in order to be given protection.[157] Indeed, it appears that the Supreme Court's usual position is that associational rights belong to individuals rather than organizations.[158] Moreover, a large body of scholarly literature attests to the constitutional value of associations that do not have a formal, corporate structure, especially in their ability to serve as a checking function on government.[159] The discipline consists of both incorporated and individual affiliates,[160] and both should be able to assert protection for disciplinary, associational interests.[161] What should matter is whether a dis-

126 S. Ct. 1297, at 1303 n.2 (2006) (limiting analysis to FAIR's claims). See the discussion of the question, as it relates to the *FAIR* litigation, in Morriss, *supra* note 12, at 441–51.

157. The reverse question is dealt with in standing cases, which ask whether an organization will be permitted to litigate individual rights. *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 343 (1977). *See also* Nathaniel Edmonds, *Associational Standing for Organizations with Internal Conflicts of Interest*, 69 U. CHI. L. REV. 351 (2002). The *FAIR* plaintiffs creatively constructed a formal corporate entity to represent academic interests not because corporate status is a prerequisite to holding or defining associational rights, but because certain law schools and professors desired litigation anonymity.

158. *See* Brody, *supra* note 49, at 856 *et seq.* (the Court is most comfortable viewing an association as the individual multiplied, as in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958)). Brody references Justice Souter's more recent comments in *FEC v. Colorado Republican Federal Campaign Commission*, 533 U.S. 431, 448 n.10 (2001), as confirmation that the Court continues to use individuals as the point of reference for associational rights claims. For arguments that institutions ought to hold the associational right, see Hills, *supra* note 42, and Horwitz, *supra* note 52, at 527–29 (avoiding competing claims to associational rights protection).

159. *See* sources cited in *supra* note 155. Some of the literature deals with relationships that are more amorphous than those of the discipline. *See, e.g.*, Sam Fleischacker, *Insignificant Communities*, *in* FREEDOM OF ASSOCIATION, *supra* note 131, at 273, 279–283 ("particle communities" allow us to achieve a more thoughtful, honest understanding of ourselves); George Kateb, *The Value of Association*, *in* FREEDOM OF ASSOCIATION, *supra* note 131, at 35, 56 (arguing that the very act of forming an association creates a voice); Alan Ryan, *The City as a Site for Free Association*, *in* FREEDOM OF ASSOCIATION, *supra* note 131, at 314 (stating the virtues of associations for the pleasure they give us in being able to do things together with others). *See also* W. MICHAEL REISMAN, LAW IN BRIEF ENCOUNTERS (1999) (microlegal systems have significant effects on social order, the quality of life, and formation of personalities).

160. Learned societies associated with specific disciplines are, for example, incorporated. They typically do not enter litigation as primary parties, but rather file amicus briefs to present information about topics being litigated. *See, e.g.* Brief Amici Curiae in Support of Petitioner by the American Association of University Professors, et al., United States v. Virginia, 518 U.S. 515 (1996) (No. 94–1941) (arguing that research on sex-based differences was not validly interpreted by the state of Virginia) [hereinafter *United States v. Virginia* AAUP Brief].

161. The Supreme Court has denied associational rights protection to some amorphous groups. *See, e.g.*, City of Chicago v. Morales, 527 U.S. 41 (1999) (gangs); Dallas v. Stanglin, 490 U.S. 19 (1989) (dance halls). Yet the discipline is not as amorphous as, for example, a cultural or identity group. *See* Brody, *supra* note 49 (discussing cultural and identity groups). The expansive definition of expressive associations employed in *Dale* suggests that the Court will pursue a pragmatic inquiry into the purposes and values of unique associations. *See, e.g.*, Hills, supra note 42. See also Justice O'Connor's concurring opinion in *Roberts v. U.S. Jay-*

ciplinary affiliate can persuade a court with fact-based as well as doctrinal arguments that the harm to specific associational interests should give rise to constitutional protection.

Different associations have different requirements of integrity. In *Dale*, the Court did not protect an expressive activity per se but, rather, the criteria by which key affiliates—those in leadership positions within the Boy Scouts—were selected because those criteria were seen as essential to the organization's integrity. Membership policies are also conventionally seen as crucial to an organization's self-definition.[162]

For the discipline, we should acknowledge the validity of Professor Seana Valentine Shiffrin's observation that associational integrity is focused on the "internal cognitive life enjoyed within the association,"[163] the way in which voice power is distributed within the discipline,[164] and whether those affiliated with the discipline trust their peers to be working cooperatively in a project of self-definition.[165] In the discipline, the very process of internal consensus formation must be protected.[166] Autonomous, authentic, and sincere deliberation of all affiliates must be protected against intrusive governmental regulation.[167]

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cees, 468 U.S. 609, 631–38 (1984) (O'Connor, J., concurring in part and concurring in the judgment), on which many scholars seeking protection for amorphous associations rely. *See, e.g.*, Kateb, *supra* note 159; Shiffrin, *supra* note 117, at 876 (premising their arguments on Justice O'Connor's concurrence in *Roberts v. U.S. Jaycees*).

162. *See* Shiffrin, *supra* note 117, at 870–73 (noting that membership is a critical factor, one over which associations ought to have significant control). The Boy Scouts filed an amicus brief in *FAIR* that attempted to make membership and leadership qualifications the only relevant internal, structural factor. Brief of Boy Scouts of America as Amicus Curiae in Support of Petitioners, *FAIR*, 126 S. Ct. 1297 (2006) (No. 04–1152).

163. Shiffrin, *supra* note 117, at 852.

164. Brody, *supra* note 49, at 865 (discussing how organizations can be typecast with reference to how they distribute voice power).

165. Shiffrin, *supra* note 117, at 868–69, 874 ("[T]hought formation in social groups . . . relies on dynamics of trust and identification . . . ."). As Mazzone, *supra* note 14, says, one of the signature traits of protected associations is the generation of social capital, i.e., trust, norms, and networks that enable individuals to cooperate and to transmit culture and tradition.

166. Shiffrin, *supra* note 117, at 878 (emphasizing how these associations can fully achieve their purposes "only when those who create also endorse the conditions of creation").

167. *Id.* at 840, 874 (criticizing a "government regulation[] that . . . exert[s] substantive influence on mental content in ways that are indifferent to and attempt to bypass . . . [an affiliate's] authentic consideration of and conscious engagement with" an idea important to the discipline). External threats to associations and their members are problematic because they interfere with "the autonomous agent's control over her mind" and with the "virtue of sincerity"—i.e., "how she thinks about topics" and her ability "to reason about them consciously, sincerely, authentically and directly"—which is essential to individual freedom. *Id.* at 854. She argues that the Court ought also to consider how intrusions into associations "may come to exert an influence on the thoughts (and actions) of the speaker in a way that surreptitiously bypasses the agent's conscious consideration and does not reflect her sincere deliberation about the matter." *Id.* at 859.

In *FAIR*, individual affiliates needed to show something other than that the Solomon Amendment interferes with a message promulgated by the discipline of law. That interference, which counters the law school's non-discrimination assurances with the message that "Uncle Sam does not want you,"[168] is not what constitutes the most significant threat to the discipline.[169] The most significant threat is the Solomon Amendment's interference with the ability of key affiliates to participate in forming a disciplinary consensus through acts that conform to their view of disciplinary norms.[170]

FAIR's affiliates needed to show that the Solomon Amendment asks law schools and professors to forego equality and justice values that they have historically struggled to define and to bring to bear on the fulfillment of role obligations central to the discipline. FAIR needed to show that the Amendment prohibits one of the most forceful ways that law school faculty might signal to law graduates and to the military that the norms of the discipline and of the military are in tension and that law graduates are being recruited to practice in an environment in which, if ordered to do so, they will be expected to relinquish the ethic of their discipline. FAIR needed to explain how the Amendment might lead to a way of "doing" law that threatens the integrity of the discipline over time by, for example, "provok[ing] guardedness [in the behavior and practices of disciplinary affiliates], which detracts from the value of" the discipline.[171]

CONCLUSION

Of course, a particular way of framing an argument, a particular empirical reality, and an adherence to a particular mode of constitutional analysis will not guarantee that any given party will prevail or lose in an academic freedom controversy. Even if the Court had been persuaded that the Solomon Amendment significantly burdens expressive, associa-

168. Transcript of Oral Argument, *supra* note 81, at 35.

169. Shiffrin, *supra* note 117, at 845 *et seq.*

170. *Compare* Roberts v. U.S. Jaycees, 468 U.S. 609, 609 (1984) (Jaycees did not prove that admitting women would force alteration of what Brody calls "its voice"), *with* Runyon v. McCrary, 427 U.S. 160, 176 (1976) (*quoting* McCrary v. Runyon, 515 F.2d 1082, 1087 (4th Cir. 1975)) ("[T]here is no showing that discontinuance of [the] discriminatory admission practices would inhibit in any way the teaching in these schools of any ideas or dogma."). *Cf.* United States v. Virginia, 518 U.S. 515 (1996) (in which there was arguably an attempt of a disciplinary affiliate of "military science" to defend its practices against non-discrimination mandates). The majority of the Court might have legitimately rejected the demonstrably invalid "scientific" claims on which the pedagogy of military science rested. *See United States v. Virginia* AAUP Brief, *supra* note 159.

171. Shiffrin, *supra* note 117, at 875.

tional activities of law schools and law professors, it would not necessarily have concluded that disciplinary interests deserve protection. Associational rights are not absolute,[172] and although *Dale* held that even a compelling governmental interest will not justify a significant intrusion on an expressive association, *Dale* did not involve the weighty interests of the military.[173]

This article only seeks to illustrate that the *FAIR* plaintiffs might have been able to develop a more potent academic freedom argument by bringing the discipline of law into an associational rights analysis and that other academic freedom arguments should also incorporate the discipline and its associational interests.

If academic freedom debates continue on their present course, in which the disciplinary focus is muted or obscured by arguments that rest primarily on appeals to institutional autonomy or individual freedom, we can expect to see continued, categorical confusion in constitutional doctrine. We can expect to see continued competitions between various claimants to be the legitimate representative of academic freedom, in which formal institutional structures take precedence over the disciplinary interests that give academic freedom its meaning. We can also expect to see a government that wishes to suppress a troublesome discipline taking opportunistic advantage of the existence of differences of opinion among disciplinary affiliates.[174] Moreover, we can expect to see professors pay less than optimal attention to how they live their ordinary pro-

172. The Court will, for example, take into account whether the discipline is too powerful and dedicated to inappropriate activities, as it does in all associational rights analysis. The dark side of associations is universally recognized. *See, e.g.*, Brody, *supra* note 49, at 836–37; Cole, *supra* note 131; Mazzone, *supra* note 14. Many scholars note the frequent conflict between equality, non-discrimination laws, and associational rights.

173. For discussions of judicial deference to the military, see, e.g., Frederick Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping with Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459 (2005); Samuel Issacharoff and Richard Pildes, *Between Libertarianism and Executive Unilateralism: An Institutional Process Approach to Rights During Wartime*, 5 THEORETICAL INQUIRIES IN LAW 1 (2004); Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001 (2004); Stephen J. Schulhofer, *Checks and Balances in Wartime: American, British and Israeli Experiences*, 102 MICH. L. REV. 1906 (2004); Turley, *supra* note 120; Ingrid Brunk Wuerth, *The President's Power to Detain "Enemy Combatants:" Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567 (2004).

174. *Cf.* Shiffrin, *supra* note 117, at 844 (regarding intrusions on associations—here of university and discipline—that take advantage of and manipulate moral connections of trust or put people on guard). Through the Solomon Amendment, for example, the government has attempted to enlist law schools' home institutions—universities that have much in the way of federal funding at stake—against the discipline of law itself. It has put each university to a choice: accept federal funds for any purpose or program and apply the Solomon Amendment throughout the entire university or protect a given discipline—even a discipline that does not receive federal funds—and lose all federal funding throughout the university.

fessional lives, from day to day, within the discipline—which will have significant implications for future claims to academic freedom.[175]

The Supreme Court does not arbitrarily protect or defer to institutional judgments or institutions that it does not understand. It protects them because it understands a given empirical reality and, therefore, the true significance of alleged threats posed by forces external to an institution.[176] This is arguably the best explanation of why, for example, the Court reached out to protect—with somewhat surprising applications of constitutional doctrine—both the integrity of the Legal Services Corporation, in *Legal Services Corp. v. Velasquez*,[177] and the normal governmental processes of the state of Colorado, in *Romer v. Evans*.[178] It is why the Court has protected science against legislative creationist mandates.[179] It is why some Justices have recently emphasized that the institutional role of attorneys and professors may require adaptations in First Amendment free speech protection for government-employed attorneys and professors.[180] Precisely because the Court is sensitive to institutional context, better efforts should be made to help the Court understand the significance of the discipline in academic freedom debate. That understanding is essential if the Court is to be able to recognize when the associational interests of disciplinary affiliates face—and ought to be given protection against—a threat from a competing normative community.[181]

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175. There is likely a direct correlation between the extent to which a discipline is perceived to have integrity and the extent to which a court, or a legislature, or the public generally is prepared to protect academic freedom of professors who speak controversially. It would behoove professors, therefore, to take care with their discipline. I am indebted to Professor Melissa Hart for the insight that how we frame the academic freedom debate is important not only to how constitutional doctrine plays out in the notorious academic freedom cases that receive play in the press, but also to how professors see themselves in ordinary times and live their ordinary lives.

176. *Cf.* Horwitz, *supra* note 52, at 483–91 (discussing the value of academic freedom), at 496–88 (discussing the value of universities), and at 580 (suggesting that the Court has given similar special treatment to other institutions, e.g., libraries, broadcasters, arts funding bodies). *Cf.* Hills, *supra* note 42, at 218–37 (laying out an argument for institutionally-specific constitutional analysis).

177. 531 U.S. 533 (2001).

178. 517 U.S. 620 (1996).

179. *See* Edwards v. Aguillard, 482 U.S. 568 (1987); Epperson v. Arkansas, 393 U.S. 97 (1968).

180. *See* Garcetti v. Ceballos, 126 S. Ct. 1951, 1962 (2006) (noting that the Court might approach the free speech issue differently were a professor or a university a party to the dispute); *id.* at 1974–75 (Breyer, J., dissenting) (noting that government attorneys must be treated differently because they have ethical and constitutional obligations to speak up about certain matters). For an interesting discussion that attempts to reconcile free speech doctrine with professional obligations, see Halberstam, *supra* note 14.

181. *See* Schauer, *supra* note 6, at 922-23 (noting that the Supreme Court has been protecting and deferring to deliberation-based institutions).