Solomon's Choice: The Spending Clause and First Amendment Rights in *Forum for Academic & Institutional Rights v. Rumsfeld*

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SOLOMON'S CHOICE: THE SPENDING CLAUSE AND FIRST AMENDMENT RIGHTS IN FORUM FOR ACADEMIC & INSTITUTIONAL RIGHTS V. RUMSFELD

Emily R. Hutchinson

Abstract: The Solomon Amendment denies federal funding to institutions of higher education that interfere with military recruiting on campus. In Forum for Academic & Institutional Rights v. Rumsfeld, the United States Court of Appeals for the Third Circuit examined the constitutionality of the Solomon Amendment using traditional First Amendment analysis. The court applied strict scrutiny and held that it was reasonably likely that the Solomon Amendment impermissibly infringed the First Amendment rights of an association of law schools and law faculty. This Note argues that the Solomon Amendment is a valid exercise of Congress's constitutionally-mandated duties to spend for the general welfare and to raise and support an army. Courts have not applied traditional First Amendment analysis—subjecting certain types of intrusions to strict scrutiny—to exercises of the spending power that implicate First Amendment rights. Instead, the proper analytical framework is the four-pronged test from South Dakota v. Dole and the unconstitutional conditions doctrine. Under this framework, the Supreme Court should reverse the Third Circuit's decision and hold that the Solomon Amendment is a valid exercise of the spending power because the Solomon Amendment passes the Dole test and does not impose an unconstitutional condition on recipients.

The Spending Clause of the United States Constitution grants Congress the power to condition the receipt of federal funds on compliance with federal objectives. However, this power is not without limits. Under South Dakota v. Dole, spending conditions must serve the general welfare, be unambiguous, be related to the federal interest in making the expenditure, and be consistent with other constitutional provisions. Additionally, spending conditions that implicate First Amendment rights must not impose an unconstitutional condition on recipients. The unconstitutional conditions doctrine prevents a government from retaliating against the exercise of First Amendment

2. See Dole, 483 U.S. at 207–08.
4. Id. at 207–08.
rights, attempting to control the content of speech when the purpose of the expenditure is to facilitate private speech, and aiming to suppress dangerous ideas.  

The Solomon Amendment, 10 U.S.C. § 983, is an example of conditional spending legislation. It facilitates Congress's constitutional duty to raise a military. Passed in 1996, the Amendment requires universities receiving federal funds to provide military recruiters access equal in quality and scope to that provided to civilian recruiters. Universities that wish to retain federal funding must either provide military recruiters the same types of access and support afforded civilian recruiters, or refrain from conducting any on-campus recruiting campaigns.

The Solomon Amendment forces many law schools to make a difficult choice. Nearly every accredited law school in the United States has adopted an antidiscrimination policy that includes sexual orientation. Most schools refuse to offer recruiting access or support to any employer that discriminates based on protected categories. The

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10. See id. § 983(b).


12. Id. at 280 (explaining the bylaws of the Association of American Law Schools (AALS), which require its members to adopt nondiscrimination policies that include sexual orientation).

13. Id. at 280–81 (stating that AALS member schools refuse career services support to employers who do not sign a certificate of nondiscrimination).
United States military is an employer that discriminates based on sexual orientation.\(^\text{14}\) Under the Solomon Amendment, law schools must choose between their desire to retain federal funding and their desire to enforce antidiscrimination policies against all employers, including the United States military.\(^\text{15}\)

In *Forum for Academic & Institutional Rights v. Rumsfeld (FAIR I)*,\(^\text{16}\) an association of law schools and law faculty challenged the constitutionality of the Solomon Amendment.\(^\text{17}\) The association argued that the Solomon Amendment was an attempt to use spending conditions to reach a result that Congress could not command directly under the First Amendment, and thus imposed an unconstitutional condition on the receipt of federal funds.\(^\text{18}\) The district court disagreed and denied the association’s motion for preliminary injunction.\(^\text{19}\) On appeal,\(^\text{20}\) the United States Court of Appeals for the Third Circuit determined that traditional First Amendment analysis was the proper analytical framework, applied strict scrutiny, and ordered the district court to enjoin enforcement of the Solomon Amendment.\(^\text{21}\)

This Note argues that the Third Circuit improperly analyzed the Solomon Amendment as a direct regulation of speech and association and erred in applying strict scrutiny. The Solomon Amendment is a valid exercise of the spending power under the United States Supreme Court’s analysis in *Dole*. Moreover, the Solomon Amendment does not impose an unconstitutional condition on law schools because it is justified by an independent regulatory power of Congress: the power to raise and support a military. Part I explains the scope of the spending power and *Dole*’s four-pronged test to analyze the constitutionality of spending conditions. Part II summarizes the unconstitutional conditions doctrine. Part III discusses Congress’s broad regulatory powers under Article I’s military clauses. Part IV explains the Solomon Amendment and provides

\(^{14}\) See 10 U.S.C. § 654 (2000) (excluding from military service those who engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts).

\(^{15}\) See *FAIR I*, 291 F. Supp. 2d at 281–82.


\(^{17}\) *Id.* at 297.

\(^{18}\) *Id.*

\(^{19}\) *Id.* at 322.


\(^{21}\) *Id.* at 230, 246.
a history of the FAIR litigation. Part V argues that the Third Circuit erred in applying strict scrutiny because the Solomon Amendment is valid conditional spending legislation under *Dole* and does not impose an unconstitutional condition on universities or their law schools. Part VI concludes that the law schools and their parent institutions must comply with the requirements of the Solomon Amendment and provide military recruiters access equal in quality and scope to that provided to civilian recruiters because they have accepted federal funds pursuant to valid conditional spending legislation.

I. CONGRESS MAY CONDITION RECEIPT OF FEDERAL FUNDS ON COMPLIANCE WITH STATUTORY DIRECTIVES

The Constitution entrusts Congress with broad powers to spend for the common defense and general welfare of the nation, and wide latitude to determine federal spending priorities. Congress may enact conditional spending legislation and require recipients of federal funds to comply with congressional policies that recipients otherwise have no duty to honor. In *Dole*, the Court announced a four-pronged test to measure the constitutionality of conditional spending legislation.

A. Congress Has Wide Latitude to Determine Federal Spending Priorities and to Fix the Terms Upon Which Federal Funds Are Disbursed

Congress possesses broad powers under the Spending Clause. The Spending Clause empowers Congress to "lay and collect Taxes, Duties,


23. See United States v. Am. Library Ass'n, 539 U.S. 194, 212 (2003) (upholding conditional spending legislation that required public libraries to install internet filters on library computers); Rust v. Sullivan, 500 U.S. 173, 198–99 (1991) (upholding conditional spending legislation that required healthcare providers to refrain from engaging in abortion-related activities); Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984) (upholding conditional spending legislation that required universities to comply with federal legislation barring discrimination based on sex); *Fullilove*, 448 U.S. at 474–75 (upholding conditional spending legislation that required grantees to spend at least 10% of federal funds to procure services or supplies from minority businesses); Lau v. Nichols, 414 U.S. 563, 569 (1974) (upholding conditional spending legislation that required school districts to take any measures necessary to bar discrimination based on race); Oklahoma v. Civil Serv. Comm'n, 330 U.S. 127, 143 (1947) (upholding conditional spending legislation that required employees of states or local agencies to refrain from participating in political activities).


25. See U.S. Const. art. I, § 8, cl. 1; *Fullilove*, 448 U.S. at 474.
Conditional Spending Legislation

Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."\textsuperscript{26} Courts have not limited Congress’s spending power to Article I’s enumerated powers.\textsuperscript{27} Rather, courts have interpreted the spending power broadly to allow Congress to legislate directly under the Spending Clause.\textsuperscript{28} Congressional determinations related to federal spending, including the prudence of a particular expenditure and the selection of particular entities as beneficiaries of federal funding, are a matter of policy not generally suited to judicial review.\textsuperscript{29} Federal spending is largely discretionary, and Congress may allow or disallow expenditures as it sees fit.\textsuperscript{30}

Congress’s broad spending powers include the power to place conditions on the receipt of federal funds and to require recipients to comply with federal policies.\textsuperscript{31} By conditioning the receipt of federal funds on compliance with federal policies, Congress induces recipients of federal funds to cooperate with policies that recipients otherwise have no duty to honor.\textsuperscript{32} Conditional spending legislation is contractual: when recipients voluntarily and knowingly accept federal funds, they agree to comply with federally imposed conditions.\textsuperscript{33} Thus, in some circumstances, Congress may accomplish results it could not command directly by specifying the conditions upon which recipients accept federal funds.\textsuperscript{34}

B. \textit{In Dole, the Court Announced a Four-Pronged Test to Assess the Constitutionality of Spending Conditions}

\textit{In Dole,} the Court explored the constitutional limits of Congress’s spending power.\textsuperscript{35} The Court upheld federal legislation that withheld a

\begin{itemize}
\item \textsuperscript{26} U.S. CONST. art. I, § 8, cl. 1.
\item \textsuperscript{27} See \textit{United States v. Butler}, 297 U.S. 1, 66 (1936) (holding that the spending power is not limited by the direct grants of legislative power enumerated in Article I, Section 8).
\item \textsuperscript{28} Id.
\item \textsuperscript{29} See \textit{Regan v. Taxation With Representation of Washington}, 461 U.S. 540, 549 (1983).
\item \textsuperscript{32} See \textit{Fullilove}, 448 U.S. at 474.
\item \textsuperscript{35} See \textit{Dole}, 483 U.S. at 206–08.
\end{itemize}
percentage of federal highway funds from states that refused to raise their mandatory minimum drinking age to twenty-one years. In reaching its decision, the Court announced a four-pronged test to assess the constitutionality of spending conditions. First, the exercise of the spending power must be in pursuit of the general welfare. Second, the condition must be sufficiently unambiguous to ensure that recipients of federal funds know the conditions they are accepting. Third, the condition must be related "to the federal interest in particular national projects or programs." Finally, other constitutional provisions must not provide an independent bar to the conditional grant of federal funds. Although Congress could not directly command states to increase their minimum drinking ages, the legislation was a valid exercise of the spending power. In practice, all conditional spending legislation meets the first prong's requirement. Reviewing courts must defer substantially to the judgment of Congress in this area. No court has ever struck spending legislation on the ground that the legislation did not serve the general welfare.

The second prong's prohibition on ambiguous spending conditions

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36. See id. at 205.
37. Id. at 207–08.
38. Id. at 207.
39. Id.
40. Id. (quoting Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)) (noting prior suggestions by the Court that a condition may be illegitimate if it is unrelated to the federal interest).
41. Id. at 208. The fourth prong of the Dole test prohibits a government from compelling a funding recipient to violate the constitutional rights of third parties, while the unconstitutional conditions doctrine, discussed infra Part II, prevents a government from requiring a funding recipient to waive its own constitutional rights as a condition of receiving government funding. Compare id. at 210–11 (explaining that the fourth prong of the Dole test prevents Congress from requiring a state receiving federal funds to violate the constitutional rights of its citizens), with United States v. Am. Library Ass'n, 539 U.S. 194, 210 (2003) (describing public libraries' unconstitutional conditions claim that the challenged statute "require[ed] them, as a condition on their receipt of federal funds, to surrender their First Amendment right to provide the public with access to constitutionally protected speech") (emphasis added).
42. Dole, 483 U.S. at 209–11.
43. See generally Lynn A. Baker & Mitchell N. Berman, Getting Off the Dole: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It to Do So, 78 IND. L.J. 459, 464 (2003) (gathering cases where courts have cursorily found that spending conditions serve the general welfare).
44. See Dole, 483 U.S. at 207.
45. See Baker & Berman, supra note 43, at 464 & n.34.
Conditional Spending Legislation

relates to the contractual nature of conditional spending legislation.\(^{46}\) Conditional spending legislation becomes an enforceable "contract" when a recipient of federal funds voluntarily and knowingly accepts its terms by receiving federal funds.\(^{47}\) Thus, when Congress imposes a condition on the receipt of federal funds, it must do so explicitly and unambiguously so that recipients know the conditions to which they are agreeing.\(^{48}\)

The third prong requires that spending conditions be reasonably calculated to advance a federal policy interest.\(^{49}\) In \textit{Dole}, the Court refused to define the outer bounds of this prong's relatedness requirement.\(^{50}\) In a subsequent case, the Court reaffirmed the \textit{Dole} Court's expansive definition of relatedness and explained that spending conditions must bear some relation to the purpose of the federal expenditure.\(^{51}\) Unless spending conditions "ha[ve] nothing to do with" the federal interest in making the expenditure, the conditions satisfy the third prong of the \textit{Dole} test.\(^{52}\)

The fourth prong prevents Congress from using the spending power to induce recipients to engage in unconstitutional activities.\(^{53}\) Thus, if Congress passed conditional spending legislation that required the States to inflict cruel and unusual punishment or invidiously discriminate, the Eighth or Fourteenth Amendment, respectively, would pose an independent bar.\(^{54}\) However, as long as Congress does not induce recipients to engage in unconstitutional activities, it may achieve indirectly via the spending power results it could not command.

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\(^{46}\) See \textit{Dole}, 483 U.S. at 207 (emphasizing the importance of federal funding recipients "exercising their choice knowingly, cognizant of the consequences of their participation") (quoting \textit{Pennhurst State Sch. & Hosp. v. Halderman}, 451 U.S. 1, 17 (1981)); \textit{Halderman}, 451 U.S. at 17 (explaining that "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions").

\(^{47}\) \textit{Halderman}, 451 U.S. at 17.

\(^{48}\) \textit{Id.}

\(^{49}\) \textit{Dole}, 483 U.S. at 208.

\(^{50}\) \textit{Id.} at 208 n.3.


\(^{52}\) See \textit{id.} (explaining that a criminal statute prohibiting bribery of governmental officials employed by entities receiving federal funds is sufficiently related to the federal interest in appropriating funds for state and local governments).

\(^{53}\) \textit{Dole}, 483 U.S. at 210.

\(^{54}\) \textit{Id.} at 210–11.
directly.55

In sum, the broad powers Congress possesses under the Spending Clause include the power to condition the receipt of federal funds upon recipients' compliance with federal policies. Spending conditions are constitutional if they satisfy the *Dole* test. The expenditure must serve the general welfare, as defined by Congress itself. The condition must unambiguously propose the terms of the contract so that recipients can make a knowing choice whether to accept federal funds. The condition must be reasonably calculated to advance a federal policy interest. Finally, the condition must not induce recipients to act unconstitutionally.

II. SPENDING LEGISLATION MUST NOT IMPOSE AN UNCONSTITUTIONAL CONDITION

In addition to passing the *Dole* test, spending conditions that implicate First Amendment rights must not violate the unconstitutional conditions doctrine.56 Courts apply strict scrutiny to spending conditions that implicate First Amendment rights in three circumstances.57 However, strict scrutiny does not apply every time spending conditions implicate First Amendment rights.58 Strict scrutiny does not apply when

55. Id.
56. See, e.g., United States v. Am. Library Ass'n, 539 U.S. 194, 203-07 (2003) (applying the *Dole* test); id. at 210-12 (analyzing the unconstitutional conditions claim). Although somewhat similar in language, the fourth prong of the *Dole* test and the unconstitutional conditions doctrine constitute independent constitutional inquiries. The fourth prong of the *Dole* test prohibits a government from compelling a funding recipient to violate the constitutional rights of third parties, while the unconstitutional conditions doctrine prevents a government from requiring a funding recipient to waive its own constitutional rights as a condition of receiving government funding. Compare *Dole*, 483 U.S. at 210-11 (explaining that the fourth prong of the *Dole* test prevents Congress from requiring a state receiving federal funds to violate the constitutional rights of its citizens), with United States v. Am. Library Ass'n, 539 U.S. 194, 210 (2003) (describing public libraries' unconstitutional conditions claim that the challenged statute "require[ed] them, as a condition on their receipt of federal funds, to surrender their First Amendment right to provide the public with access to constitutionally protected speech") (emphasis added).

57. See, e.g., Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541-44, 549 (2001) (discussing why the "latitude" that normally applies to federal conditional spending legislation does not apply to statutes that aim at the suppression of dangerous ideas); FCC v. League of Women Voters of Cal., 468 U.S. 364, 380-84 (1984) (applying strict scrutiny to the challenged statute after finding that strict scrutiny applies when a statute appropriates funds to facilitate private speech and discriminates based on content); Elrod v. Burns, 427 U.S. 347, 362-63 (1976) (applying strict scrutiny to the practice of retaliating against public employees who failed to affiliate with ruling political party).

the purpose of a federal expenditure is to develop a federal spending program and spending conditions limit the scope of that program,\textsuperscript{59} nor does it apply to spending conditions that are independently justified by a regulatory power of Congress.\textsuperscript{60} In these circumstances, rational spending conditions do not impose an unconstitutional condition.\textsuperscript{61}

A. Spending Conditions Must Survive Strict Scrutiny in Three Circumstances

The Court applies strict scrutiny to conditional spending legislation that implicates First Amendment rights in three circumstances.\textsuperscript{62} First, governments may not retaliate against individuals who exercise their First Amendment rights.\textsuperscript{63} Second, a government may not limit the content of speech when the purpose of the expenditure is to facilitate private speech.\textsuperscript{64} Third, governments may not discriminate in their funding to aim at the suppression of “dangerous ideas” by inducing recipients to abandon speech critical of the government.\textsuperscript{65}

\textsuperscript{59} Am. Library Ass’n, 539 U.S. at 211–12; Rust, 500 U.S. at 196.
\textsuperscript{61} See Am. Library Ass’n, 539 U.S. at 211–12 (upholding spending legislation that limits the scope of a federal spending program); Finley, 524 U.S. at 588–90 (same); Rust, 500 U.S. at 196 (same); see also Bell, 465 U.S. at 575–76 (upholding spending legislation that is independently justified by a congressional regulatory power); Fullilove, 448 U.S. at 474, 478, 490 (same); Lau, 414 U.S. at 569 (same).
\textsuperscript{62} In these circumstances, the government must prove that the spending condition is narrowly tailored to promote a compelling governmental interest. If the spending condition does not survive strict scrutiny review, the condition is unconstitutional. See Legal Servs. Corp., 531 U.S. at 541–44, 549 (applying strict scrutiny to a statute that aimed at the suppression of dangerous ideas); League of Women Voters, 468 U.S. at 380–81 (applying strict scrutiny to a statute that facilitated private speech and discriminated based on content); Elrod, 427 U.S. at 362–63 (applying strict scrutiny to the practice of retaliating against public employees who failed to affiliate with ruling political party).
1. **Strict Scrutiny Applies to Spending Conditions When a Government Retaliates Against Individuals Solely Because They Have Exercised Their First Amendment Rights**

A government or its officials may not retaliate against individuals who exercise their First Amendment rights.\(^\text{66}\) Although governments enjoy wide discretion in distributing public benefits, the First Amendment prevents governments from denying benefits as a means of penalizing or inhibiting protected speech and association.\(^\text{67}\) If the only possible effect of a denial is to penalize or inhibit protected speech or association, the denial must survive strict scrutiny.\(^\text{68}\)

2. **Strict Scrutiny Applies to Spending Conditions When a Government Facilitates Private Speech and Discriminates Based on Content**

A government may not limit a public forum it has created or restrict the content of private speech it subsidizes if the limitation or restriction does not survive strict scrutiny.\(^\text{69}\) In *Federal Communications Commission v. League of Women Voters of California*,\(^\text{70}\) owners and operators of noncommercial broadcasting stations brought a First Amendment challenge to a provision of the federal Public Broadcasting Act of 1967, which prohibited public broadcasting stations that received federal funds from engaging in editorializing.\(^\text{71}\) The Court found the

\(^{66}\) See, e.g., *Elrod*, 427 U.S. at 356-57 (holding that the practice of patronage dismissals, whereby a state official fires a member of an opposing political party for failing to affiliate with the official’s own party, violates the First Amendment); *Perry*, 408 U.S. at 597-98 (remanding for trial where there was a genuine issue of fact as to whether a state college system refused to renew a teacher’s employment contract in retaliation for the teacher’s outspoken criticism of its Regents).

\(^{67}\) See *Elrod*, 427 U.S. at 360 (explaining that denials are permitted for appropriate reasons); *Perry*, 408 U.S. at 597 (discussing cases where denials were unconstitutional because they impermissibly penalized the exercise of First Amendment rights).

\(^{68}\) See, e.g., *Elrod*, 427 U.S. at 363 (stating that denials must be the least restrictive means of furthering a vital governmental interest and that the benefit gained must outweigh the loss of constitutionally protected rights).

\(^{69}\) See, e.g., *League of Women Voters*, 468 U.S. at 391 (stating that the risk that local editorializing would jeopardize balanced coverage of public issues cannot justify a broad suppression of editorial speech when radio station programs are as “distinctive, varied, and idiosyncratic as the various communities they represent”).


challenged provision unconstitutional. The purposes of the federal expenditure were to facilitate balanced coverage of public issues, foster the growth and development of local broadcasting stations, and preserve the traditional autonomy of the broadcast media. Because the stations' editorial policies were bound to be as diverse as their communities, the Court reasoned that any risk that editorializing would jeopardize balanced coverage of public issues was insufficient to justify such a broad suppression of speech.

3. **Strict Scrutiny Applies to Spending Conditions When a Government Aims to Suppress "Dangerous Ideas"**

A government may not discriminate in its funding to aim at the suppression of dangerous ideas. When a government uses its spending power to induce individuals to forego protected speech challenging or criticizing the government, the government aims at the suppression of dangerous ideas. Although Congress may fix the terms upon which it distributes federal funds, Congress may not attempt to induce recipients into abandoning speech critical of the government. The First Amendment protects an individual's right to speak critically of the government, and any governmental attempts to suppress the exercise of that right are unconstitutional unless they survive strict scrutiny.

In *Legal Services Corp. v. Velazquez*, law firms brought a First Amendment challenge to a provision of the Legal Services Corporation

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72. *Id.* at 402.

73. *Id.* at 386–87.

74. *Id.* at 391.

75. See *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548–49 (2001) (striking down a provision of the Legal Services Corporation Act that impeded judicial review of existing welfare laws by prohibiting law firms receiving federal funds from attempting to amend or challenge those laws); *Speiser v. Randall*, 357 U.S. 513, 528–29 (1958) (striking down a portion of the California tax assessment form that required taxpayers to affirm that they would not advocate for the overthrow of the United States or California governments). However, as long as a government does not discriminate in its funding to aim at the suppression of dangerous ideas, it does not impose an unconstitutional condition by refusing to subsidize the exercise of First Amendment rights. See *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 548–49 (1983) (upholding a provision of the Internal Revenue Code that denied § 501(c)(3) tax exemptions to organizations engaging in lobbying activities).

76. See *Legal Servs. Corp.*, 531 U.S. at 546; *Speiser*, 357 U.S. at 518–19.

77. See *Legal Servs. Corp.*, 531 U.S. at 548–49.

78. See *Speiser*, 357 U.S. at 520, 525.

Act that prohibited law firms receiving federal funds from challenging existing welfare laws. The Court found the provision unconstitutional. The purpose of the federal expenditure was to facilitate lawyers' private speech on behalf of their indigent clients, and the provision at issue was inconsistent with the ethical duty of lawyers to bring all viable claims on behalf of their clients. Moreover, the provision aimed at the suppression of dangerous ideas and violated accepted separation-of-powers principles by insulating federal welfare statutes from judicial inquiry.

B. Strict Scrutiny Does Not Apply When the Purpose of a Federal Expenditure Is to Develop a Federal Spending Program and Spending Conditions Limit the Scope of the Program

The Court does not apply strict scrutiny to spending conditions that limit the scope of a federal spending program. When Congress creates a federal spending program for a particular purpose, it is entitled to insist that recipients use federal funds for that purpose and not for alternate purposes. Although the First Amendment may protect activities outside the scope of the federal spending program, Congress does not impose an unconstitutional condition on recipients by refusing to subsidize those activities. If recipients wish to exercise their First Amendment rights and to engage in activities outside the scope of the federal spending program, they are free to avoid the condition by declining federal financial assistance.

81. Id. at 549.
82. Id. at 544–45.
83. Id. at 546.
84. See, e.g., United States v. Am. Library Ass'n, 539 U.S. 194, 206–08 (2003) (declining to apply forum and prior restraint analyses to funding decisions related to public library acquisitions); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 588 (1998) (stating that Congress has wide latitude to set spending priorities when making appropriations for publicly-funded artworks); Rust v. Sullivan, 500 U.S. 173, 196 (1991) (explaining that unconstitutional conditions cases applying strict scrutiny are inapposite when spending conditions limit the scope of a federal spending program).
85. See Am. Library Ass'n, 539 U.S. at 211–12; Rust, 500 U.S. at 193–94.
86. Rust, 500 U.S. at 196, 198.
87. Id. at 198–99.
In *United States v. American Library Ass'n*, the Court confirmed the relevance of the *Dole* test in the unconstitutional conditions context and reiterated that when Congress appropriates funds for a particular purpose, it is entitled to insist that recipients use the funds for that purpose. The case arose when a group of library associations and libraries challenged provisions of the Children's Internet Protection Act (CIPA) that required libraries receiving federal funds to install internet filters on each of their computers. The Court found these provisions constitutional. The Court applied *Dole*'s four-pronged test and emphasized that traditional First Amendment analysis is inapplicable when a spending condition requires waiver of First Amendment rights. Because CIPA did not induce the libraries to violate their patrons' First Amendment rights, the spending condition was consistent with the First Amendment under *Dole*'s fourth prong. Moreover, CIPA did not violate the unconstitutional conditions doctrine. The purpose of the federal expenditure was to facilitate research, learning, and recreational pursuits by furnishing to libraries materials of requisite and appropriate quality. Because Congress was entitled to insist that libraries spend funds only for that purpose, the spending condition was constitutional. Libraries that did not want to comply with the condition were free to refuse federal funds and provide unfiltered access.

C. *Strict Scrutiny Does Not Apply When the Purpose of the Federal Expenditure Is to Entice Voluntary Compliance with Independently Justified Federal Policies*

The Court does not subject spending conditions that entice voluntary compliance with independently justified federal policies to strict

89. *See id.* at 203, 211–12.
91. *Id.* at 214.
92. *See id.* at 203 n.2 (applying the *Dole* test); *id.* at 205 (rejecting public forum principles); *id.* at 209 n.4 (eschewing traditional First Amendment principles relied upon by the dissenting justices).
93. *Id.* at 207–09 (discussing the purpose of content-based criteria in library acquisitions and the ease with which library patrons may have filtering software disabled).
94. *Id.* at 211–12.
95. *Id.* at 206, 211.
96. *Id.* at 211–12.
97. *Id.* at 212.
A federal policy is independently justified if it is warranted by a congressional regulatory power other than the Spending Clause. The Court has upheld conditional spending legislation, including legislation that implicates First Amendment rights, that is independently justified by one of Congress's regulatory powers. Congress may deny federal funding to entities or individuals that refuse to comply with independently justified federal policies for several reasons. First, the success of independently justified federal policies often depends on broad coverage and uniform compliance. Second, Congress need not subsidize protected speech that is contrary to, or undermines the success of, independently justified federal policies. Finally, entities or individuals that wish to exercise their First Amendment rights by refusing to comply may do so without federal financial assistance.

The Fourteenth Amendment provided an independent justification for the Court's expansive interpretation of Title VI of the Civil Rights Act of 1964 in *Lau v. Nichols*. Title VI prohibits all programs or activities receiving federal financial assistance from discriminating based on

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100. See Grove City Coll. v. Bell, 465 U.S. 555, 575–76 (1984) (explaining that Title IX's spending condition is justified by Congress's Fourteenth Amendment powers and does not infringe First Amendment rights); Bob Jones Univ. v. United States, 461 U.S. 574, 604 (1983) (explaining that denying tax-exempt status to organizations that discriminate based on race is justified by Congress's Fourteenth Amendment powers and does not violate the First Amendment); *Fullilove*, 448 U.S. at 476, 478, 490 (explaining that requiring set-asides for minority businesses is justified by Congress's Commerce Clause and Fourteenth Amendment powers); *Lau*, 414 U.S. at 568–69 (explaining that Title VI's spending condition is justified by Congress's Fourteenth Amendment powers).


102. See *Bell*, 465 U.S. at 564 (recognizing the need for broad interpretation and application of antidiscrimination statutes); *Bob Jones Univ.*, 461 U.S. at 594–96 (explaining that providing tax subsidies to organizations that discriminate based on race is "wholly incompatible" with public policy to eradicate discrimination); *Lau*, 414 U.S. at 566–68 (holding that even unintentional discrimination comes within Title VI's broad prohibition on discrimination based on race).

103. See *Lau*, 414 U.S. at 569 (quoting 110 CONG. REC. 6543 (1964) (statement of Sen. Humphrey (quoting President Kennedy's message to Congress, June 19, 1963))) (affirming that Congress need not spend public funds on programs that "encourage[], entrench[], subsidize[], or result[] in racial discrimination" in light of a comprehensive federal statutory scheme to eradicate discrimination).

104. See *Bell*, 465 U.S. at 575.

race. In *Lau*, non-English-speaking students of Chinese ancestry brought a class-action lawsuit against officials of a California school district because the district did not provide English-language instruction. The Court declined to reach the plaintiffs’ Equal Protection argument and granted relief based solely on Title VI. The school district’s unintentional discrimination came within Title VI’s broad prohibition because the statute and its implementing regulations barred actions that had the effect of discriminating based on race. Moreover, the Court reasoned that requiring Congress to subsidize actions that the statute impliedly barred was unjust.

The Court has upheld independently justified federal spending legislation against First Amendment challenges on at least two occasions. In *Grove City College v. Bell*, the Court relied on Congress’s Fourteenth Amendment powers to expansively interpret a regulation implementing Title IX of the Education Amendments of 1972, which prohibited all programs or activities receiving federal financial assistance from discriminating based on sex. A private college, which enrolled students receiving federal aid but refused all direct federal aid, refused to execute an Assurance of Compliance with Title IX. The Court held that enrolling students who received federal financial assistance triggered Title IX coverage and that the university

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108. *Id.* at 566.
109. *Id.* at 568.
110. See *id.* at 569 (quoting 110 CONG. REC. 6543 (1964) (statement of Sen. Humphrey (quoting President Kennedy’s message to Congress, June 19, 1963))) (affirming that Congress need not spend public funds on programs that “encourage[], entrench[], subsidize[], or result[] in racial discrimination” in light of a comprehensive federal statutory scheme to eradicate discrimination).
111. See *Grove City Coll. v. Bell*, 465 U.S. 555, 575–76 (1984) (enforcing provisions of Title IX of the Education Amendments of 1972 that required educational programs receiving federal funds to declare that they did not discriminate based on sex); see also *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). In *Bob Jones*, the Court upheld an IRS interpretation of provisions of the Internal Revenue Code that denied tax-exempt status to private universities that discriminated based on race because of genuine religious beliefs. *Id.* at 604–05. The Court cursorily applied strict scrutiny and found the interpretation constitutional. *Id.* at 603–04. Given the Court’s subsequent Free Exercise jurisprudence, it is unlikely the Court would apply strict scrutiny on the facts of *Bob Jones* today. See generally *Employment Div. v. Smith*, 494 U.S. 872, 881–82 (1990) (holding that strict scrutiny only applies to laws of general applicability that implicate Free Exercise rights when hybrid rights are involved).
had to execute the Assurance to retain federal funding. The Court reasoned that Title VI and Title IX (which is patterned after Title VI) each contemplate broad coverage to accomplish their underlying goals, and Congress did not intend to exempt from coverage one of the primary components of federal financial assistance to universities and students. Moreover, the regulation did not constitute an unconstitutional condition because Congress is free to attach reasonable and unambiguous conditions to federal financial assistance. Although the college may have had a First Amendment right to discriminate based on sex or to refuse to execute an Assurance of Compliance, conditioning the receipt of federal funds on compliance with independently justified antidiscrimination policies did not violate the right. By terminating its involvement in all federal financial assistance, including federal financial assistance to enrolled students, the college could exercise its First Amendment right to refuse to execute the Assurance.

In sum, the Court subjects spending conditions that implicate First Amendment rights to strict scrutiny in three circumstances. A government may not retaliate against the exercise of First Amendment rights, or limit the content of private speech it subsidizes, or discriminate in its funding to aim at the suppression of dangerous ideas. In contrast, strict scrutiny does not apply to spending conditions that limit the scope of a federal program or to spending conditions that entice voluntary compliance with independently justified federal policies. A federal policy is independently justified if it is warranted by a congressional regulatory power other than the Spending Clause.

III. CONGRESS HAS A CONSTITUTIONAL DUTY AND OBLIGATION TO RAISE AND SUPPORT A MILITARY

Article I of the United States Constitution entrusts regulation of the military to the Legislature. Congress is empowered to declare war, to raise and support armies, to provide and maintain a navy, and to make rules to regulate the land and naval forces. In addition, the

115. Id. at 574–75.
116. Id. at 566–69.
117. Id. at 575.
118. Id. at 575–76.
119. Id.
121. Id.
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Constitution charges Congress with providing for the common defense and general welfare of the nation and for making all laws necessary and proper for carrying into execution its Article I powers.122

For over 200 years, courts have deferred substantially to the judgment of Congress when reviewing statutes and regulations related to the Article I military powers.123 Congress, rather than the judiciary, is considered competent to assess the needs of the military and balance those needs against conflicting interests of servicemembers or civilians.124 This is particularly true in the military recruitment context; the constitutional powers of Congress to raise and support armies and make all laws necessary and proper to that end are exceptionally broad.125 In United States v. O'Brien,126 the Court reinstated the conviction and sentence of a man who knowingly burned his Selective Service registration certificate on the steps of a Boston courthouse.127 The Court held that the national interest in having a system for raising armies that functions with maximum efficiency justified the conviction.128 Moreover, despite evidence in the record that several Congressmen intended the criminal statute to target people who burned their draft cards in opposition to the Vietnam War,129 the Court was

122. Id. § 8, cls. 1, 18.
125. See, e.g., United States v. O'Brien, 391 U.S. 367, 381 (1968) ("[T]he Nation has a vital interest in having a system for raising armies that functions with maximum efficiency . . . ."); Selective Draft Law Cases, 245 U.S. 366, 377-79 (1918) (explaining that the Constitution places no limitations on Congress's power to use all means necessary and proper to raise and support armies); see also Lichter v. United States, 334 U.S. 742, 755-58 (1948) (concluding that the Constitution's military clauses are to be interpreted broadly).
127. Id. at 386.
128. Id. at 382.
129. See id. at 383-88 (discussing the statute's legislative history and explaining that the Court will not strike down otherwise permissible legislation because of alleged impermissible motives on the part of several Senators).
unwilling to strike the statute based on an alleged illegitimate motive by several legislators.\textsuperscript{130}

IV. IN FAIR, LAW SCHOOLS CHALLENGED THE CONSTITUTIONALITY OF THE SOLOMON AMENDMENT

The Solomon Amendment denies federal funds to institutions of higher education that interfere with military recruiting on campus.\textsuperscript{131} In \textit{FAIR I}, an association of law schools and law faculty that wished to bar military recruiters from law school campuses and retain federal funding brought First and Fifth Amendment challenges to the Solomon Amendment.\textsuperscript{132} The association argued that the Solomon Amendment imposed an unconstitutional condition on the receipt of federal funds by requiring law schools to forgo protected speech and associational rights.\textsuperscript{133} Rather than analyzing the Amendment as conditional spending legislation, the district court analyzed the Solomon Amendment as a direct regulation of speech.\textsuperscript{134} In \textit{Forum for Academic \& Institutional Rights v. Rumsfeld (FAIR II)},\textsuperscript{135} over vigorous dissent, a divided panel of the United States Court of Appeals for the Third Circuit agreed that Spending Clause analysis did not apply, applied strict scrutiny, and ordered the district court to enter the injunction.\textsuperscript{136}

\textbf{A. The Solomon Amendment's Plain Language and Legislative History Indicate that Its Spending Conditions Facilitate Congress's Duty to Raise a Military}

The federal government provides funding to institutions of higher education for a wide range of purposes, including promoting research and development, increasing national educational attainment, subsidizing the cost of education to families, ensuring equal access to higher education and the marketplace, and developing specific training

\begin{itemize}
  \item 130. \textit{id.} at 383.
  \item 131. 10 U.S.C.A. § 983(b) (West Supp. 2005).
  \item 133. \textit{id.} at 274.
  \item 134. \textit{FAIR I}, 291 F. Supp. 2d at 299.
  \item 136. \textit{id.} at 229 n.9 (declining to apply Spending Clause analysis); \textit{id.} at 242–43 (discussing strict scrutiny); \textit{id.} at 246 (remanding for the district court to enter the injunction).
\end{itemize}
The Solomon Amendment is conditional spending legislation that denies federal funding to higher education institutions that receive federal funds and interfere with military recruiting on university campuses. It requires that universities, and sub-elements of universities, provide military recruiters access equal in quality and scope to that provided civilian recruiters. In pertinent part, the Solomon Amendment provides:

No funds . . . 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 . . . that either prohibits, or in effect prevents . . . the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access . . . that is provided to any other employer.

The Solomon Amendment does not apply to institutions that have ceased offending practices or to institutions with a longstanding, religious-based policy of pacifism. Moreover, Department of Defense implementing regulations exempt institutions that exclude all recruiters from campus, only permit recruiters on campus if students express interest in them, or present evidence of equal access. The Amendment applies to funds from the Departments of Defense, Labor, Health and Human Services, Education, Homeland Security, and Transportation; the National Nuclear Security Administration; the Central Intelligence Agency; and related agencies. The Solomon Amendment does not restrict federal funds available solely for student financial assistance.


139. Id. § 983(b)(1).

140. Id. § 983(b).

141. Id. § 983(c).


143. 10 U.S.C.A. § 983(d)(1).

144. Id. § 983(d)(2).
The Solomon Amendment impliedly allows universities to issue disclaimers, voice objections to the military's policies, and take other measures to counteract the military's presence by conditioning receipt of federal funds solely in terms of access.\textsuperscript{145}

The Solomon Amendment's legislative history indicates that Congress passed the Amendment in light of the importance of on-campus recruiting to raising and supporting a well-qualified, all-volunteer military.\textsuperscript{146} For decades, Congress has relied upon on-campus recruiting to attract the nation's youth to military service.\textsuperscript{147} Occasionally, military departments, which are statutorily bound to "conduct intensive recruiting campaigns,"\textsuperscript{148} have confronted resistance to military recruiting at institutions of higher education.\textsuperscript{149} In response, Congress included provisions in various appropriations acts that prohibited distribution of specified federal funds to institutions of higher education that bar military recruiters from campuses.\textsuperscript{150} In 1995, Congress again placed restrictions on the distribution of Department of

\textsuperscript{145} See id. § 983.

\textsuperscript{146} See generally H.R. REP. NO. 92-1149 at 79-80 (1972) (summarizing the problem of resistance to military recruiting on campus); see also 142 CONG. REC. 16,860 (1996) (statement of Rep. Solomon) ("[R]ecruiting is the key to our all-volunteer military forces . . . . Recruiters have been able to enlist such promising volunteers . . . . by going into high schools and colleges . . . ."); id. at 12,712 (1996) (statement of Rep. Goodlatte) ("Campus recruiting is a vitally important component of the military's effort to attract our Nation's best and brightest young people."); 141 CONG. REC. 595 (1995) (statement of Rep. Solomon) ("[W]ith the defense drawdown, recruiting the most highly qualified candidates from around the country has become even more important."). The legislative history also contains some indication of several representatives' impermissible motives. See, e.g., 140 CONG. REC. 11,439 (1994) (statement of Rep. Solomon) ("We can begin today by telling recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your first-amendment rights [sic]. But do not expect Federal dollars to support your interference with our military recruiters."); id. at 11,441 (statement of Rep. Pombo) ("These colleges and universities need to know that their starry-eyed idealism comes with a price . . . . [S]end a message over the wall of the ivory tower of higher education.").


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Defense funds. Many universities continued to refuse to allow military recruiters on campus. Representative Gerald B. H. Solomon introduced a bill to expand the restriction to include funding from other government agencies. The purpose of the proposed legislation was to encourage educational institutions to open their campuses to military recruiters and to advance Congress’s constitutional duty to raise a military.

B. In FAIR I and FAIR II, the District and Circuit Courts Analyzed the Solomon Amendment as a Direct Regulation of Speech and Association and Applied Strict Scrutiny

In FAIR I, an association of law schools and law faculty brought First and Fifth Amendment challenges to the Solomon Amendment. The association argued that strict scrutiny applied because the Solomon Amendment imposed an unconstitutional condition on the receipt of federal funds by penalizing the exercise of three First Amendment rights: academic freedom, freedom of expressive association, and

153. Id.
155. FAIR I, 291 F. Supp. 2d 269, 274–75 (D.N.J. 2003), rev’d FAIR II, 390 F.3d 219 (3d Cir. 2004), cert. granted, ___ U.S. ___, 125 S. Ct. 1977 (May 2, 2005). Many law schools, professors, and students oppose military recruiting on campus because the military's policy regarding homosexuals conflicts with the schools' longstanding antidiscrimination policies, which include sexual orientation as a protected category. See id. at 281–82. However, the price of refusing to comply with the Solomon Amendment is high: In 2002, the federal government spent nearly $48.5 billion on higher education, including expenditures on higher education programs and research programs at universities and related institutions. See generally STATISTICAL ABSTRACT OF THE UNITED STATES, 2004-2005, at 137 (2005). Law schools and their members have challenged the Solomon Amendment as an unconstitutional condition because if a law school enforces its antidiscrimination policy and bars military recruiters from campus, it and its parent institution risk losing all federal funding. See FAIR II, 390 F.3d at 227–28; see also Burt v. Rumsfeld, 354 F. Supp. 2d 156, 159–60 (D. Conn. 2005) (summarizing the unconstitutional conditions and First Amendment claims brought by law school faculty); Student Members of SAME v. Rumsfeld, 321 F. Supp. 2d 388, 390–92 (D. Conn. 2004) (summarizing a law student organization's challenges to the Solomon Amendment on First and Fifth Amendment grounds).
freedom from compelled speech.156 The district court denied the association’s motion for preliminary injunction on the grounds that the association had not established a reasonable likelihood of success on the merits.157

The district court recognized that the Solomon Amendment was an attempt to attach certain conditions to the receipt of federal funds.158 However, the court declined to apply Spending Clause analysis, believing that such analysis did not apply when legislation implicates First Amendment rights.159 Moreover, the court held that the doctrine of unconstitutional conditions failed to provide an analytical framework because the Solomon Amendment does not define the scope of a federal spending program.160 Because it believed law schools were free to take ameliorative measures to counteract the military’s temporary presence on campus,161 the district court considered the incidental effects on the association’s First Amendment rights to be no greater than essential to further the government’s important interest.162 The court held that the association was unlikely to prevail on the merits.163

156. See FAIR I, 291 F. Supp. 2d at 297, 317 (summarizing the association’s unconstitutional conditions, academic freedom, expressive association, and compelled speech claims under the First Amendment and the association’s void for vagueness claim under the Fifth Amendment).
157. Id. at 322.
158. Id. at 298.
159. Id. at 299.
160. Id. at 299–300.
161. Id. at 281 (discussing recommendation of the AALS that law schools take ameliorative measures to resolve the tension between compliance with the Solomon Amendment and the schools’ non-discrimination policies); id. at 305–06 (stating that by taking ameliorative measures to distance themselves from the military’s discriminatory policy, law schools “counteract and indeed overwhelm the message of discrimination which they feel is inherent in the visits of the military recruiters”); id. at 314 (explaining that law schools are free to disclaim and even denounce any endorsement of the military’s recruiting policy). Most AALS schools that comply with the access requirements of the Solomon Amendment issue disclaimers; the University of Washington School of Law’s disclaimer is typical: “The U.S. Military will recruit at the Law School today. The Law School’s non-discrimination policy prohibits any employer using Law School facilities for recruitment purposes from discriminating on the basis of sexual orientation. However, the Law School is compelled by the Solomon Amendment to permit the U.S. Military to use Law School facilities for recruitment purposes despite its discrimination against gay and lesbian persons. Under this law, universities that do not allow the U.S. Military access to students for recruitment purposes lose federal funding. In no way does the Law School condone the U.S. Military’s continuing discrimination against gay and lesbian persons.” Statement from Career Services to the Faculty, Staff, and Students of the University of Washington School of Law (Oct. 17, 2000) (on file with author).
162. FAIR I, 291 F. Supp. 2d at 313.
163. See id. at 322 (concluding that the plaintiffs had not established a reasonable likelihood of
On appeal, a divided panel of the Third Circuit reversed and ordered the district court to enter the injunction.\textsuperscript{164} In a footnote, the majority agreed with the district court that there was a limited exception to the unconstitutional conditions doctrine when Congress defines the scope of a selective spending program, but refused to apply Spending Clause analysis on the ground that the Solomon Amendment did not fit within this exception.\textsuperscript{165} Instead, the majority analyzed the Solomon Amendment as a direct regulation of speech and association and applied strict scrutiny.\textsuperscript{166} Because the court believed it was unlikely that the Solomon Amendment would survive strict scrutiny, the court held that the association had demonstrated a reasonable likelihood of success on the merits and ordered the district court to enter a preliminary injunction.\textsuperscript{167} The Third Circuit has since stayed the preliminary injunction pending Supreme Court review.\textsuperscript{168} The Court has granted certiorari.\textsuperscript{169}

In sum, the Solomon Amendment is conditional spending legislation that prohibits institutions of higher education that receive federal funds from interfering with military recruiting on university campuses. Its plain language and legislative history suggest that its spending conditions facilitate Congress’s constitutionally-mandated duty to raise a military. In \textit{FAIR II}, the United States Court of Appeals for the Third Circuit examined the constitutionality of the Solomon Amendment as a direct regulation of speech and association, applied strict scrutiny, and ordered the district court to enjoin enforcement of the Solomon Amendment because the association had demonstrated a reasonable

\begin{itemize}
  \item\textsuperscript{164} \textit{FAIR II}, 390 F.3d 219, 246 (3d Cir. 2004), cert. granted, ___ U.S. ___, 125 S. Ct. 1977 (May 2, 2005).
  \item\textsuperscript{165} \textit{Id.} at 229 n.9.
  \item\textsuperscript{166} \textit{See id.} at 233 (holding that under Boy Scouts of Am. v. Dale, 530 U.S. 640, 648, 653 (2000), the Solomon Amendment significantly impairs the law schools’ associational rights by interfering with the schools’ ability to disseminate their chosen message of non-discrimination); \textit{id.} at 240 (holding that under Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 569-81 (1995), the Solomon Amendment compels the schools to propagate, accommodate, and subsidize the military’s recruiting message against their will); \textit{see also id.} at 243-46 (arguing that the \textit{O'Brien} expressive conduct test is inapplicable because the Solomon Amendment directly affects the schools’ speech and associational rights).
  \item\textsuperscript{167} \textit{Id.} at 246.
  \item\textsuperscript{169} Rumsfeld v. Forum for Academic & Institutional Rights (\textit{FAIR III}), ___ U.S. ___, 125 S. Ct. 1977 (May 2, 2005).
\end{itemize}
likelihood of success on the merits.

V. THE SOLOMON AMENDMENT IS VALID CONDITIONAL SPENDING LEGISLATION

The Solomon Amendment is valid conditional spending legislation because it meets the four-pronged test articulated in Dole.\(^{170}\) Moreover, although the Solomon Amendment does not define the scope of a federal spending program, it does not violate the unconstitutional conditions doctrine because it is independently justified under Congress’s military powers.\(^{171}\) The Third Circuit mistakenly analyzed the constitutionality of the Solomon Amendment as if it were direct regulation of the association’s First Amendment speech and associational rights and erred in applying strict scrutiny.

A. The Solomon Amendment Is Valid Conditional Spending Legislation Under Dole

Because the Solomon Amendment is conditional spending legislation, Dole provides the proper analytical framework to determine its constitutionality.\(^{172}\) The Solomon Amendment does not directly command that institutions of higher education provide access or affirmative support to military recruiters.\(^{173}\) Instead, the Solomon Amendment encourages universities to comply voluntarily with a longstanding policy of on-campus military recruiting.\(^{174}\) Because the Solomon Amendment does not directly regulate speech and association, Dole provides the proper analytical framework for assessing the Solomon Amendment’s constitutionality.\(^{175}\)

\(^{170}\) See infra Part V.A.

\(^{171}\) See infra Part V.B.3.


\(^{174}\) See, e.g., 142 CONG. REC. 16,860 (1996) (statement of Rep. Solomon) (“Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges . . . . That is why we need this amendment.”); 142 CONG. REC. 12,712 (1996) (statement of Rep. Solomon) (“But because it is an all-voluntary military, our military does need access to be able to offer these honorable careers to these young men and women.”); 141 CONG. REC. 595 (1995) (statement of Rep. Solomon) (“[W]ith the defense drawdown, recruiting the most highly qualified candidates from around the country has become even more important.”); 140 CONG. REC. 11,438 (1994) (statement of Rep. Solomon) (“[W]e are unable to find enough recruits to fill the current number of slots, especially with high-caliber students.”).

\(^{175}\) See Am. Library Ass’n, 539 U.S. at 203 n.2; FAIR I, 291 F. Supp. 2d 269, 298 (D.N.J. 2003),
The Solomon Amendment meets the *Dole* requirement that exercises of the spending power serve the general welfare by facilitating Congress’s responsibilities to provide for the common defense and general welfare of the United States. The Court has recognized the vital national interest in having effective systems of military recruiting. The Solomon Amendment furthers this interest by encouraging institutions of higher education, which are an important historical source of recruits, to allow recruiters access to campuses. Moreover, the Solomon Amendment helps the military departments meet their statutory duty to conduct intensive recruiting campaigns by encouraging universities to allow military recruiters access to traditionally receptive potential recruits.

The Solomon Amendment also meets the *Dole* requirement that spending conditions be clear and unambiguous. Its plain language requires access “equal in quality and scope” to that provided to civilian recruiters. By accepting federal funds, universities and their sub-elements know or should know that they are agreeing to provide military recruiters the same types of access and support civilian recruiters receive. Universities and their sub-elements bind themselves to an enforceable contract to provide equal access by voluntarily and knowingly accepting federal funds unambiguously conditioned on providing equal access. If a parent institution accepts federal funds and thus subjects its law school to the requirements of the Solomon Amendment, it binds the law school only to provide access equal in quality and scope to that the law school already provides to civilian recruiters.

The Solomon Amendment also meets the *Dole* requirement that

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179. *See id. (discussing 10 U.S.C.A. § 503(a) (West Supp. 2005)).
182. *See id.; FAIR I*, 291 F. Supp. 2d at 282–83 (summarizing military and law school efforts to clarify the prohibitions).
conditional spending legislation relate to a valid federal interest.\textsuperscript{185} The federal government provides funding to universities for a wide range of purposes: funding high-quality, cutting-edge research and development, including defense research and development; increasing national educational attainment; subsidizing the cost of education to families by providing financial assistance to parents and students; ensuring that all students receive equal access to higher education and the marketplace; and funding specific training programs, including Reserve Officers' Training Corps (ROTC).\textsuperscript{186} Requiring schools to provide military recruiters access equal in quality and scope to that provided to civilian recruiters ensures that military recruiters have access to students who have benefited from federally subsidized higher education.\textsuperscript{187} It also ensures that the government has the opportunity to capitalize on the research and training programs it has funded.\textsuperscript{188} Since the condition is sufficiently related to the federal interest in higher education expenditures, it is valid under the third prong of the \textit{Dole} test.\textsuperscript{189}

Finally, the First Amendment does not pose an independent constitutional bar.\textsuperscript{190} The Solomon Amendment does not induce law schools to infringe the First Amendment speech or associational rights of their members.\textsuperscript{191} The Solomon Amendment does not require that law schools deny their members, including professors, staff, and students, their First Amendment rights to refuse to associate with military recruiters on campus, express their disagreement with federal policy and the Solomon Amendment, protest military recruiting on campus, or participate in normal political processes to change federal policy.\textsuperscript{192} As

\begin{itemize}
\item \textsuperscript{185} \textit{Dole}, 483 U.S. at 207.
\item \textsuperscript{187} See \textit{FAIR I}, 291 F. Supp. 2d at 313 (discussing the disadvantage military recruiters would face in the absence of the Solomon Amendment).
\item \textsuperscript{189} See \textit{Sabri v. United States}, 541 U.S. 600, 608 (2004); \textit{Dole}, 483 U.S. at 207.
\item \textsuperscript{190} \textit{Dole}, 483 U.S. at 208.
\item \textsuperscript{191} See \textit{FAIR I}, 291 F. Supp. 2d at 305-06.
\item \textsuperscript{192} See \textit{id}.
\end{itemize}
long as they provide access to military recruiters, universities, their sub-elements, and their members may take any measures they wish to express their displeasure with the military's policy regarding homosexuality or with the Solomon Amendment itself. Moreover, the condition requiring universities and sub-elements to provide access equal in quality and scope to that provided to civilian recruiters is not unduly coercive. Its purpose and effect is to increase military recruiting on campus, not to deter protected speech. Because the condition does not induce universities or their sub-elements to violate the First Amendment rights of their members, and because the condition is not unduly coercive, it satisfies the fourth prong of the Dole test.

B. The Solomon Amendment Does Not Violate the Unconstitutional Conditions Doctrine

The Third Circuit erred in concluding that because the Solomon Amendment does not define the scope of a federal spending program, strict scrutiny applies. The Solomon Amendment does not penalize the exercise of First Amendment rights, facilitate private speech, or aim at the suppression of dangerous ideas. While the Solomon Amendment does not limit the scope of a federal spending program, it does not violate the unconstitutional conditions doctrine because it is independently justified under Congress's military powers.

193. See 10 U.S.C.A. § 983 (West Supp. 2005) (conditioning receipt of federal funds solely in terms of access and impliedly allowing universities to issue disclaimers, voice objections to the military's policies, and take other measures to counteract the military's presence); FAIR I, 291 F. Supp. 2d at 305–06, 313–14.
194. See FAIR I, 291 F. Supp. 2d at 313 (explaining that without the Solomon Amendment, the governmental interest in military recruiting would be achieved less effectively).
195. See Sabri, 541 U.S. at 608 (holding that the challenged statute was not unduly coercive because it did not "bring[] federal economic might to bear on [the recipient's] own choices"); United States v. Am. Library Ass'n, 539 U.S. 194, 207–09 (2003) (holding that the challenged statute did not require public libraries to violate the First Amendment rights of their patrons because of the ease with which patrons could have internet filters disabled); Dole, 483 U.S. at 210 (discussing constitutional infirmity of hypothetical statutes requiring a recipient of federal funding to violate third parties' constitutional rights).
196. See infra Part V.B.1.
197. See infra Part V.B.2–3.
1. The Solomon Amendment Does Not Fit Within Any of the Three Circumstances Where Strict Scrutiny Applies

The Solomon Amendment does not fit within any of the three categories of conditional spending legislation where the Supreme Court requires the application of strict scrutiny. When conditional spending legislation implicates First Amendment rights, strict scrutiny applies in three situations: when a government retaliates against individuals who have exercised their First Amendment rights,\(^\text{198}\) facilitates private speech but discriminates based on content,\(^\text{199}\) or aims at the suppression of dangerous ideas.\(^\text{200}\) Because the Solomon Amendment does not fit within any of these categories, the government need not prove its conditions are narrowly tailored to promote a compelling governmental interest.\(^\text{201}\)

The Solomon Amendment is not intended to retaliate against universities or law schools that exercise their First Amendment rights.\(^\text{202}\) If the denial of a governmental benefit has no purpose other than penalizing or inhibiting protected speech, the denial is impermissible retaliation.\(^\text{203}\) Unlike the denials of benefits that the Court has struck

\(^{198}\) See, e.g., Elrod v. Burns, 427 U.S. 347, 356–57 (1976) (holding that the practice of patronage dismissals, whereby a state official fires a member of an opposing political party for failing to affiliate with the official’s own party, violates the First Amendment); Perry v. Sindermann, 408 U.S. 593, 597–98 (1972) (remanding for trial where there was a genuine issue of fact as to whether a state college system refused to renew a teacher’s employment contract in retaliation for the teacher’s outspoken criticism of its Regents).


\(^{200}\) See, e.g., Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001) (striking down the provision of the Legal Services Corporation Act that prohibited law firms receiving federal funds from attempting to amend or challenge existing welfare laws); Speiser v. Randall, 357 U.S. 513, 528–29 (1958) (striking down the portion of the California tax assessment form that required taxpayers to affirm that they would not advocate the overthrow of the United States or California governments).

\(^{201}\) See supra Part II.


\(^{203}\) See, e.g., Elrod, 427 U.S. at 356–57 (holding that the practice of patronage dismissals, whereby a state official fires a member of an opposing political party for failing to affiliate with the official’s own party, violates the First Amendment); Perry, 408 U.S. at 597–98 (remanding for trial where there was a genuine issue of fact as to whether a state college system refused to renew a teacher’s employment contract in retaliation for the teacher’s outspoken criticism of its Regents).
down as impermissible retaliation, the Solomon Amendment does not function solely to penalize protected speech and association. The Amendment's stated purpose and logical effect is to increase military recruiting on campus, not to deter protected speech.

Nor does the Solomon Amendment facilitate private speech. In League of Women Voters, a broad suppression of editorial speech was held to be impermissible given that the purpose of the federal expenditure at issue was to facilitate the speech of broadcasting stations across the nation. In contrast, the federal expenditures limited by the Solomon Amendment do not serve a single purpose or facilitate private speech.

The Solomon Amendment is not aimed at the suppression of dangerous ideas. In Legal Services Corp., the statute at issue aimed to suppress all speech critical of federal welfare statutes and to insulate federal welfare law from judicial scrutiny. In contrast, the Solomon Amendment does not aim to suppress speech critical of the government. It aims to entice voluntary compliance with a congressional determination that access to campuses is necessary to conduct successful recruiting campaigns. Universities and law schools remain free to engage in speech critical of the government and its policies, and nearly every law school in the nation that complies with the access requirements of the Solomon Amendment does so. Moreover,

204. Compare Elrod, 427 U.S. at 357 (stating that patronage is inimical to the free functioning of our electoral process), and Perry, 408 U.S. at 598 (affirming absolute constitutional bar to terminating public employment contract as reprisal for speech activities), with 142 CONG. REC. 12,712 (1996) (statement of Rep. Goodlatte) (discussing policy of facilitating government's constitutionally mandated military duties by withholding federal funds from institutions that interfere with on-campus military recruiting).

205. See FAIR I, 291 F. Supp. 2d at 313 (explaining that without the Solomon Amendment, the governmental interest in military recruiting would be achieved less effectively).


207. Compare League of Women Voters, 468 U.S. at 368–70 (discussing a federal statutory scheme that established a federal public broadcasting system and appropriated federal funds for that purpose), with 10 U.S.C.A. § 983 (West Supp. 2005) (placing restrictions on any funds made available for the Departments of Defense, Labor, Health and Human Services, Education, Homeland Security, and Transportation; the National Nuclear Security Administration; the Central Intelligence Agency; and related agencies).


210. See id.

211. The University of Washington School of Law's disclaimer is typical: "The U.S. Military will recruit at the Law School today. The Law School's non-discrimination policy prohibits any
the Solomon Amendment does not distinguish between universities that bar military recruiters because of their First Amendment beliefs and universities that bar military recruiters for reasons unrelated to protected expression.\textsuperscript{212} Although the Amendment's legislative history indicates impermissible motives on the part of several legislators, the Court will not strike otherwise permissible legislation based on such isolated indications.\textsuperscript{213}

2. \textit{The Solomon Amendment Does Not Limit the Scope of a Federal Spending Program}

The Third Circuit correctly stated that the Solomon Amendment does not limit the scope of a spending program.\textsuperscript{214} In \textit{American Library Ass'n}, the federal expenditure at issue created a spending program to subsidize the acquisition of library materials of requisite quality.\textsuperscript{215} The spending condition prevented libraries from using federal funds in a manner that would allow for the acquisition of indecent materials.\textsuperscript{216} In contrast, the Solomon Amendment does not create a spending program, and its conditions do not limit the scope of a spending program.\textsuperscript{217}
3. The Solomon Amendment Is Independently Justified by Congress’s Military Powers

The Solomon Amendment does not violate the unconstitutional conditions doctrine because it is justified by an independent regulatory power of Congress. In Lau and Bell, Congress’s independent regulatory powers justified expansive conditional spending legislation. Although Congress could not have directly commanded compliance with the statutes at issue in these cases, the financial inducement created by these statutes was justified by a longstanding national policy, embodied in the Fourteenth Amendment, to eradicate discrimination. Similarly, the military clauses of the federal Constitution justify the Solomon Amendment. Although Congress may not be able to command compliance with the Solomon Amendment, the financial inducement created by the Solomon Amendment is justified by a longstanding national policy to conduct effective military recruiting campaigns, embodied in Article I’s military clauses. As the Court has recognized, Congress’s regulatory powers under the military clauses are exceptionally broad. Moreover, the governmental interest in effective systems of military recruiting is of paramount importance to Congress’s ability to fulfill its constitutional duty to raise and support a military. For decades, Congress has relied on on-campus recruiting campaigns to enlist well-qualified men and women. Once Congress recognized that


223. See, e.g., Lichter v. United States, 334 U.S. 742, 755–58 (1948) (stating that the Constitution’s military clauses are to be interpreted broadly); Selective Draft Law Cases, 245 U.S. 366, 377–79 (1918) (explaining that the Constitution places no limitations on Congress’s power to use all means necessary and proper to raise and support armies).

224. United States v. O’Brien, 391 U.S. 367, 381 (1968) (stating that “the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency”).

225. FAIR II, 390 F.3d at 250–51.
existing recruiting policies were insufficient, it passed the Solomon Amendment to create a more effective recruiting policy and to increase military enlistments.\(^{226}\)

Because the Solomon Amendment is independently justified by Congress’s broad regulatory powers under the military clauses, the government need not prove that the Solomon Amendment is narrowly tailored to promote a compelling governmental interest.\(^{227}\) Just as the college in \textit{Bell} was not entitled to retain federal funding if it exercised its First Amendment right to refuse to comply with Title IX,\(^{228}\) the law schools challenging the Solomon Amendment are not entitled to retain federal funding if they exercise their First Amendment right to refuse to comply with the Solomon Amendment. The national interest in eradicating discrimination was sufficient to limit the college’s First Amendment right in \textit{Bell},\(^{229}\) and the national interest in accessing university campuses for military recruiting purposes is sufficient to limit the First Amendment rights of the law schools. Moreover, just as the college in \textit{Bell} was free to avoid the condition and fully exercise its First Amendment rights by foregoing all federal funds,\(^{230}\) the law schools and their parent institutions are free to avoid the conditions of the Solomon Amendment and fully exercise their First Amendment right to exclude military recruiters from campus by foregoing federal funds.

In sum, the Solomon Amendment is valid conditional spending legislation because it meets each prong of the \textit{Dole} test and does not violate the unconstitutional conditions doctrine. The Solomon Amendment does not fit within any of the three categories of conditional spending legislation that require strict scrutiny. Although the Solomon

\(^{226}\) \textit{See}, \textit{e.g.}, 142 \textit{Cong. Rec.} 16,860 (1996) (statement of Rep. Solomon) ("Recruiters have been able to enlist such promising volunteers for our Armed Forces by going into high schools and colleges . . . . That is why we need this amendment."); 142 \textit{Cong. Rec.} 12,712 (1996) (statement of Rep. Solomon) ("But because it is an all-voluntary military, our military does need access to be able to offer these honorable careers to these young men and women."); 141 \textit{Cong. Rec.} 595 (1995) (statement of Rep. Solomon) ("[W]ith the defense drawdown, recruiting the most highly qualified candidates from around the country has become even more important."); 140 \textit{Cong. Rec.} 11,438 (1994) (statement of Rep. Solomon) ("[W]e are unable to find enough recruits to fill the current number of slots, especially with high-caliber students.").


\(^{228}\) \textit{See \textit{Bell}}, 465 U.S. at 575.

\(^{229}\) \textit{See id.} at 566–68.

\(^{230}\) \textit{Id.} at 575.
Amendment does not limit the scope of a federal spending program, it is independently justified by Congress’s Article I military powers.

VI. CONCLUSION

In *FAIR II*, the Third Circuit erred in applying strict scrutiny because the Solomon Amendment is conditional spending legislation properly analyzed under *Dole*’s four-pronged test and the unconstitutional conditions doctrine. The Solomon Amendment is valid conditional spending legislation under *Dole*. The Solomon Amendment serves the general welfare, is unambiguous, is related sufficiently to the federal interest, and does not require law schools and their parent institutions to violate the constitutional rights of their members. Moreover, the Solomon Amendment does not impose an unconstitutional condition on law schools and their parent institutions because it is independently justified by Congress’s regulatory powers under the military clauses of the federal Constitution. Although Congress may not be able to compel law schools and their parent institutions to allow military recruiters on campus, it may entice them to comply with its determination that campus recruiting is vital to raising and supporting a well-qualified, all-volunteer military. Because the Solomon Amendment is valid conditional spending legislation, law schools and their parent institutions that accept federal funds must comply with the requirements of the Solomon Amendment and provide military recruiters access equal in quality and scope to that provided to civilian recruiters.