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Three Facts of Deference

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THREE FACES OF DEFERENCE

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Deference—the substitution by a decisionmaker of someone else's judgment for its own—is a pervasive tool of constitutional doctrine. But although it has been studied at more abstract levels of jurisprudence and at very specific doctrinal levels, it has received surprisingly little general attention in constitutional scholarship. This Article aims to fill that gap.

This Article makes three primary contributions to the literature. First, it provides a careful examination of deference as a doctrinal tool in constitutional law, and offers a taxonomy of deference. In particular, it suggests that deference can best be understood as relying on two separate but overlapping grounds: deference on the basis of the legal authority of the deferee, and deference on the basis of the deferee's epistemic, or knowledge-based, authority. Importantly, this Article suggests that deference cannot be examined from the standpoint of the deferring institution—usually, the courts—alone. Rather, we must also take into account the obligations of deferees, which should demand deference only for those decisions reached in the full and fair exercise of their legal or epistemic authority.

Second, this Article demonstrates the practical benefits of this richer understanding of deference by applying it to a recent case in which the Supreme Court confronted competing claims of deference: Rumsfeld v. Forum for Academic & Institutional Rights (FAIR), *in which the Supreme Court rejected a challenge to the Solomon Amendment, which*

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requires law schools to provide access to campus for military recruiters. In FAIR, *the Court faced claims of deference from Congress, acting pursuant to its military powers, and from the law schools, which invoked deference both as expressive associations and as universities. The Court's treatment of these competing claims to deference was unsatisfactory. The Court gave too much deference to Congress, and too little to the law schools. In particular, it failed to accord them the deference they deserved as universities, which serve as vital "First Amendment institutions" in the universe of public discourse. The Court's failure to soundly address these competing claims of deference bespeaks a larger failure to theorize the nature of deference and the occasions on which courts should defer. Thus underequipped, the Court was left at sea when confronting multiple institutions competing for deference in the same case. At the same time, the law schools themselves may have fallen short in meeting their own obligations as deferees in this case.*

Finally, this Article shows that its examination of deference lies at the intersection of two developing areas of constitutional scholarship: the study of constitutional decision rules, and the study of institutionally oriented approaches to the First Amendment. It argues that these two emerging fields are linked by the concept of deference, and both might learn a good deal from each other.

INTRODUCTION

The law of the First Amendment has set itself a Sisyphean task. And like Sisyphus, it is doomed forever to be disappointed.[1]

Here is the task: those who interpret and enforce the First Amendment have "a deeply felt desire . . . to achieve noninstrumental certainty in the law."[2] Courts interpreting the First Amendment seek to understand it in strictly *legal* terms—to erect a doctrinal framework that is generally applicable and need not bend to every new circumstance. In the First Amendment, and in constitutional law more generally, courts seek to realize this goal by viewing the law through a lens of "juridical categories,"[3] in which all speakers and all factual questions, no matter how varied and complex, are compressed into a series of purely legal inquiries.[4] In short, the law of the First Amendment yearns for acontextuality.[5]

Signs of this urge toward acontextuality may be found throughout the law of the First Amendment.[6] For example, the Court has long refused to recognize any special privileges for the press, notwithstanding the textual anchor of the Press Clause, because doing so

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1 This theme is developed at length in Paul Horwitz, *Universities as First Amendment Institutions: Some Easy Answers and Hard Questions*, 54 UCLA L. REV. 1497 (2007).

2 Roderick M. Hills, Jr., *The Pragmatist's View of Constitutional Implementation and Constitutional Meaning*, 119 HARV. L. REV. F. 173, 174 (2006), http://www.harvardlawreview.org/forum/issues/119/march06/hills.pdf.

3 Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 119 (1998) [hereinafter Schauer, *Principles*]. *See generally* Frederick Schauer, *Prediction and Particularity*, 78 B.U. L. REV. 773, 781–85 (1998) (describing this tendency).

4 *See* Paul Horwitz, Grutter*'s First Amendment*, 46 B.C. L. REV. 461, 564 (2005); Frederick Schauer, *Institutions as Legal and Constitutional Categories*, 54 UCLA L. REV. 1747, 1759–60 (2007) (noting a tradition of lawyers, judges, and scholars who prefer to frame legal analysis in terms that "appear[] lawlike to the core, such as state action, public forum, limited-purpose public figure, suspect classification, fundamental right," and so on, or in terms of Dworkinian "moral abstractions," rather than in "real-world, prelegal, institutional terms").

5 *See* Schauer, *supra* note 4, at 1749 (noting the law's "frequent and at times peculiar reluctance to employ the extralegal world's institutionally demarcated categories," particularly in the field of constitutional law); *cf.* Claire L'Heureux-Dubé, *It Takes a Vision: The Constitutionalization of Equality in Canada*, 14 YALE J.L. & FEMINISM 363, 370 (2002) (noting "the notoriously disembodied and acontextual world of law").

6 *See* Horwitz, *supra* note 4, at 564.

would require courts to consider who qualifies as a journalist, a factual question that raises "practical and conceptual difficulties of a high order."[7] Thus, the Court's fear of context has led it to "render[] the Press Clause . . . a virtual nullity."[8] Similar observations could be drawn from across the wide realm of First Amendment law, from the free exercise of religion, to public forum doctrine, to that most prominent symbol of acontextuality, content neutrality doctrine.[9]

In short, the Court has strived for a First Amendment that is all rule and no context.[10] From stem to stern, its approach has been "institutional[ly] agnostic[]," [11] with little evident "regard for the identity of the speaker or the institutional environment in which the speech occurs."[12]

And here is the dilemma: it turns out that context *does* matter.[13] Time after time, the Court has found that its acontextual framework fails to fit the factually rich, socially embedded world in which speech actually occurs. Thus, the Court conceded in a case involving the use of filtering software by libraries that general principles of public forum doctrine were "out of place in the context of this case,"[14] and that it must instead "examine the role of libraries in our society."[15] In another case, the Court abandoned content neutrality doctrine because the defendant, a government arts funding body, necessarily had to make content-based distinctions.[16] Still more recently, the

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7 Branzburg v. Hayes, 408 U.S. 665, 704 (1972).

8 Horwitz, *supra* note 4, at 564–65; *see also* Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256, 1257 (2005) ("[E]xisting First Amendment doctrine renders the Press Clause redundant and thus irrelevant, with the institutional press being treated simply as another speaker."). *See generally* Paul Horwitz, *"Or of the [Blog],"* 11 NEXUS 45, 48–62 (2006) [hereinafter Horwitz, *Blog*] (investigating the interplay between various theories of the Press Clause and the blogosphere).

9 For examples, see Horwitz, *supra* note 1, at 1504–10.

10 *See, e.g.*, James Weinstein, *Speech Categorization and the Limits of First Amendment Formalism: Lessons from* Nike v. Kasky, 54 CASE W. RES. L. REV. 1091, 1094 (2004).

11 Schauer, *Principles*, *supra* note 3, at 120.

12 Schauer, *supra* note 8, at 1256.

13 *Cf.* Grutter v. Bollinger, 539 U.S. 306, 327 (2003) ("Context matters when reviewing race-based governmental action under the Equal Protection Clause.").

14 United States v. Am. Library Ass'n, 539 U.S. 194, 205 (2003) (plurality opinion).

15 *Id.* at 203.

16 *See* Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998); *see also* Lee C. Bollinger, *Public Institutions of Culture and the First Amendment: The New Frontier*, 63 U. CIN. L. REV. 1103, 1115 (1995) (noting the tension, in cases like *Finley*, between the Court's customary focus on content neutrality and its "manifest desire . . . both to permit the state to establish and support cultural institutions and to confer on them

Court, in the course of trying to clarify its doctrine concerning government employee speech, could not say whether its new rule would apply in cases "involving speech related to scholarship or teaching" in public universities.[17] Other examples abound.[18]

If acontextuality has been the goal toward which the Court has been striving, it is thus clear that it is one the Court can never reach. This is the Sisyphean dilemma courts face as they shape the law of the First Amendment. On the one hand, courts (and, often, scholars[19]) feel compelled to craft pure, formal legal doctrine. In Rick Hills' evocative words, they feel "the call to hunt for the Snark of 'pure,' noninstrumental constitutional value."[20] On the other hand, they are confronted with brute facts that ill fit the hermetic doctrinal structure they have erected. The result of this dilemma, critics have charged, is an increasing state of incoherence in First Amendment doctrine, as courts are caught in the tension between doctrinal generality and factual specificity.[21] Courts require some vehicle to bring responsiveness into the law[22] despite their natural urge toward acontextuality.

When faced with this dilemma, one way the courts respond is with deference. When they defer, courts suspend their own judgment in favor of the judgment of some other party—another branch of gov-

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at least some considerable degree of constitutional autonomy"); Schauer, *supra* note 4, at 1755 & n.39 (criticizing the contextual blindness of the Court's free speech cases, including *Finley*).

17 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

18 *See* Horwitz, *supra* note 1, 1507–09.

19 *See generally* Richard A. Posner, *Against Constitutional Theory*, 73 N.Y.U. L. REV. 1, 11–22 (1998) (observing the tendency toward creating pure doctrine in constitutional scholarship, without endorsing it).

20 Hills, *supra* note 2, at 174.

21 *See* Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1270–79 (1995); *see also* Schauer, *Principles*, *supra* note 3, at 86–87 (noting "an intractable tension between free speech theory [in general] and judicial methodology [in particular cases]" and suggesting that "[i]f freedom of speech . . . is largely centered on the policy question of institutional autonomy, but the Court's own understanding of its role requires it to stay on the principle side of the policy/principle divide, then the increasingly obvious phenomenon of institutional differentiation will prove progressively more injurious to the Court's efforts to confront the full range of free speech issues").

22 *Cf.* PHILIPPE NONET & PHILIP SELZNICK, LAW AND SOCIETY IN TRANSITION 73–78 (2d ed. 2001) ("The quest for responsive law has been a continuing preoccupation of modern legal theory.").

ernment,[23] an administrative agency,[24] a private institutional actor,[25] or a quasi-public actor.[26]

The relationship between deference and the law's contextual dilemma is complex. But it is clear that that there is an intimate connection between these two phenomena. In deferring to other actors, courts open up a space for shared legal and constitutional interpretation by other actors who may be closer to the facts on the ground. Thus, deference allows courts to bring responsiveness into the law by taking themselves out of the equation.

The tension between acontextual law and real-world factual diversity and complexity is particularly pervasive throughout constitutional law. It is not surprising, then, that deference pervades constitutional law as well. What *is* surprising is how underexamined deference is as a transsubstantive tool of constitutional law. This gap is especially surprising because deference has been on constitutional law's scholarly agenda since at least 1893, when James Bradley Thayer published his seminal article on judicial review.[27]

To be sure, scholars have been aware of deference as a doctrinal device. It has been studied at high levels of abstraction by jurisprudes.[28] It has also been examined at high levels of specificity with respect to particular constitutional or quasi-constitutional doctrines.

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23 *See, e.g.*, Field v. Clark, 143 U.S. 649, 670–79 (1892) (setting forth the "enrolled bill" doctrine); Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1172–81 (2003) (discussing the enrolled bill doctrine and noting that it constitutes a form of epistemic deference granted by the federal courts to Congress).

24 *See, e.g.*, Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

25 *See, e.g.*, Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974) (describing "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials" as "the exercise of editorial control and judgment," which is entitled to substantial deference by courts and lawmakers); Randall P. Bezanson, *The Developing Law of Editorial Judgment*, 78 NEB. L. REV. 754, 776 (1999) (arguing that many courts in libel cases carve out a space for deference to the press' decision whether to publish particular stories by asking whether the press actor was exercising sound "editorial judgment").

26 *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306, 328–29 (2003) (deferring to admissions decisions by a state law school, not because of its status as a state actor—although it was this status that triggered Fourteenth Amendment scrutiny in the first place—but because of its status as a *university*).

27 *See* James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

28 *See, e.g.*, PHILIP SOPER, THE ETHICS OF DEFERENCE (2002); Scott Brewer, *Scientific Expert Testimony and Intellectual Due Process*, 107 YALE L.J. 1535 (1998); Heidi M. Hurd, *Challenging Authority*, 100 YALE L.J. 1611 (1991).

For example, endless pages have been devoted by administrative law scholars to the study of judicial deference to administrative agencies.[29] And constitutional law scholars have discussed deference within the context of specific government institutions, especially the military[30] and prisons.[31]

Between the extremes of abstraction and specificity, however, there has been a startling gap in the legal literature.[32] There has been surprisingly little effort to fill the space left open in the study of deference as a general principle of constitutional law somewhere on the middle rungs of the ladder of justificatory ascent.[33] We need an examination of deference's role in constitutional law that is both sufficiently abstract *and* sufficiently practical to shed some light on this pervasive doctrinal tool, and that might at least lead to its being recognized *as* a central subject of constitutional law.

This Article seeks to fill that gap. In what follows, I will identify and examine deference as a general device in constitutional law. I will also offer a practical application of this study, by limning the varied faces of deference that play a prominent role in the Supreme Court's recent decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*).[34] In that case, the Supreme Court rejected a variety of First Amendment challenges to the Solomon Amendment,[35] under which Congress threatened to penalize law schools that obstruct the government's use of military recruiters on campus.[36] That provision was challenged unsuccessfully by law schools that wished to bar on-campus military recruiters who discriminate on the basis of sexual orientation.[37]

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29 A search in Westlaw's Journals & Law Reviews (JLR) database reveals at least 1987 articles discussing "Chevron deference." *See Chevron*, 467 U.S. at 843–45.

30 *See infra* notes 135–40 and accompanying text.

31 *See infra* notes 141–45 and accompanying text.

32 As always, there are honorable exceptions. *See, e.g.*, Daniel J. Solove, *The Darkest Domain: Deference, Judicial Review, and the Bill of Rights*, 84 IOWA L. REV. 941 (1999). As I suggest below, however, Solove's valuable work nevertheless leaves much room for further inquiry. *See infra* note 56.

33 *See* Ronald Dworkin, *In Praise of Theory*, 29 ARIZ. ST. L.J. 353, 356–57 (1997) (defining justificatory ascent).

34 547 U.S. 47 (2006). For clarity's sake, I refer to the respondent group, the Forum for Academic and Institutional Rights, by the short form "FAIR." I refer to the case by the italicized short form "*FAIR*."

35 National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 541(a), 110 Stat. 186, 315 (codified as amended at 10 U.S.C. § 983 (2000 & Supp. V 2005)).

36 *FAIR*, 547 U.S. at 70.

37 *See id.* at 52–53; *see also* 10 U.S.C. § 983 (2000 & Supp. V 2005) ("No funds . . . may be provided . . . to an institution of higher education if the Secretary of Defense

The Court's decision in *FAIR* nicely illustrates both the pervasiveness of deference as a subject of constitutional law and our limited current understanding of this device. In the course of its decision, the Court encountered no fewer than three demands for judicial deference, one favoring the appellant and two favoring the respondents: deference to the military, deference to expressive associations ("*Dale* deference"), and deference to higher educational institutions ("*Grutter* deference"[38]). In the end, it placed substantial weight on the military deference claim. It gave some weight to the expressive association claim, but far less than might have been expected given the Court's sweeping statements about deference in its prior decision in *Boy Scouts of America v. Dale*.[39] And it gave no weight at all to the *Grutter* deference argument.

FAIR is ultimately unsatisfactory for two reasons. First, the Court's failure to seriously theorize about the nature and scope of deference and the proper occasions for its use left it ill-equipped to deal with the competing claims of deference that arose in the case. Second, the Court's urge toward acontextuality left it unable to fully and openly acknowledge the importance of the context in which the *FAIR* challenge took place—the domain of a "First Amendment institution,"[40] the university.

The Article proceeds as follows. Part I offers a broad discussion of deference as an element of constitutional law. It examines some of the many varied contexts in which the Court has employed deference, and provides a taxonomy of deference as a device in constitutional law. It suggests that the Court's use of deference may be divided into two principal categories: deference on the grounds of the *legal authority* of the deferred-to institution, and deference on the grounds of the superior knowledge, or *epistemic authority*, of the institution.[41] As we will see, these categories are hardly watertight. It also examines an aspect of deference that is all too frequently ignored: the obligations

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determines that that institution . . . has a policy or practice . . . that either prohibits, or in effect prevents . . . access by military recruiters for purposes of military recruiting . . . .").

38 *See* Horwitz, *supra* note 4, at 509.

39 530 U.S. 640 (2000).

40 *See generally* Horwitz, *supra* note 4 (discussing the importance of adapting general First Amendment principles to the specific institutions and environments involved in a given case).

41 *See, e.g.*, Gary Lawson & Christoper D. Moore, *The Executive Power of Constitutional Interpretation*, 81 IOWA L. REV. 1267, 1278–79 (1996). Similarly, Larry Solum divides the universe of deference into two categories: "'deference to authority' and 'epistemic deference.'" Legal Theory Blog, http://lsolum.typepad.com/legaltheory/2007/09/legal-theory-4.html (Sept. 16, 2007, 08:06).

of the *deferee*. I argue that deference carries with it significant obligations on the part of the deferred-to party.

The next Parts apply this richer understanding of deference to the *FAIR* case itself. Part II provides some background on the Court's ruling in *FAIR*. Despite the conventional wisdom that this was an easy case, I will suggest that the Court's opinion actually obscures a host of difficult First Amendment questions. Part III returns the focus to deference by examining the competing claims to deference raised in *FAIR*. I will argue that the Court accorded too much weight to the claim of military deference and too little to the claim of *Dale* deference. Moreover, the Court essentially ignored the most important claim of deference raised by *FAIR*: the *universities'* claim to deference as First Amendment institutions. Had it taken that claim seriously, the Court would have given far more weight than it did to the universities' claim that they were entitled to exclude military recruiters from law school campuses. This conclusion may be cold comfort to the law school plaintiffs in *FAIR*, however. A key aspect of deference involves the obligations of the deferred-to party. There is good reason to question whether all of the plaintiffs in *FAIR* met those obligations.

Having examined deference in general as a tool of constitutional doctrine, and *FAIR* in particular as a case study in deference, Part IV concludes by linking this Article to larger currents in contemporary constitutional theory. It suggests that deference stands at the intersection of two separate streams of constitutional scholarship, ostensibly distinct but in fact deeply interrelated: the developing study of constitutional decision rules, and the emerging body of First Amendment scholarship that seeks to advance a more institutionally oriented approach toward free speech law. By studying deference, we may enrich our understanding of both of these new streams of legal scholarship—and find that they have much to offer each other.

I. A TAXONOMY OF DEFERENCE

At first blush, the claim that deference is an underexamined subject in American legal scholarship may seem extravagant. After all, deference has featured in countless discussions in the academic literature of constitutional law and its cousin, administrative law. The constitutional doctrine of separation of powers, for example, revolves around the extent to which one branch of the federal government must defer to another branch's interpretation of some constitutional question.[42] Within administrative law, vast forests have been felled on

42 *See, e.g.*, Note, *And Justiciability for All?: Future Injury Plaintiffs and the Separation of Powers*, 109 HARV. L. REV. 1066, 1077 (1996) (noting, critically, that "[i]n recent

the subject of deference to administrative agencies.[43] And scholars have often discussed deference to other specific government institutions, such as the military,[44] prisons,[45] public schools,[46] and universities.[47]

What is generally missing from these treatments, however, is an effort to treat deference as a distinct subject worthy of discussion on its own. Commentators often assume the importance of deference as a principle within administrative law, as a factor in the debate over the legitimacy of judicial review and the corresponding legitimacy of constitutional interpretation by other branches,[48] or as an element in cases involving specific government institutions. But these treatments are content to treat deference as a bit player in a larger discussion of specific areas of constitutional or administrative law. They almost never treat deference as a subject in and of itself. Even when discussing deference as it applies to particular subfields of constitutional law, few scholars unpack and examine deference itself as a separate topic worthy of discussion.[49] And fewer still have treated deference as a transsubstantive doctrine, unmooring it from specific areas of inquiry and looking at deference as a freestanding legal principle in constitutional law.

There are honorable exceptions, but they still leave much to be discussed. For example, Daniel Solove has written valuably about the effect of deference on the courts' interpretation of the Bill of Rights,[50] but his account of deference is rather more genealogical than analytical. Similarly, C. Thomas Dienes' attack on deference to government interests in First Amendment cases involving "the military and other special contexts" critiques the courts' policy of deference in those cir-

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times, judges have incanted the separation-of-powers mantra as if it were coterminous with deference to the legislative and executive branches").

43 *See supra* note 29 and accompanying text.

44 *See infra* notes 135–40 and accompanying text.

45 *See, e.g.*, Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U. L. REV. 441, 450–55 (1999); Daniel J. Solove, Note, *Faith Profaned: The Religious Freedom Restoration Act and Religion in the Prisons*, 106 YALE L.J. 459, 479–83 (1996).

46 *See, e.g.*, Chemerinsky, *supra* note 45, at 455–58; James E. Ryan, *The Supreme Court and Public Schools*, 86 VA. L. REV. 1335, 1369–89 (2000).

47 *See, e.g.*, Horwitz, *supra* note 4, at 495–97 (citing literature).

48 *See, e.g.*, Lawson & Moore, *supra* note 41, at 1274–79.

49 *See, e.g.*, Diane H. Mazur, *A Blueprint for Law School Engagement with the Military*, 1 J. NAT'L SEC. L. & POL'Y 473, 498 n.109 (2005) (citing examples of scholarly discussions treating deference to the military as a well-established tradition without questioning that underlying tradition).

50 *See* Solove, *supra* note 32.

cumstances but says relatively little about what, precisely, deference means.[51] At the other end of the spectrum, Philip Soper has offered up a sophisticated book-length treatment of deference,[52] but it is pitched at a high level of abstraction, focusing more on the broader philosophical question of political obligation than on the practical questions raised by the courts' deference to specific institutions.[53] Still other scholars have noted the transsubstantive nature of deference in constitutional law, observing that deference is a common feature when courts deal with a number of different institutions, but have offered little direct discussion of deference itself.[54]

In the final analysis, then, there are surprisingly few efforts to directly define and confront the nature of deference as a standard move in constitutional argument. It remains, in Solove's words, "malleable, indeterminate, and not well-defined."[55] This is unfortunate, given the sheer magnitude of occasions on which the courts defer to various public and private actors in constitutional cases. As Solove writes:

> The Court frequently accords deference to the judgments of numerous decisionmakers in the bureaucratic state: Congress, the Executive, state legislatures, agencies, military officials, prison officials, professionals, prosecutors, employers, and practically any other decisionmaker in a position of authority or expertise. The scope of deference is staggering, and the areas within its dominion often affect fundamental constitutional rights such as freedom of speech, freedom of religion, and equal protection . . . . [And yet,] while deference has been examined in various contexts, it has never been analyzed in depth as a fundamental issue for constitutional jurisprudence.[56]

This Part takes up that challenge. I seek here to bring some greater clarity to our understanding of deference as a transsubstantive

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51 *See* C. Thomas Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. CIN. L. REV. 779, 827–43 (1988); *see also* Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 53–104 (1990) (looking at the role of deference in various First Amendment contexts).

52 *See* SOPER, *supra* note 28.

53 *See* Frederick Schauer, *Deferring*, 103 MICH. L. REV. 1567, 1576 (2005) (reviewing SOPER, *supra* note 28).

54 *See, e.g.*, Chemerinsky, *supra* note 45, at 442–58.

55 Solove, *supra* note 32, at 945.

56 *Id.* at 944–45. Although Solove valiantly takes up the call for a comprehensive examination of deference in his own article, it focuses more on tracing the historical roots of the deference principle in constitutional law than on unpacking the concept of deference itself. The latter is the approach taken here.

element of constitutional law. In what follows, I offer a working definition of deference, defend it against a competing definition, and distinguish it from some closely related concepts. I then unpack the varied reasons *why* courts defer to other institutions, examining courts' use of deference under two general categories: deference based on *legal authority* and deference based on *epistemic authority.* With this general schema in hand, I raise a number of questions about the relationship between deference and constitutional interpretation, the scope of deference itself, and the surprisingly puzzling question of how courts know whether, when, and how much to defer to other institutions. Finally, I emphasize an often overlooked, but vital, aspect of deference: deference implies not only an obligation on the part of the deferring party to suspend its own judgment, but also a corollary obligation on the part of the recipient of deference to exercise its own authority responsibly within the boundaries of that deference.

A. Defining Deference

As Henry Monaghan observed some time ago, deference "is not a well-defined concept."[57] Indeed, at least as the term is generally used, it may not even consist of a single concept, but rather may be "an umbrella that has been used to cover a variety of judicial approaches."[58] Nevertheless, I want to begin by suggesting a general definition of the concept.

For purposes of this Article, we may define deference in terms suggested by Robert Schapiro: deference involves a decisionmaker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently.[59] Although Schapiro is speaking directly in terms of judicial deference to other branches of government,[60] the point can be generalized to a variety of decisionmakers. Indeed, Philip Soper's broader philosophical treatment of deference arrives at a similar conclusion, arguing that "[d]eference suggests that I am acting in some sense contrary to the way I would normally act if I simply considered the balance of reasons . . . that bear on the action."[61] Sim-

57 Henry P. Monaghan, Marbury *and the Administrative State,* 83 COLUM. L. REV. 1, 4 (1983).

58 *Id.* at 4–5.

59 *See* Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law,* 85 CORNELL L. REV. 656, 665 (2000) ("Judicial deference acknowledges that, based on the interpretation of another branch of government, a court might arrive at a conclusion different from one it would otherwise reach.").

60 *See id.* at 664–69.

61 SOPER, *supra* note 28, at 22.

ilarly, Monaghan concludes that deference to an administrative agency, "to be meaningful," necessarily implies that the agency's view displaces "what might have been the judicial view *res nova*."[62] Deference, then, involves a decisionmaker (*D1*) setting aside its own judgment and following the judgment of another decisionmaker (*D2*) in circumstances in which the deferring decisionmaker, *D1*, *might* have reached a different decision.

In adopting this definition, I set aside for now questions involving the *scope* of deference, which often plague judicial decisionmakers. *D1* might defer to the judgment of *D2* altogether; it might defer only on questions of fact, while reaching its own conclusions on questions of law without any deference to the legal judgment of *D2*; or it might adopt some other approach.[63] Nevertheless, deference exists as long as *D1* follows *D2*'s determinations along at least some dimension.

I also largely set aside the potentially troubling question of the *degree* of deference, although a few words are in order. While purporting to defer to the determination of some other decisionmaker, courts regularly caution that their deference is "not absolute."[64] That phrase may refer to at least two different phenomena. A court's reference to the nonabsolute nature of deference may signify the *extent* to which the court will follow the judgment of *D2*. Or it may refer to the court's unwillingness to defer unless certain *preconditions* for deference have been met,[65] as when, for example, a court refuses to defer to prison officials unless they "present credible evidence to support their stated penological goals."[66]

The first notion, that of deferring "up to a point," or of deference as a thumb on the scales but not a complete surrender of judgment, may qualify as a form of deference under the definition I have offered above. A court in these circumstances may still reach a conclusion it would not have reached independently; however, if the court ultimately resists substituting *D2*'s position for its own, it may be difficult to call this deference under my definition.[67]

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62 Monaghan, *supra* note 57, at 5.

63 For discussion of the law-fact distinction, see, for example, Ronald J. Allen & Michael S. Pardo, *The Myth of the Law-Fact Distinction*, 97 NW. U. L. REV. 1769, 1771–90 (2003); Richard D. Friedman, *Standards of Persuasion and the Distinction Between Fact and Law*, 86 NW. U. L. REV. 916, 917–25 (1992); Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 229, 232–39 (1985).

64 *See, e.g.*, Beerheide v. Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002).

65 For a valuable discussion of the preconditions for deference, see ROBERT C. POST, CONSTITUTIONAL DOMAINS 257–65 (1995).

66 *Beerheide*, 286 F.3d at 1189 (emphasis omitted).

67 *See infra* notes 70–74 and accompanying text (criticizing such a reading of deference by Lawson and Moore).

Does the other reading of the statement that deference is not absolute—the reading that focuses not on the degree of deference per se, but on whether certain *preconditions* for deference have been met—involve deference under my definition? That depends. If the precondition for *D1*'s application of deference is that it independently *agrees* with *D2*'s determination, then following *D2* in these circumstances does not amount to deference in any useful sense of the word. On the other hand, if *D1* will follow *D2*, regardless of whether it would otherwise have reached the same conclusion, *as long as* certain prior conditions are met—for example, that *D2* has followed some degree of due process in reaching its own determination—then we can properly call this deference.

We have thus already arrived at a provisional definition of deference: *D1*'s willingness to follow *D2*'s determination, despite the fact that it might have reached a different conclusion had it reasoned independently. We have also noted a number of other concepts that may accompany deference, including the *scope* of deference, the *degree* to which *D1* is willing to defer to *D2*, and the relevant *preconditions* that *D1* may insist upon before it will defer to *D2*. Let us test this definition against a competitor.

In a valuable discussion of deference in the context of interbranch interpretations of the Constitution, Gary Lawson and Christopher Moore describe "deference" as a court's "contingent judgment, perhaps based on an assessment both of the interpretation and of the interpreter, that a particular Congress or court in a particular circumstance is likely to have correctly interpreted the Constitution."[68] In their view, when federal judges review the judgments of the political branches, they may properly defer when that deference is the result of "a contingent judgment that the views of the political departments are, *in the specific case at issue*, likely to reflect the answer that a thorough, fully-informed independent examination of the issue would yield."[69]

This statement is capable of a number of saving constructions. But it serves here mostly to illustrate the sorts of judgments by *D1* that should not be treated as acts of deference under my definition. Lawson and Moore may mean only that, in areas in which the political branches are likely to be correct, judges may cut short their own "thorough, fully-informed independent determination of the issue,"[70] and defer to the other branches at that point. That would indeed consti-

68 Lawson & Moore, *supra* note 41, at 1271.

69 *Id.* at 1278 (emphasis added).

70 *Id.*

tute deference. But if they mean that in cases involving the political branches, courts must always engage in an *independent* "judgment . . . that a particular Congress or court in a particular circumstance is likely to have correctly interpreted the Constitution,"[71] then we cannot call this deference.[72] One does not defer by simply "acting on [one's] own understanding of what the balance of reasons . . . supports,"[73] any more than I can be said to have deferred to my neighbor if, having discussed the matter together, both of us decide independently to buy the same type of car. I may coincidentally agree with my neighbor's taste in cars. Or my neighbor may have supplied reasons to buy a particular car that I ultimately decide are compelling. But deference is not the same thing as agreement. I have not deferred to my neighbor unless, to some extent, I substitute his judgment for mine, and follow his conclusion even if I would have reached a different decision on my own. In Robert Schapiro's neat phrasing, "deference implies difference."[74]

Having thus defined deference, it may be useful to distinguish it from some concepts that may be confused with it. First, we must distinguish between deference and *obedience*, although this distinction turns out to be somewhat tricky in practice. If my daughter puts her toys away when I tell her to, she does so out of obedience, not deference. Similarly, a lower court that follows the binding authority of a higher court obeys that higher authority; it does not defer to it. Deference implies some freedom to act. Although *D1*, in deferring to *D2*, puts aside its own independent judgment in reaching a decision, *D1*'s decision to follow *D2* is properly termed deference only if *D1 could* reach an independent judgment if it chose to.

Deference may appear to shade into obedience if it is adopted as a general, ongoing policy. Thus, once courts have adopted a general policy of deferring to the judgment of military officials,[75] it may appear that they are simply obeying the military's judgment. But

71 *Id.* at 1271.

72 Nor could we call it deference if *D1* only *purported* to give consideration to *D2*, while rejecting any conclusions by *D2* that it thought wrong. *Cf.* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (referring to "mealy-mouthed" uses of the word "deference" that do not "necessarily mean[] anything more than considering those views with attentiveness and profound respect, before we reject them").

73 SOPER, *supra* note 28, at 22.

74 Schapiro, *supra* note 59, at 665.

75 *See, e.g.*, Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("[W]hen evaluating whether military needs justify a particular restriction on religiously motivated conduct, courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.").

although the Supreme Court may follow a general policy of deferring to military judgments, it is not *obliged* to do so,[76] and might conceivably reject that policy, in isolated cases or altogether. Thus, deference implies that *D1* has some power of independent decisionmaking, but chooses to displace its own judgment with that of *D2*; obedience implies that *D1* follows *D2*'s judgment because it has no choice *but* to do so.

The situation may be complicated where some independent controlling authority dictates to *D1* that it defer to *D2*. For example, in *Rostker v. Goldberg*,[77] in upholding the exclusion of women from the Selective Service System against a constitutional challenge, the Court wrote, "We of course do not abdicate our ultimate responsibility to decide the constitutional question, but simply recognize that the Constitution itself *requires* such deference to congressional choice."[78] We could thus characterize the Supreme Court's own description of its obligation in these circumstances as one of obedience rather than deference. This suggests that, when courts purport to "defer" out of obligation to some higher legal authority, they are mislabeling as acts of deference what are actually acts of obedience. We thus might want to be cautious in labeling as deference a judicial act that is required by the Constitution.

Yet we would quite rightly hesitate to describe the Court's deference to military judgment as an act of obedience. Notwithstanding the Court's emphatic language in *Rostker*, the Court's military deference cases do not disclaim its independent authority to interpret the Constitution even where military judgment is involved; and, as we will see below, the Court has not rested on the Constitution alone in describing its decision to defer to military judgments.[79] More broadly, the Court did not disclaim the possibility that, as an independent interpreter of the Constitution, it might subsequently reverse itself and conclude that the Constitution did not require it to defer to the military. We might thus distinguish between the Supreme Court's own *decision* to defer to military officials' judgment, and lower courts' obligation to *obey* the Supreme Court and follow suit in deferring.

In short, the line between obedience and deference may be unclear in particular circumstances, and courts and scholars may err

76 *See id.* at 515 (Brennan, J., dissenting) ("[W]hile we have hesitated . . . to strike down restrictions on individual liberties which could reasonably be justified as necessary to the military's vital function, we have never abdicated our obligation of judicial review." (citation omitted)).

77 453 U.S. 57 (1981).

78 *Id.* at 67 (emphasis added).

79 *See infra* notes 109–21 and accompanying text.

in describing the courts as engaging in deference on occasions when they are actually engaging in acts of obedience. Nevertheless, as a general matter, we may distinguish obedience from deference because of the quality of independent choice—the choice to disclaim one's own judgment in favor of another's—that inheres in a proper act of deference.

An easier distinction is that between deference and *discretion.* The discussion so far suggests that an important aspect of deference is *D1*'s *choice,* when confronted with a range of options, to displace its own judgment with the judgment of *D2.* That choice is an exercise of discretion. But a court that declined to defer to the judgment of another institution, and instead rested on its own independent judgment, would also be exercising its discretion in selecting that option. So, too, assuming that a variety of conclusions are possible if a court *does* exercise independent judgment—if, say, a number of equally plausible readings of a statute are available to it—then its decision to adopt one conclusion over another will be an exercise of discretion. Thus, while the decision to defer is itself an exercise of discretion, deference is ultimately only a subset of the larger field of discretion. Again, the distinction could be complicated a little more: once a court decides on deference as a general ongoing policy, it may seem as if it is no longer exercising any discretion at all. But the fact that this choice is available, even if only hypothetically, and the fact that a court in such a situation would be faced with a number of potential options—to defer, to refuse to defer, or to select among a variety of independent judgments of its own—suggests that deference is merely one outcome among a range of available judicial choices that we properly label as discretion. Deference is a *form* of discretionary choice, but is not synonymous with discretion itself.

Finally, we may wish to distinguish between deference and *jurisdiction.* Assume that Congress stripped the federal courts of their ability to decide cases involving exercises of military judgment. A court that dismissed for want of jurisdiction a case raising a question of military judgment could hardly be said to have "deferred" to the military in that case. This is so for two reasons. First, as I have argued, deference implies some degree of voluntariness, however notional it may be: *D1* only defers to *D2* if it might have done otherwise. Second, deference implies that *D1* has some continuing authority to act, and *does* act; only its independent judgment is displaced, not its actual authority. When the Court defers to the military's judgment in a particular case, it does still issue a decision, one that carries with it both precedential weight and legal force. Critics of the Court's deference to various institutions have sometimes characterized that deference as

being so broad that it amounts to a disclaimer of jurisdiction over the question.[80] And in a broader sense of the word, I have argued elsewhere that courts might approach the question of deference to certain "First Amendment institutions" in largely jurisdictional terms, in which courts would grant these institutions substantial freedom to develop their own views of the First Amendment within their own areas of expertise.[81] But that is a rather more casual use of the term. Speaking more precisely, we should be able to distinguish clearly between deference and jurisdiction.[82]

B. Why and When Courts Defer

To recap, we have defined deference as a decisionmaker's decision to follow a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently, and we have drawn some distinctions between deference and other legal concepts. We now reach the obvious question: why defer? Given the courts' fundamental obligation to "say what the law is,"[83] why should the courts *ever* defer to the judgments of other decisionmakers? If deference consists of following the judgment of another *even if* one might consider that judgment wrong, why should courts ever willingly surrender their own independent judgment?[84]

This subpart offers a more detailed account of the reasons courts give for deferring to others despite the obvious importance of independent judgment to the judicial function. Drawing on terminology suggested by Gary Lawson and Christopher Moore, I will offer two broad categories of justification for deference: reasons of *legal authority* and reasons of *epistemic authority*. I will thus discuss the reasons for *legal deference* and for *epistemic deference*.[85] As we will see, these categories are neither watertight nor exclusive. In the same general field—in cases involving deference to prison authorities, for example—and

80 *See, e.g.*, Dienes, *supra* note 51, at 819–20 (referring to the Court's deference to the military as "*de facto* non-justiciability").

81 *See, e.g.*, Horwitz, *supra* note 1, at 1516–23; *see also* Roderick M. Hills, Jr., *The Constitutional Rights of Private Governments*, 78 N.Y.U. L. REV. 144, 147, 188–96 (2003) (offering an "institutional" theory of rights as rules in which institutions would effectively have jurisdiction over decisions within their own sphere of expertise).

82 *See* Solove, *supra* note 32, at 953.

83 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

84 *See* Scalia, *supra* note 72, at 513.

85 *See* Lawson & Moore, *supra* note 41, at 1271 (distinguishing between "epistemological deference" and "legal deference"); Solum, *supra* note 41 (distinguishing between "deference to authority" and "epistemic deference").

sometimes within the same decision, a court may justify its decision to defer in terms of both epistemic and legal authority. Moreover, epistemic justifications for deference may shade into legal justifications for deference, and vice versa. Although these categories are thus not perfectly distinct, they bring considerable clarity to our understanding of the courts' justifications for deferring to the determinations of prisons, the military, administrative agencies, schools, and other institutions and individuals.

1. Legal Authority-Based Justifications for Deference

Legal authority-based justifications for deference are fundamentally status-based justifications, which depend for their force on the legal authority of the body to which the courts are deferring.[86] Because their concern is with the courts' obligations as constitutional interpreters to follow the interpretations of the political branches, Lawson and Moore describe legal authority-based deference as deference "that results from the constitutionally-prescribed authoritative status of the prior interpreter."[87] As we will see, however, the status-based approach captured by the concept of legal deference does not attach only to determinations made by Congress or the President. It may also apply in cases involving a host of other public institutions—and, more surprisingly, in cases involving *private* institutions as well.[88]

The most prominent legal authority-based justification for deference goes to the heart of our constitutional structure: the separation of powers. The central example of a separation of powers justification for legal deference is the Supreme Court's landmark decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,[89] in which the Court set forth a two-part test for courts engaging in a review of agency interpretations of law. Under that approach, courts first ask whether Congress unambiguously addressed the question at issue.[90] If the statute is ambiguous the court must defer to any "permissible [agency] construction of the statute."[91] The reviewing court's position in such cases is deferential in exactly the way I have defined the term: the court must follow a permissible agency interpretation of a statute even if that interpretation is not "the reading the court would have reached if the question initially had arisen in a judicial proceed-

86 *See* Lawson & Moore, *supra* note 41, at 1278.
87 *Id.* at 1271.
88 *See* Solove, *supra* note 32, at 944.
89 467 U.S. 837 (1984).
90 *Id.* at 842–43.
91 *Id.* at 843.

ing."[92] *Chevron* ushered in an era of judicial review of agency interpretations of law that is far more deferential than the Court's prior approach.[93]

For present purposes, of equal significance to the Court's sea change in its approach to judicial review of agency interpretations of law is the justification it offered for this newly deferential approach. Deference to agency interpretations of law was hardly *Chevron*'s invention. But the traditional basis for deference to agency interpretations rested on the Court's view that agencies often possessed greater expertise on the question at issue than did the generalist federal courts.[94] *Chevron* noted the old expertise-based rationale for deference.[95] But its primary justification for deference to agency interpretations was based not on expertise, but on the Court's conclusion that Congress had impliedly delegated its lawmaking power to the agencies.[96] Moreover, it said, agencies are indirectly "accountable to the people" through the President and it is "entirely appropriate for this political branch of the Government to make [the] policy choices that" are inherent in the interpretation of ambiguous statutes.[97] In short, *Chevron* "relocated the basis for judicial deference [to agency interpretations of law] from expertise to an implied delegation of lawmaking power."[98] Most scholars have described that move as one sounding in the separation of powers.[99]

The separation of powers justification for legal deference is by no means limited to administrative law. In constitutional law, the Court has often employed a similar justification for its deferential review of actions taken by the political branches. Let us focus on a central

92 *Compare id.* at 843 n.11 (following an agency interpretation differing from the Court's own interpretation), *with* SEC v. Sloan, 436 U.S. 103, 113 (1978) (rejecting an agency interpretation that the Court concluded was not the "most natural or logical").

93 *See, e.g.*, ALFRED C. AMAN, JR. & WILLIAM T. MAYTON, ADMINISTRATIVE LAW § 13.7.2, at 476–81 (2d ed. 2001).

94 *See, e.g.*, SEC v. Chenery Corp., 332 U.S. 194, 209 (1947); Skidmore v. Swift & Co., 323 U.S. 134, 139–40 (1944).

95 *See Chevron*, 467 U.S. at 865.

96 *See id.* at 843–44.

97 *Id.* at 865–66.

98 Ronald J. Krotoszynski, Jr., *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of* Skidmore, 54 ADMIN. L. REV. 735, 742 (2002).

99 *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 994 (3d ed. 2000); Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. REV. 1272, 1283–84 (2002); Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 456, 466–67 (1989); Randolph J. May, *Defining Deference Down: Independent Agencies and* Chevron *Deference*, 58 ADMIN. L. REV. 429, 435–36 (2006).

example of legal authority-based deference that we will encounter later in discussing *FAIR*: judicial deference in examining legislation based on Congress' war powers, and in examining decisions made by military officials themselves. In such cases, the Court has stressed the Constitution's assignment to Congress of the power to "provide for the common Defence," "[t]o raise and support Armies," and "[t]o provide and maintain a Navy."[100] The Court has described Congress' power to make its own determinations in this area as "broad and sweeping."[101] In *Rostker*, in words later quoted by the Court in *FAIR*, it suggested that "judicial deference . . . is at its apogee" when the federal courts examine legislation passed pursuant to Congress' authority to establish and maintain the armed forces.[102]

As Diane Mazur has noted, this is an odd justification. In *Rostker*, Justice Rehnquist justified the Court's deference to Congress in the area of military legislation on the grounds that Congress had acted "under an explicit constitutional grant of authority."[103] But "Congress *always* acts under an explicit constitutional grant of authority."[104] There is "no indication in the text or structure of the Constitution that judicial deference to congressional action in military matters should be any different in scope than judicial deference to congressional action in other contexts."[105]

It is thus unclear why the legal authority-based argument for deference should be any stronger for judicial review of congressional action relating to the military than it is for any other congressional action. It may seem that the Court, in deferring to Congress' exercise of its military power, is in effect suggesting that this subject, having been textually committed to the discretion of another branch, falls within the scope of the political question doctrine.[106] But, of course, the Court has *not* totally disclaimed its authority to scrutinize Con-

100 U.S. CONST. art. I, § 8, cls. 1, 12–13; *see also* Jonathan Turley, *The Military Pocket Republic*, 97 NW. U. L. REV. 1, 40 (2002) (noting the textual basis for the military system of governance, but arguing that "a purely textualist reading of these provisions does not establish any special military enclave in which otherwise unconstitutional measures could be justified to the extent [currently] allowed by the Supreme Court").

101 United States v. O'Brien, 391 U.S. 367, 377 (1968).

102 453 U.S. 53, 70 (1981), *quoted in* Rumsfeld v. Forum for Academic & Inst'l Rights, Inc. (*FAIR*), 547 U.S. 47, 58 (2006).

103 *Id.* at 70.

104 Diane H. Mazur, *Rehnquist's Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701, 761 (2002) (emphasis added); *see, e.g.*, United States v. Morrison, 529 U.S. 598, 607 (2000) ("Every law enacted by Congress must be based on one or more of its powers enumerated in the Constitution.").

105 Mazur, *supra* note 104, at 761 n.350.

106 *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228–29 (1993).

gress' actions under its military power.[107] In any event, we can at least conclude that the Court's deference to congressional actions arising under Congress' military power demonstrates that the separation of powers argument for legal authority-based deference is not limited to the *Chevron* doctrine.[108]

A closely related legal authority-based justification for judicial deference is the argument from democratic legitimacy. We have already seen that argument at work in *Chevron*. The Court wrote that, where the interpretation of ambiguous statutes requires a decisionmaker to engage in policy choices, the decisionmaker tasked with those choices should be an agency which is indirectly "accountable to the people" through the President.[109] Sitting in review of such decisions, "federal judges—who have no constituency—have a duty to respect legitimate policy choices made by those who do."[110] Thus, beyond the basic textual argument that deference is appropriate where the Constitution assigns certain tasks to the political branches, the Court also has justified its deference to those branches on the grounds that they are

107 *See, e.g.*, *Rostker*, 453 U.S. at 67. Critics of the political question doctrine have long suggested, of course, that the same is true even when the Court *does* dismiss cases on political question grounds. *See, e.g.*, Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 617–24 (1976).

108 What seems at first blush to be a second form of separation of powers justification for judicial deference to the military is far more textually rooted in character, but also much smaller in scope. The Constitution explicitly carves out certain aspects of military life from its otherwise generally applicable commands. Congress is empowered by Article I to "make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14. That provision must be read together with the Fifth Amendment, which exempts cases "arising in the land or naval forces" from the requirement for grand jury indictment or presentation. U.S. CONST. amend. V. And the Court has held that a military defendant subject to a trial by court-martial has no Sixth Amendment right to a jury trial before a jury "of the State and district wherein the crime shall have been committed." U.S. CONST. amend. VI; *see also Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 123 (1866) ("Every one connected with the [military or naval] branches of the public service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts."). Thus, the Constitution suggests that Congress may establish a military justice system that is insulated in some respects from the otherwise generally applicable guarantees provided in the Fifth and Sixth Amendments. *See generally* Mazur, *supra* note 104, at 707–19 (highlighting differences between civilian and military law). Properly regarded, however, this exclusion of military personnel from certain aspects of the Constitution is not so much a basis for deference as it is a limitation on the federal courts' *jurisdiction* to entertain such questions.

109 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 865 (1984).

110 *Id.* at 866.

more closely tied to the mechanisms of political accountability that legitimize and constrain the policy choices they make.

In addition to the separation of powers and democratic legitimacy forms of legal authority-based judicial deference, there is another, less conventional form of legal authority-based judicial deference. Consider *Parker v. Levy*.[111] Levy, an Army doctor serving in the United States, was convicted by a court-martial under the Uniform Code of Military Justice on the basis of various remarks he made to enlisted personnel about his opposition to the war in Vietnam.[112] He challenged the conviction largely on First Amendment grounds, and the Court upheld his conviction.[113]

Justice Rehnquist wrote for the Court that "[t]his Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."[114] The distinction "between the military community and the civilian community,"[115] and the "different character of the military community and of the military mission,"[116] he continued, required "a different application of those protections" available under the First Amendment in the military context.[117] Accordingly, the Court applied a more deferential standard in reviewing Levy's First Amendment vagueness and overbreadth challenges than it would have applied in a civilian case.[118] This line of cases is known as the "separate community doctrine."[119] Under this doctrine, courts give "considerable . . . deference to decisions by Congress or the military" that implicate constitutional rights.[120]

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111 417 U.S. 733 (1974).

112 *Id.* at 735–40.

113 *Id.* at 752, 762.

114 *Id.* at 743. Justice Rehnquist drew primarily on the Court's earlier statement in *Orloff v. Willoughby*, 345 U.S. 83 (1953), that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian." *Id.* at 94. For an argument that *Orloff* was improperly extended in *Parker*, see Mazur, *supra* note 104, at 740–48.

115 *Parker*, 417 U.S. at 749.

116 *Id.* at 758.

117 *Id.*

118 *See id.* at 760–61.

119 James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 178 (1984).

120 *Id.* For discussion of the separate community doctrine, see, for example, Dienes, *supra* note 51, at 823–27 (criticizing the doctrine); Mazur, *supra* note 104, at 748–69 (same); Donald N. Zillman & Edward J. Imwinkelried, *Constitutional Rights and Military Necessity: Reflections on the Society Apart*, 51 NOTRE DAME L. REV. 396, 401–34 (1976) (same). *But see* Hirschhorn, *supra* note 119, at 218–28 (defending the separate community doctrine).

The separate community doctrine can be viewed as a form of legal authority-based justification for judicial deference. Although, as we will see, courts often defer to the military for epistemically based reasons, the separate community doctrine does not necessarily rest on the view that the military is possessed of greater knowledge about its own affairs than courts are likely to have. Rather, it is based literally on the view that the military is a separate *society*, "a society apart from civilian society."[121] Viewed in this light, the Court's deference to the military can be seen as suggesting that the military occupies a separate and distinct social sphere into which the courts are forbidden to enter. We might thus view this aspect of deference to the military as being, at bottom, legal authority-based, in the sense that the military is treated as occupying a wholly different social *and* legal sphere.

The military is not the only institution that has enjoyed some degree of institutionally oriented legal authority-based deference. Institutions of higher education have often been treated in similar terms. Although the justifications courts give for according substantial deference to the decisions of colleges and universities are usually epistemic in nature,[122] the upshot is that these institutions are regularly treated as occupying "a special niche in [the] constitutional tradition," in which they enjoy a substantial right of "educational autonomy."[123] Similarly, in cases involving the freedom of expressive associations, such as the Court's decision in *Dale*, the Court indicated that it will defer to an association's "assertions regarding the nature of its expression" and its "view of what would impair its expression."[124] Although the Court's deference to educational institutions and private associations might simply be based on the epistemic argument that those associations are better qualified to judge such matters than is the Court itself, something more is arguably at work here. As John McGinnis has argued, we could think of the Court's decision in *Dale* as one that effectively sets aside a "constitutional space" for civil associations, including public universities and private groups, in which they enjoy substantial autonomy to shape their own norms.[125] Such a justification, with its echoes of a "society apart," sounds in legal and not just epistemic authority.

In sum, we can see a variety of circumstances in which courts defer to the decisions of other institutions on legal authority-based

121 *Parker*, 417 U.S. at 744.

122 *See infra* notes 150–56 and accompanying text.

123 Grutter v. Bollinger, 539 U.S. 306, 329 (2003).

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

125 John O. McGinnis, *Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery*, 90 CAL. L. REV. 485, 533 (2002).

grounds, and a variety of reasons why they do so. Courts may justify legal authority-based deference on separation of powers grounds, or on the closely related basis that in such cases, *D2*'s decisions possess greater democratic legitimacy. In a broader sense, a court may defer on legal authority-based grounds when it treats another institution—whether a public institution such as the military, or a private association such as the Boy Scouts—as constituting a separate social order that in some sense lies outside the regular sphere of the courts' decisionmaking process.

2. Epistemic Authority-Based Justifications for Deference

The second basic justification for judicial deference is not grounded on the *legal* authority of the institution to which the courts defer, but rather on its *epistemic* authority. Simply put, courts defer to other institutions when they believe that those institutions *know more* than the courts do about some set of issues, such that it makes sense to allow the views of the knowledgeable authority to substitute for the courts' own judgment.[126] Although the questions raised by the notion of epistemic deference can be subtle and difficult,[127] we can start at a more basic level by simply identifying some of the occasions on which courts will engage in epistemic authority-based deference.

Most commonly, courts defer to other decisionmakers on epistemic grounds when they believe that the other decisionmaker has greater expertise at its command on the issue in question. This is the argument from comparative institutional competence, which has played a significant role in accounts of judicial deference since at least the heyday of the legal process school of jurisprudence.[128] As the name suggests, when courts defer to other decisionmakers on epistemic grounds related to comparative institutional competence, they

126 *See, e.g.*, Guy-Uriel E. Charles, *Colored Speech: Cross-Burnings, Epistemics, and the Triumph of the Crits?*, 93 GEO. L.J. 575, 610 (2005).

127 For exemplary discussions, see, for example, Brewer, *supra* note 28, at 1540–96; Hurd, *supra* note 28, at 1641–66. My colleague Michael Pardo has made a number of significant recent contributions to the understanding of epistemology in the law, focusing on evidence law. *See* Michael S. Pardo, *Testimony*, 82 TUL. L. REV. 119 (2007); Michael S. Pardo, *The Field of Evidence and the Field of Knowledge*, 24 LAW & PHIL. 321 (2005).

128 *See generally* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 3–6 (William N. Eskridge, Jr. & Philip P. Frickey eds., 2d ed. 1994) (introducing the concept of institutional competence); Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394–402 (1996) (discussing the importance of institutional competence within legal process jurisprudence).

are actually doing two things. First, they are suggesting that some other decisionmaker actually possesses important information, experience, and skills that will help it decide some relevant question correctly. Second, they are suggesting that the other decisionmaker is not just a good one: it is also a *superior* decisionmaker, relative to the court. Thus, epistemic deference on expertise grounds involves both a positive statement about the abilities of *D2* as a decisionmaker, and a negative statement about the weakness of *D1* as a decisionmaker relative to *D2*.[129]

Courts regularly invoke this form of reasoning when deferring to other institutions. Although these reasons can be distinguished from legal authority-based grounds for deference, courts often defer to the same institutions for both legal and epistemic authority-based reasons. Thus, just as they defer to the determinations of administrative agencies for reasons of legal authority,[130] so courts also regularly rely on the expertise of those agencies in deferring to them. Although, as we have seen, *Chevron* suggested that deference to administrative agencies is required primarily because Congress chose to delegate decisionmaking authority to those agencies,[131] the Court also acknowledged a long tradition of deferring to agencies because they possess "'more than ordinary knowledge respecting the matters subjected to agency regulations.'"[132] *Chevron* thus exhibits both the positive and negative aspects of epistemic deference, pointing out not only that agencies may have "great expertise,"[133] but also that judges may "*not* [be] experts in the field."[134]

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129 *See* Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1291 (2006).

130 *See* discussion *supra* notes 89–99 and accompanying text.

131 *See* discussion *supra* notes 95–99 and accompanying text; *see also* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 NW. U. L. REV. 297, 307 n.43 (2004) (noting that since *Chevron* the Court has "come to rest the requirement of deference . . . on [the] . . . delegation of decisionmaking authority from Congress to the agency"). *But see* Note, *The Two Faces of* Chevron, 120 HARV. L. REV. 1562, 1563 (2007) (suggesting that many lower courts applying *Chevron* "have come to rely on agency expertise in more contexts, and more heavily, in deciding the degree of deference to provide to agency interpretations than the Supreme Court does").

132 Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (quoting United States v. Shimer, 367 U.S. 374, 382 (1961)).

133 *Id.* at 865.

134 *Id.* (emphasis added); *see also* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 483–84 (2005) ("Judicial officers have no particular skill in the substantive areas of administrative inquiry and appellate courts generally lack the institutional ability or resources to make sound policy decisions according to extensive and complicated factual records.").

As with administrative agencies, courts regularly defer to the military not only on legal authority grounds,[135] but also on the grounds that the military possesses greater expertise than the courts do on questions relating to the armed forces.[136] The Supreme Court has argued that "deference to the professional judgment of military authorities"[137] is especially important given the "complex, subtle, and professional" nature of the military's "decisions as to the composition, training, equipping, and control of a military force."[138] Again, the courts' deference to the military is not based on the military's expertise alone, but is comparative in nature. The courts are equally certain that they are themselves "'ill-equipped'" to make independent determinations about various aspects of military life.[139] The Supreme Court has concluded that "it is difficult to conceive of an area of governmental activity in which courts have less competence" than the military sphere.[140]

Another sphere in which the courts are apt to defer on epistemic grounds is that of the prison. As with the military, the Court has stressed that "the problems of prisons in America are complex and intractable,"[141] and that running a prison "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources."[142] Similarly, the Court has suggested that decisions with respect to prison security are "peculiarly within the province and professional expertise of corrections officials."[143] Accordingly, and in order "[t]o ensure that courts accord appropriate deference to prison officials,"[144] the Court has directed courts considering inmates' constitutional challenges to apply a deferential standard of review, asking whether the challenged prison regulation is "reasonably related to legitimate penological interests."[145]

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135 *See* discussion *supra* notes 108–21 and accompanying text.

136 *See, e.g.*, Fallon, *supra* note 129, at 1300–01 (noting the appearance of both legal and epistemic arguments for judicial deference to the military in the Court's opinions); Mark Strasser, *Unconstitutional? Don't Ask; If It Is, Don't Tell: On Deference, Rationality, and the Constitution*, 66 U. COLO. L. REV. 375, 376–77 (1995) (same).

137 Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

138 Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

139 Chappell v. Wallace, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962)).

140 *Gilligan*, 413 U.S. at 10.

141 Procunier v. Martinez, 416 U.S. 396, 404–05 (1974).

142 Turner v. Safley, 482 U.S. 78, 85 (1987).

143 Pell v. Procunier, 417 U.S. 817, 827 (1974).

144 O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987).

145 *Turner*, 482 U.S. at 89; *see also* Beard v. Banks, 126 S. Ct. 2572, 2579–80 (2006) (applying *Turner* in upholding a prison policy restricting access to newspapers,

Another area in which epistemic authority-based arguments for deference are regularly employed by the federal courts involves education. At both the K–12 level of public education and the university level, courts regularly justify substantial judicial deference by appealing to the expertise of educators. At the public school level, while the Supreme Court has stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[146] the Court has subsequently laid greater emphasis on the view that any such First Amendment rights must be "applied in light of the special characteristics of the school environment,"[147] and that judgments regarding the needs of educators in that environment rest in the first instance with the educators themselves.[148] Thus, federal courts have "granted [public school] educators substantial deference" in weighing the appropriateness of school actions with respect to student speech.[149]

Similarly, the courts have regularly cited the expertise of universities in deferring to educational judgments made by those institutions. For example, in *Regents of the University of Michigan v. Ewing*,[150] Justice Stevens, writing for the Court, observed that the federal courts are poorly suited to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions—decisions that require an 'expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'"[151]

The federal courts have accordingly given substantial deference to "a university's academic decisions"[152] across a range of issues. Most famously, in his concurring opinion in *Sweezy v. New Hampshire*,[153] Justice Frankfurter argued that universities are entitled to deference with

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magazines, and photographs for inmates in a highly restricted level of a prison's long-term segregation unit); *Turner*, 482 U.S. at 89–91 (setting out four factors to be analyzed in "determining the reasonableness of the regulation at issue"). *But see* Johnson v. California, 543 U.S. 499, 509–11 (2005) (declining to apply the *Turner* standard to a prison policy that temporarily separated inmates by race and national origin).

146 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

147 *Id.*

148 *See, e.g.*, Morse v. Frederick, 127 S. Ct. 2618, 2629 (2007); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986).

149 LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001).

150 474 U.S. 214 (1985).

151 *Id.* at 226 (quoting Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 90 (1978)).

152 Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

153 354 U.S. 234 (1957).

respect to academic decisions concerning "the four essential freedoms of a university—to determine . . . who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[154] This deference to university officials underlay the Court's decision in *Grutter v. Bollinger*,[155] upholding the affirmative action program of the University of Michigan Law School, in part on the basis of the deference due to "complex educational judgments in an area that lies primarily within the expertise of the university."[156]

Finally, courts often defer to a wide range of *private* institutions, as opposed to the primarily public institutions we have considered so far. The most prominent recent example is, of course, the deference to expressive associations exhibited by the Supreme Court in its decision in *Dale*.[157] Here, the Court made it clear that in evaluating First Amendment claims by expressive associations, it will defer to "an association's assertions regarding the nature of its expression," and to its "view of what would impair its expression."[158]

The Court did not explain precisely why expressive associations are entitled to this level of deference, but we might view deference to expressive associations as another form of epistemically grounded judicial deference. The sheer variety of expressive associations, and the complex balance of intergroup relations and outward expressive goals that characterizes each association, may simply overwhelm the courts' ability to make useful judgments about the nature of particular expressive enterprises. Thus, we might see the Court's willingness to accept at face value the claims of expressive associations, as in *Dale*, as an acknowledgement that courts are epistemically ill-suited to make independent determinations about the nature of expressive associations, or the circumstances in which an expressive association's ability to express its views would be impaired. In this sense, the courts' deference to expressive associations is simply a larger example of a conclusion drawn long ago by James Madison with respect to religious

154 *Id.* at 263 (Frankfurter, J., concurring) (internal quotation marks and citations omitted).

155 539 U.S. 306.

156 *Id.* at 328. For a critique of judicial deference to universities, with specific reference to employment decisions, see Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 10–19 (2006). For a broader critique of the courts' use of deference in particular institutional contexts, see generally Scott A. Moss, *Students and Workers and Prisoners—Oh, My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1670–78 (2007).

157 *See infra* Part III.B.

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

associations in particular: "the Civil Magistrate is [not] a competent judge" of such organizations.[159]

These examples barely begin to describe the broad spectrum of institutions to which the courts will accord epistemically based judicial deference. As Professor Solove notes, one could easily add government health institutions, government employers, and various actors within the criminal justice system to the list, along with "practically any other decisionmaker in a position of authority or expertise."[160] But they will serve for now to illustrate the breadth of institutions to which the courts will grant some degree of deference based on the superior epistemic authority of those institutions relative to the courts.

3. Error Costs: Fusing the Legal and Epistemic Authority Justifications for Judicial Deference

The last two sections have offered two broad sets of justifications regularly relied on by courts in according deference to the claims of various organizations or institutions. First, courts will defer to particular institutions where they are convinced those institutions possess superior *legal authority* relative to the deciding court. Second, courts are inclined to defer to institutions when they believe those institutions are blessed with a superior expertise within some particular area of knowledge—in other words, when those institutions possess a superior *epistemic authority* relative to the deciding court.

The discussion so far raises two important questions. First, why do the courts defer on epistemic grounds only to particular institutions? After all, the federal courts regularly, and without any hint of deference, review and resolve problems of the most exquisite complexity.[161] Indeed, apart from narrow questions of law, there is *no* issue on which a court might not properly be said to be an inferior epistemic authority. Why, then, defer on epistemic grounds in some cases and not in virtually *all* cases? Second, why do courts so often defer for reasons of *both* legal and epistemic authority?

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159 Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 23–24 (2000) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, *in* 5 THE FOUNDERS' CONSTITUTION 82, 83 (Philip Kurland & Ralph Lerner eds., 1987)).

160 Solove, *supra* note 32, at 961.

161 *See generally* Frederick Schauer, *The Dilemma of Ignorance:* PGA Tour, Inc. v. Casey Martin, 2001 SUP. CT. REV. 267, 278–88 (noting that "it is (possibly) too late in the day to suggest that courts should be limited in their jurisdiction to topics about which the judges . . . have antecedent and genuine expertise" and that examples of deference are "best thought of as the exceptions and not the rule").

One possible answer to the first question lies in a consideration of error costs. A widely recognized view of the judicial task holds that courts, in framing decision rules, seek "to minimize the sum of error costs and administrative costs."[162] That is, courts will seek some decision rule by which they can minimize both the costs of erroneous decisions, "discounted by the respective probabilities of those errors," and the administrative costs "of operating under the rule in question."[163]

Thus, one reason why courts might defer in cases involving particular institutions and not others is that the courts, drawing on long experience, conclude that a deferential posture with respect to certain institutions is justified because deference in those instances minimizes the sum of error costs and administrative costs. To take an example, a court might conclude that, in the common run of cases, prison administrators are less likely to err in making particular decisions within the sphere of their expertise than are courts. Moreover, the court might conclude that a rule favoring general deference to prison administrators is less costly than one requiring careful case-by-case review by courts, in light of the courts' inexpertness relative to the expertise of many prison administrators.

In short, a court might conclude that, as to particular institutions, a general rule of deference might minimize the sum of error costs and administrative costs. In other cases, a court might conclude that an institution is as likely as—or more likely than—a court to err in making its own decisions, and that the administrative costs of more searching judicial review of that institution's decisions are not particularly high. Thus, a rule of deference would not satisfy the court's desire to minimize either error costs or administrative costs. And in some middle category of cases, a court might conclude that although another institution is epistemically superior to the court, it is not so epistemically superior, and the administrative costs of more probing review are not so great, as to justify a general rule of deference.

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162 David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 193 (1988); *see also, e.g.*, Fallon, *supra* note 129, at 1310–12 ("On another interpretation, the judicially manageable standard . . . would be that which would produce the greatest possible proportion of correct outcomes . . . over the total range of cases to be decided by courts."); Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649, 1661–63 (2005) (discussing "costs of error" as a factor in the construction of constitutional decision rules); Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885, 933, 936 (2003) (arguing that the risk of judicial error is a relevant factor in any institutionally sensitive account of constitutional interpretation).

163 Strauss, *supra* note 162, at 193 n.12.

This argument seems to justify approaching particular institutions, and not others, with a presumptive rule of deference. But it does not entirely answer the question I posed above. In particular, it does not answer the question of why the courts generally defer to the institutions that they actually *do* defer to—prisons, the military, educational institutions—and not others. Courts do not, for example, show any special degree of deference to decisions made by the aeronautics industry.[164] Yet is it really more likely that the sum of error and administrative costs will be lower with respect to cases involving aeronautics than they are with respect to decisions made by universities—an institution with which judges have at least a passing acquaintance?

The answer to this question lies in a deeper understanding of the nature of error costs in the context of judicial review. Although courts often defer because they are convinced another institution is more likely to reach the *right* answer on some question outside the expertise of the courts,[165] the courts sometimes are even more concerned that they may reach the *wrong* answer if they do not defer to particular institutions, and that wrong answers can be especially hazardous in particular cases. As Professor Fallon observes, "[S]ome kinds of errors are more serious than others."[166] Costly errors can take at least two forms. First, a court might be concerned that the real-world effects of judicial error might be so grave as to counsel in favor of deference to a more expert decisionmaker. This fear that the "consequences of judicial error" might be "uniquely serious" supports judicial deference in favor of the military, given the potential "cost in lives and material" involved.[167] Second, courts may believe that in certain contexts, nondeferential judicial review is likely to result in the underprotection of essential constitutional rights.[168] For example, a court may believe that deferring to an expressive association's own "view of what would

164 In a different sense, of course, such cases will be subject to a certain kind of deference at the appellate level: the reviewing court will defer to the findings made by the trier of fact with respect to any relevant facts in dispute concerning, say, the aeronautics industry. But this is a form of deference to the lower court, not to the industry in question.

165 *See, e.g.*, Solove, *supra* note 32, at 1004–06.

166 Fallon, *supra* note 129, at 1311.

167 Hirschhorn, *supra* note 119, at 238–39; *see also* Fallon, *supra* note 129, at 1311–12 ("The Court may therefore believe it appropriate to craft doctrinal tests not merely to maximize the number of cases that courts decide correctly, but to minimize the number of decisions that occasion severe harm.").

168 Of course, in other contexts, courts may *refuse* to defer precisely because they believe that a failure to engage in searching judicial review will result in the violation of constitutional rights. *See, e.g.*, Johnson v. California, 543 U.S. 499, 505–15 (2005) (determining that strict scrutiny, rather than deferential reasonableness review,

impair its expression"[169] minimizes the risk that a court will underprotect expressive associational rights.

These reasons lead to a further insight. Although there are important distinctions between legal authority-based and epistemic authority-based arguments for judicial deference, often the two will fuse into one.[170] The court may conclude that, in those areas in which the real-world costs of error are likely to be especially grave, the Constitution has, not coincidentally, conferred *legal* authority on an institution that is also especially likely to have greater *epistemic* authority in this area.

Similarly, as I argue at greater length below,[171] the courts often recognize that particular institutions are especially vital to the maintenance of certain constitutional freedoms, and, more broadly, that these institutions play a central role in our public life.[172] Accordingly, it may well accord these institutions a greater measure of deference, in recognition of both the epistemic authority such an institution is likely to develop over time, and the legal authority it enjoys under the Constitution as an independent and autonomous public institution. For example, the courts may recognize that the press serves a vital social function in monitoring the conduct of political officials[173] and encouraging public discourse by private citizens,[174] and that it has long enjoyed the kind of autonomous legal status that continues to justify deferring to decisions made by journalists and editors.[175] Similarly, the courts may believe that religious institutions are epistemically superior to courts in judging threats to their own freedom,[176]

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applied to a prisoner's claims that racial classification in the penal system violated the Equal Protection Clause).

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

170 *See, e.g.*, Lawson & Moore, *supra* note 41, at 1278 (noting that "[e]pistemological deference can often shade into legal deference").

171 *See infra* Parts III.B–D.

172 *See, e.g.*, Frederick Schauer, *Is There a Right to Academic Freedom?*, 77 U. COLO. L. REV. 907, 925 (2006) ("An institutional understanding of the First Amendment is structured around the principle that certain institutions play special roles in serving the kinds of values that the First Amendment is most plausibly understood to protect.").

173 *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 527 (noting "the value that free speech, a free press, and free assembly can serve in checking the abuse of power by public officials").

174 *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 678 (1991) (Souter, J., dissenting) ("[F]reedom of the press is ultimately founded on the value of enhancing [public] discourse for the sake of a citizenry better informed and thus more prudently self-governed.").

175 *See* Bezanson, *supra* note 25, at 758–60; Horwitz, *Blog*, *supra* note 8, at 48–51.

176 *See, e.g.*, McConnell, *supra* note 159, 24–25.

and also that these institutions are, under our Constitution, peculiarly deserving of a substantial measure of decisionmaking autonomy.[177]

Thus, it is not surprising that judicial deference to particular institutions will often rest on a mixed ground of both legal and epistemic authority. Nor is it surprising that courts have regularly deferred to particular institutions on epistemic grounds, while refusing to defer to other institutions whose affairs raise equally factually difficult questions. In the courts' view, some institutions partake of some form of both legal and epistemic authority, and are especially deserving of judicial deference. Other institutions do not rise to this level and will receive less deference from courts, which will be more willing to muddle through in such cases.

C. Some Conclusions and Questions About Deference

The taxonomy of deference I have offered thus far allows us to begin drawing some conclusions about the Court's use of deference as a general device in constitutional law. It also raises a number of difficult questions. The questions raised here will outnumber the answers I offer. Even so, we may emerge from this discussion in a position that enables us to reach some deeper conclusions about both the *FAIR* case and its broader implications for First Amendment doctrine, while leaving some questions open for future inquiry.

The first conclusion we may reach is that deference is *pervasive* as a jurisprudential device in constitutional law. To take only the examples offered above, judicial deference is relevant to, at the very least, questions concerning administrative law, military law, prisoners' rights, and First Amendment rights in and around public schools, universities, the press, religious associations, and a broad array of other expressive associations.

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177 *See, e.g.*, Horwitz, *supra* note 1, at 1510 ("By deferring . . . courts offer . . . institutions substantial autonomy to act in ways that may conform poorly to the general doctrinal structures maintained by courts, but that make complete sense in light of the needs and functions of particular institutions and their superior ability to assess the relevant facts."); *see also* Richard W. Garnett, *The Freedom of the Church*, 4 J. CATH. SOC. THOUGHT 59, 73–81 (2006) (arguing that "[r]eligious freedom, which includes necessarily the freedom of the Church, is a good to be promoted, and not merely the result of, or what is left over after, government neutrality or incompetence"); Richard W. Garnett, *Religion and Group Rights: Are Churches (Just) Like the Boy Scouts?*, 22 ST. JOHN'S J. LEGAL COMMENT. 515, 528–33 (2007) (discussing religious institutions as First Amendment institutions); Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37, 92 (2002) (examining competing views of religious institutional autonomy and concluding that "[l]ife's ultimate questions are to be left in private hands, and when those hands are institutional, the state must respect the internal life and self-governance of such institutions").

Indeed, by focusing on cases in which the federal courts have deferred explicitly to other formal or informal institutions, I have vastly understated the true scope of deference as a common feature in constitutional law. I have not considered, for example, the degree to which deference pervades the courts' review of actions taken by the players in the criminal justice system, including prosecutors, criminal defense attorneys, and police officers.[178] Similarly, I have not considered the degree to which deference figures heavily in the Supreme Court's review of factual determinations made by lower courts.[179]

More broadly, my focus on the explicit use of deference by the courts in cases involving epistemically or legally superior institutions sets aside the process of judicial review in most other constitutional cases, with its spectrum of analysis running from rational basis scrutiny to strict scrutiny—all of which involve degrees of deference to government actors.[180] Even in the limited, institutionally oriented areas I have explored, however, the pervasiveness of deference as a method of judicial weighting in constitutional law is quite apparent.

For all its pervasiveness, however, the second conclusion we may reach is that deference remains curiously undertheorized and misunderstood by the federal courts. As Justice Thurgood Marshall once complained, the Court's pronouncements about deference often amount to nothing more than the mouthing of "hollow shibboleths"[181]: rote invocations unsupported by explanation or justification beyond a cite to an equally undertheorized prior precedent. Why does the Supreme Court, when it employs deference, sometimes invoke the legal authority of the decisionmaker to whom it is deferring, and why does it sometimes invoke instead the other institution's

178 *See generally* Solove, *supra* note 32, at 963–64 (showing that "ineffective assistance of counsel claims are reviewed with great deference" and that reviews of "prosecutorial decisions . . . are highly deferential").

179 *See, e.g.*, House v. Bell, 126 S. Ct. 2064, 2078 (2006) ("Deference is given to a trial court's assessment of evidence presented to it in the first instance."); Miller-El v. Cockrell, 537 U.S. 322, 339 (2003) (arguing on epistemic grounds for deference to a trial court's findings concerning the presence or absence of discriminatory intent in the use of peremptory challenges). For an extensive treatment of appellate standards of review, see generally HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS—STANDARDS OF REVIEW 19–183 (2007).

180 For superb recent treatments of the Court's use of tiers of scrutiny in judicial review, including pertinent discussions of deference, see, for example, Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1285–90 (2007); G. Edward White, *Historicizing Judicial Scrutiny*, 57 S.C. L. REV. 1, 65–83 (2005); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 798–833 (2006).

181 Rostker v. Goldberg, 453 U.S. 57, 112 (1981) (Marshall, J., dissenting).

epistemic authority? Why defer to some institutions, on either or both grounds, and not others? Why does the Court sometimes invoke the epistemic authority-based justification for judicial deference when, in fact, the Court is not relying on the relevant expertise of that body in the case at hand?[182] Is judicial deference properly limited to the factual determinations of the deferred-to body, or should courts defer as well to legal or mixed factual and legal determinations made by the other body?[183] If so, why should courts ever defer to the *legal* determinations of other bodies? And why do courts defer to legal determinations in some areas but not others?[184] The courts have offered few clear answers to these nettlesome questions.

Although this Article may supply tentative answers to some of these questions, many will remain unanswered here. Still, this Article may contribute to a better understanding of the use of deference in constitutional law in two ways. First, this Article's description of the legal and epistemic authority justifications for judicial deference at least points the way to a clearer understanding of the occasions and arguments for judicial deference, and helps provide a starting point for anyone seeking to explore the larger puzzles posed by this phenomenon. Second, as we will see, this Article's attempt to cash out its basic taxonomy of deference in the more concrete surroundings of the *FAIR* litigation sheds some light on how these questions arise in the actual practice of the courts.

These lingering questions give rise to a third broad line of inquiry: how the Court knows whether, and how much, to defer to other institutions. We might divide this into two separate questions: how the Court knows whether to defer on legal authority-based

182 For example, in *Rostker*, the Court noted that "'[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments'" worthy of substantial judicial deference. *Id.* at 65–66 (majority opinion) (quoting Gilligan v. Morgan, 413 U.S. 1, 10 (1973)). But the judgment in that case concerned deference to *Congress'* determination that women should not be subject to the draft; the military—the superior epistemic authority in that case—actually *favored* the inclusion of women in the draft. *See, e.g., id.* at 84–85 (White, J., dissenting); Mazur, *supra* note 49, at 488. For a similar argument in the context of the *FAIR* decision, see *infra* notes 318–19 and accompanying text.

183 For a discussion of the law-fact distinction, see sources cited *supra* note 63.

184 *See, e.g.*, Mazur, *supra* note 104, at 761 (noting that the legal authority-based justification for judicial deference to Congress in the exercise of its military and war powers applies equally to Congress' exercise of its other Article I, Section 8 powers, although courts do not necessarily defer to legal determinations made by Congress in those areas).

grounds, and how it knows whether to defer on epistemic authority-based grounds. In both cases, the answer is surprisingly unclear.

In one sense, deference on legal authority-based grounds seems simple enough: where the Constitution confers decisionmaking authority on another body—Congress, the executive branch, or even some private institution—the Court defers, and that is the end of the matter. This is the core of a number of familiar constitutional doctrines, some of which have already been mentioned above: the political question doctrine,[185] the enrolled bill doctrine,[186] *Chevron* deference,[187] the rational basis test introduced by the Court in *McCulloch v. Maryland*,[188] the Court's substantial (but, seemingly, shrinking) deference to Congress' exercise of its enforcement powers under Section 5 of the Fourteenth Amendment,[189] and so on.

The problem here is that the Constitution rarely, if ever, speaks in a clear or direct voice about the necessity, propriety, or degree of deference required when the federal courts review the actions of other legal authorities.[190] It is true, for example, that the Constitution assigns responsibility for the lawmaking process to the legislative and executive branches, and so the enrolled bill doctrine may be seen as a reasonable recognition of this conferral of legal authority. But nothing in the Constitution *requires* the courts to refrain from examining closely whether the political branches have, in fact, met the constitutional requirements for lawmaking in a given case. And yet it is well accepted that courts will not do so.[191] Nor does the Constitution itself

185 *See, e.g.*, Nixon v. United States, 506 U.S. 224, 228–29 (1993).

186 *See, e.g.*, Field v. Clark, 143 U.S. 649, 670–79 (1892).

187 *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842–45 (1984).

188 17 U.S. (4 Wheat.) 316, 421 (1819).

189 *See, e.g.*, Katzenbach v. Morgan, 384 U.S. 641, 650–51 (1966) (setting a deferential standard for judicial review of congressional exercise of power under Section 5 of the Fourteenth Amendment); *cf.* City of Boerne v. Flores, 521 U.S. 507, 519–20 (1997) (refusing to defer to "substantive" exercises of the Section 5 enforcement power). This position has been subject to criticism. *See, e.g.*, Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943, 2020–23 (2003); Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1, 17–30 (2003).

190 *See* Monaghan, *supra* note 57, at 9 ("To be sure, this commitment-to-another-branch rationale [for judicial deference] necessitates some judicial interpretation . . . .").

191 *See, e.g.*, Public Citizen v. U.S. Dist. Court, 486 F.3d 1342, 1349–50 (D.C. Cir. 2007) (rejecting a challenge to the Deficit Reduction Act of 2005 which argued that the bill presented to the President had not passed both chambers with identical language).

tell us in so many words why courts ought to defer on such questions as whether a bill has passed both houses of Congress in identical form, but not on matters that are arguably equally committed to Congress or the executive branch; why, for example, courts defer substantially to Congress where it exercises its lawmaking powers under the Commerce Clause, but not where it exercises its lawmaking authority in a way that implicates the Bill of Rights.[192] In short, however sound the legal authority-based justification for judicial deference may be, it does not offer clear guidance as to the occasions on which judicial deference is required or appropriate.

The question of when courts are obliged to defer to other institutions grows still more difficult when we turn to epistemic justifications for judicial deference. As Scott Brewer has observed in a somewhat different context,[193] this is a peculiarly vexing question in at least two ways, the second of which will be especially relevant when we turn to the Court's decision in *FAIR*. First, there is a foundational problem: if the premise of an epistemic justification for judicial deference is that deference is appropriate where some other institution has more expertise than the courts do, how do courts—which are, by hypothesis, unqualified or underqualified to make judgments about this area—know *when* this condition applies? In other words, even if courts are well aware of what they do not know, how can they tell that some other institution in fact knows more than them? If the basis for epistemic deference is that the courts are relatively ignorant, then how can the courts determine in a nonarbitrary way that some other institution is relatively knowledgeable?

We might respond on practical and intuitive grounds that such complaints are "too quick, too cheap, too thin."[194] Judges may not know much about engineering, but they understand that some individuals or institutions know considerably more about engineering than they do. But this leads to a second problem. It is true that courts usually confront situations in which there is only one claimant invoking an entitlement to deference, so that the question is a simple binary one of whether or not to defer to the institution, and specifically whether that institution is epistemically superior to the court. But this is not always the case. In cases involving scientific expertise,

192 The canonical citation is, of course, *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

193 *See generally* Brewer, *supra* note 28, at 1540–96, 1634–71 (analyzing the epistemic justifications for judicial deference as it relates to scientific expert testimony).

194 *Id.* at 1630 (addressing potential responses to the argument that focusing on expert credentials does not provide an "epistemically legitimate method" for judges weighing the selection of experts).

for example, courts often face *competing* experts "who testify to contrary or even contradictory scientific propositions."[195] The question then is which of these competing experts the court will defer to with respect to the relevant factual questions before it. In such cases, courts must select between competing epistemic authorities in precisely those cases in which, by hypothesis, the courts are least qualified to make such a selection on epistemically justified grounds. Thus, courts may well be incapable of choosing between these competing claimants "in an epistemically nonarbitrary way."[196]

The same question confronts us in a somewhat different form even outside the realm of expert scientific knowledge. For the deference question is not always a binary one, even in cases in which the courts face epistemically superior *institutions*, such as Congress, prisons, and the other institutions I have already canvassed, rather than individual scientific experts. As we will see, *FAIR* is just such a case. In that case, the Supreme Court faced at least two competing claims to deference, from institutions that were *both* ostensibly epistemically superior to the Court itself: Congress and the law schools.[197] Thus, the question before it was not simply whether to defer to some epistemically superior authority, but *which* institution should win the competition for deference.

One partial answer to the dilemma of how courts are to know whether and when to defer lies within the shared space between legal and epistemic authority that we saw earlier. That is the notion that the courts ought especially to defer in cases involving institutions that are not only epistemically superior, but that also have particular significance in our constitutional and social order. Whatever arguments might be made for deference in the common run of cases, some cases involve institutions that are of special importance to the constitutional order, and that are, to some extent, singled out as important by the Constitution itself. Thus, I have argued elsewhere that a number of institutions—the press, universities, religious institutions, libraries,

195 *Id.* at 1538.

196 *Id.* at 1680.

197 In fact, the number of competing claims to deference in *FAIR* proliferate still further. We might argue that the Court faced the question whether to defer on epistemic grounds to Congress in its exercise of its authority over the military, or whether this claim to deference was undermined by the fact that the military itself apparently took a different view of the necessity of the Solomon Amendment. *See infra* notes 318–19 and accompanying text. We might also further subdivide the law schools' claims to deference into two forms of deference: deference to the schools as expressive associations, and deference to the schools as educational institutions. *See infra* Part III.B–C.

and perhaps a few others—are of "special importance to public discourse."[198] These institutions are singled out not only by their fundamental role in preserving and furthering public discourse, but also by their very institutional nature: by the fact that they have a store of expertise and a long tradition of norms, practices, and traditions that enable them to function productively as self-governing institutions.

We can thus supply a tentative answer to the question of how courts should know when and whether to defer to particular institutions: courts ought especially to defer when they confront a claim to deference made by an institution of particular importance in our constitutional and social structure, one whose expertise and whose constitutional importance both counsel in favor of judicial abstention.[199] And in cases in which the Court faces competing claims to deference from two or more institutions, and in which the competing institutions all possess more or less equal measures of epistemic and/or legal authority, it ought to put a thumb on the scale of the institution that is, in the Court's judgment, the most constitutionally significant.

It bears emphasis that this is only a partial answer. It does not, for example, answer Professor Brewer's question: how, given their epistemic weakness, are courts to select among competing claims to deference?[200] And it raises a further difficult question: how are courts to weigh competing claims to deference in cases in which more than one institution is constitutionally significant, where it is not evident that one institution is more significant than the rest? As we will see, *FAIR* is just such a case. Notwithstanding these questions, however, placing the focus on the constitutional significance of deferred-to institutions may at least represent a step forward in our understanding of deference.

198 Horwitz, *supra* note 4, at 571.

199 Incidentally, this answer may help us understand why courts sometimes defer to institutions that they actually understand reasonably well, and why they do not always defer to institutions that they understand less well: because of the greater constitutional and social importance of some of the institutions in the former category. For example, courts defer to universities, with which all judges have substantial personal experience, but do not defer substantially on the question of the nature of the game of golf—a question as to which the current Court, at least, has no special expertise, but one that only a few duffers would find constitutionally significant. *Compare* Pamela S. Karlan, *Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants*, 54 UCLA L. REV. 1613, 1621–22 (2007) (law schools), *with* Schauer, *supra* note 161, at 274–76 (professional golf).

200 *See* Brewer, *supra* note 28, at 1590–96.

D. The Reciprocal Obligations of Deferred-to Institutions

One last significant issue remains to be discussed in this Part's attempt to impose some clarity and order on the use of deference in constitutional law. Thus far, our examination of deference has proceeded from the standpoint of the institution that defers—namely, the judiciary. Focusing on the deferring party is common in the constitutional literature on deference. But there is another standpoint worth considering, and it is much more rarely discussed: that of the party to which deference is owed (*D2*, as I have labeled it, or the "deferee").[201] Let us assume a situation in which judicial deference to a party or institution is required. In such circumstances, we know that the court owes deference to the deferee. But what obligations does the deferee, in turn, owe to the court? This question is surely central to the concept of deference, but is often neglected. Here, I set out some qualities that might characterize the obligations of the deferee, under both the legal and epistemic authority justifications for deference. The distinction between these bases for deference is unlikely to be of great importance here, as the obligations of the deferee are similar in both cases. Nevertheless, I will take them seperately.

Under an epistemically based rule of deference, a party that invokes deference should display a number of qualities. First and most obviously, to the extent that judicial deference to such an institution is based on its epistemic superiority, we should oblige such an institution to actually bring the weight of its expertise to bear on the problem before the court. Conversely, a party invoking its epistemic authority as a basis for judicial deference ought not invoke that authority on questions that are beyond the scope of its expertise.[202]

Second, we might expect a party that invokes deference to reason *in good faith* on those questions that will be the subject of the judicial act of deference.[203] As Schauer observes, to the extent that the obligations of the deferee partake of a moral character, the deferee "would not want to put another person . . . in the position of having to defer to a decision that he . . . thinks [is] wrong"[204] by invoking deference

201 *See* Schauer, *supra* note 53, at 1574.

202 *Cf.* Charles, *supra* note 126, at 613 ("The fact that one may defer to the epistemic authority of someone in regard to one subject matter does not necessarily mean that one defers to her on all subject matters. Ascertaining the contexts, domains, or subject matters that command epistemic deference is part of the inquiry into epistemic authority.").

203 *See* SOPER, *supra* note 28, at 182 ("Deference requires good faith on the part of the [deferee].").

204 Schauer, *supra* note 53, at 1574.

without engaging in good-faith deliberation on the question at hand.[205]

Third, we might expect a deferee to reason *thoughtfully* toward its conclusions. A conclusion that is reached in haste, or carelessly, or without serious consideration of the complexity of the question, is hardly one that partakes of the quality of epistemic authority that is the basis for judicial deference.

Finally, we might expect a deferee to meet not just a set of *substantive* obligations when it invokes deference, but also to observe a minimum level of appropriate *process* in its deliberations. To the extent that it demands deference for its deliberations, those deliberations should be sufficiently structured and transparent to earn the trust of the deferring institution, and the deferee should take some pains to explain its reasons and its process in a way that provides a similar assurance that its conclusions are the result of a meaningful, full, and fair exercise of its expertise.[206]

The qualities we should expect from a faithful deferee will be the same if we shift the ground from the epistemic justification for judicial deference to the legal authority-based justification. If the courts are to defer to some institution because it possesses the sole or superior legal authority to decide in that area, we should expect that institution to seek deference only where its conclusions actually fall within the proper scope of its legal authority. To take an exaggerated example, deference to Congress on the basis of its postal powers would not be justified in the case of legislation dealing with some matter lying outside the proper scope of that power—say, an appropriation for the Department of Defense.

The qualities we might expect from a deferee whose exercise of its legal authority is worthy of judicial deference are also likely to line up closely with the qualities addressed above. After all, one of the foundations of legal authority-based deference is that the Constitution has equipped the political branches with a variety of mechanisms to ensure sound, legitimate, and accountable decisionmaking. These include open, extended, and transparent deliberation, and a meaningful opportunity to air opposing viewpoints. Thus, just as we saw

205 *Cf.* Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 CORNELL J.L. & PUB. POL'Y 203 (2004) (examining and defending cases in which courts have refused to accord full *Chevron* deference to instances of "self-interested agency action").

206 *Cf.* Joseph Vining, *Authority and Responsibility: The Jurisprudence of Deference*, 43 ADMIN. L. REV. 135, 140 (1991) ("[Courts] regularly demand, and condition their deference upon, evidence that the agency has in fact responsibly considered the question fully and on the merits.").

that legal authority-based justifications for deference often shade into epistemic justifications for deference, so, too, the obligations of deferees are likely to be the same under both accounts of deference.

This discussion of the obligations of the deferee corresponds fairly closely to the current state of administrative law. As we have seen, since *Chevron* the primary basis for judicial deference to agency interpretations of law has been legal authority rather than epistemic authority: courts defer because of the political status of administrative agencies rather than their expertise. But recent cases have made clear that this is not the whole story.

In *United States v. Mead Corp.*,[207] for example, the Court discussed the proper occasions for *Chevron* deference.[208] Relying on the legal authority justification offered by the Court in *Chevron* itself, the Court held that *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[209] What this means in practice is that *Chevron* deference is most clearly appropriate where an agency is acting under a congressionally mandated "formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force."[210] As Richard Murphy has observed, this statement draws on both legal and epistemic authority-based justifications for deference: "'[R]elatively formal administrative procedures' . . . encourage 'deliberation' (and thus the deployment of expertise) and 'fairness' (transparency and political accountability)."[211] In short, the Court's ruling in *Mead* suggests that judicial deference is most fitting where an administrative agency is operating squarely within the terms of a properly delegated legal authority *and* operating according to a process that best ensures the sound application of its epistemic authority.

Similarly, in a case decided a year before *Mead*, *Christensen v. Harris County*,[212] the Court declined to apply *Chevron* deference to an agency interpretation of a statute contained in an agency opinion letter, contrasting agency statements of this kind with "formal adjudication[s] or notice-and-comment rulemaking."[213] While *Christensen* was

207 533 U.S. 218 (2001).

208 *See id.* at 226–31.

209 *Id.* at 226–27.

210 *Id.* at 229–30.

211 Richard Murphy, *The* Brand X *Constitution*, 2007 BYU L. REV. 1247, 1290 (first alteration in original) (quoting *Mead*, 533 U.S. at 230).

212 529 U.S. 576 (2000).

213 *Id.* at 586–87.

ostensibly decided on standard post-*Chevron* legal authority grounds, the opinion also evokes the kinds of process rules that I have suggested must be observed by a faithful deferee, since informal statements such as opinion letters "may or may not reflect the careful application of agency expertise."[214]

Concerns about the obligations of the deferee can also be found in a variety of the subfields of constitutional law discussed earlier in this Article. Higher education law supplies a prominent example. Although courts regularly defer to the academic decisions of universities,[215] they are far less likely to do so where a university has failed to support its decision adequately with thoughtful deliberation carried out according to some reasonable process. An example of this is *Guckenberger v. Boston University*,[216] a case involving a claim against Boston University under the Americans with Disabilities Act, in which some students argued that they should be exempt from foreign-language requirements. The district court refused to dismiss the action because the university administration had not "engage[d] in any form of 'reasoned deliberation as to whether modifications [in the foreign language requirement] would change the essential academic standards of [the university's] liberal arts curriculum.'"[217] On remand, after the university demonstrated that it had engaged in subsequent good-faith deliberation on the issue, the court deferred to the university's insistence that the requirement was essential to the program.[218]

Although this focus on the obligations of the deferee appears in the case law dealing with potential deferees, it is somewhat less well attended to in constitutional scholarship itself. Even here, however, we may find echoes of this concern. Laurence Tribe's model of substantive due process as a form of "allocation of competences,"[219] for example, could be seen as being grounded in a consideration of the

214 Krotoszynski, *supra* note 98, at 745 (citing Jim Rossi, *Respecting Deference: Conceptualizing* Skidmore *Within the Architecture of* Chevron, 42 WM. & MARY L. REV. 1105, 1144–46 (2001)).

215 *See, e.g.*, Univ. of Pa. v. EEOC, 493 U.S. 182, 199 (1990) ("[C]ourts have stressed the importance of avoiding second-guessing of legitimate academic judgments."); Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985) (deferring substantially to an academic decision to dismiss a student where the University reasonably exercised professional judgment according to "accepted academic norms").

216 8 F. Supp. 2d 82 (D. Mass. 1998).

217 *Id.* at 85 (quoting Guckenberger v. Boston Univ., 974 F. Supp. 106, 149 (D. Mass. 1997)).

218 *See id.* at 90.

219 Laurence H. Tribe, *Foreword: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 10–14 (1973).

proper deference relationship between different public and private decisionmakers.[220]

Two conclusions are in order here. First, although both courts and scholars have examined the obligations of the deferee, most of them have done so from the standpoint of the *deferrer*—generally, the reviewing court.[221] That focus is understandable, but we ought not to think about the obligations of the deferee strictly in terms of what is acceptable to the deferrer. If we are to think of the deferee as having a kind of moral responsibility to take seriously its privileged status as a subject of deference,[222] we ought to give proper consideration to the obligations of the deferee for its own sake, and not simply as a matter of predicting whether or not the courts will defer in particular circumstances. After all, the courts are not the only realm in which we might exert pressure on deferees to earn the deference they invoke. Thus, as we will see below, even if the Court ought to have deferred to the law school plaintiffs in *FAIR*, the plaintiffs might still be criticized from within the legal academic community itself for the conclusions they drew about their mission as academic institutions.

Second, in considering the obligations of the deferee we may find another piece of the answer to the question of how courts should approach cases in which they face competing claims to deference from two or more institutions.[223] Even if more than one institution before the reviewing court is usually entitled to deference, and even if more than one of those institutions is constitutionally significant in some sense, not all such institutions are equally deserving of deference on every occasion. Courts may face competing claims of deference in which one of the institutions seeking judicial deference has failed to deliberate fully and transparently on the question as to which it seeks deference, or has reached a conclusion that falls beyond the usual scope of its legal or epistemic authority. In such circumstances, that institution has not necessarily honored its own obligations as a would-be deferee, and a court may properly accord it less deference than it does to the competing institution.

E. Summary

Given the extensive nature of the discussion so far, a brief summary is in order. I have suggested that deference is both pervasive

220 *See* Hills, *supra* note 81, at 147 & n.3.

221 On the importance of standpoint in considering questions of deference, see Schauer, *supra* note 53, at 1573–76.

222 *See id.* at 1572–74 (drawing on and extending SOPER, *supra* note 28).

223 *See supra* notes 198–201 and accompanying text.

and undertheorized as a tool of constitutional law. I have attempted to bring a greater degree of order to the subject by dividing deference roughly into two general types: deference based on the legal authority of the institution invoking deference, and deference based on the epistemic authority of that institution—although these justifications are not entirely distinct, either in theory or in practice. Both of these justifications for judicial deference have been offered in a variety of circumstances involving a multitude of public and private institutions before the courts.

Finally, I have argued that the relatively undertheorized status of deference as a tool in constitutional law is important for at least two reasons. First, it leaves us with more work to do in understanding deference, not just from the standpoint of the party (in this case, the courts) that faces a request for deference, but also from the standpoint of the very institution that is invoking the court's deference. From that standpoint, we can see that deferees have a quasi-moral obligation to act in a responsible manner.[224] Where they fail to do so, both the courts and a variety of other public and private actors may fairly criticize these institutions for invoking deference. Second, the more undertheorized deference is as a tool in constitutional law, the more difficult it will be for courts to deal with situations in which they face not one, but several *competing* institutions, each of which demands deference. As we will see, *FAIR* provides precisely such an example.

II. *RUMSFELD V. FAIR*

Placing the question of deference to one side for now, this Part turns to the Supreme Court's decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*).[225] First, some background is in order.[226]

A. The Solomon Amendment

Under the bylaws of the American Association of Law Schools (AALS), every member school is bound to a policy of equal opportunity in employment, including equal treatment without regard to sex-

224 For those who might object to characterizing deferees' obligations in moral terms, another way to think about those obligations is as partaking of a fiduciary character. For an elaboration of this notion in the administrative law context, see generally Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117 (2006).

225 547 U.S. 47 (2006).

226 *See also* Horwitz, *supra* note 4, at 516–33.

ual orientation.[227] Schools are expected to limit the use of their facilities in recruitment or placement assistance to those employers who are willing to abide by these principles of equal opportunity.[228] One potential employer is the United States military, which discriminates against gays and lesbians.[229] Because of its policies, the military has been the subject of various protests, limitations, and outright restrictions on its ability to recruit law students on campus.[230]

In 1994, in response to the law schools' opposition to on-campus military recruiting, Congress passed the so-called Solomon Amendment.[231] Under the statute, a university or its "subelement," such as a law school, may not prevent the government from recruiting students on campus, or restrict the government's access to student information for recruiting purposes.[232] Failure to comply with this provision carries with it significant funding consequences, for both the law school and the university. A law school's noncompliance may result in the government withdrawing all Defense Department funding from the university as a whole, and a significant portion of nondefense government funding from the law school itself.[233]

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227 BYLAWS OF THE ASS'N OF AM. LAW SCH., INC. § 6-3(b) (Ass'n of Am. Law Sch., Inc. 2005), *available at* http://www.aals.org/about_handbook_requirements.php. Separate principles apply to religiously affiliated law schools. *See* ASS'N OF AM. LAW SCH., INC., INTERPRETIVE PRINCIPLES TO GUIDE RELIGIOUSLY-AFFILIATED MEMBER SCHOOLS (1993), http://www.aals.org/about_handbook_sgp_rel.php.

228 *See* EXECUTIVE COMM. REGULATIONS § 6-3.2(a) (Ass'n of Am. Law Sch., Inc. 2005), *available at* http://www.aals.org/about_handbook_regulations.php.

229 *See* 10 U.S.C. § 654 (2000) (mandating discharge of members of the armed forces who engage in "homosexual acts").

230 *See, e.g.*, Forum for Academic & Inst'l Rights, Inc. v. Rumsfeld (*FAIR I*), 291 F. Supp. 2d 269, 281–83 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2003), *rev'd*, 547 U.S. 47 (2006).

231 National Defense Authorization Act for Fiscal Year 1996, Pub L. No. 104-106, § 541(a), 110 Stat. 186, 315 (codified as amended at 10 U.S.C. § 983(b) (2000 & Supp. V 2005)). For early commentary on the Solomon Amendment, see, for example, Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205, 209–15 (2004); Sylvia Law, *Civil Rights Under Attack by the Military*, 7 WASH. U. J.L. & POL'Y 117, 121–29 (2001); Francisco Valdes, *Solomon's Shames: Law as Might and Inequality*, 23 T. MARSHALL L. REV. 351, 364–71 (1998); Amy Kapczynski, Comment, *Queer Brinksmanship: Citizenship and the Solomon Wars*, 112 YALE L.J. 673, 675 (2002); Peter H. Schuck, *Equal Opportunity Recruiting*, AM. LAW., Jan. 2004, at 57.

232 *See* 10 U.S.C. § 983(b) (2000 & Supp. V 2005).

233 *See id.* § 983(b), (d).

An earlier version of the Solomon Amendment simply required that military recruiters be granted "entry" to law school campuses,[234] without making clear what sort of treatment military recruiters would be entitled to once they arrived there.[235] The Department of Defense interpreted the policy as requiring "not only access to campuses, but treatment equal to that accorded other recruiters,"[236] and its enforcement policies followed suit.[237] After the district court questioned whether the Department's enforcement policy was justified by the plain text of the statute,[238] Congress amended the statute to make clear that law schools, and the broader academic institutions of which they are a part, risk forfeiting federal funds if they

> prohibit[], or in effect prevent[] . . . [the military] from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting[,] in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.[239]

In short, "[i]n order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most favorable access."[240]

B. The Supreme Court's Decision in FAIR

The Forum for Academic and Institutional Rights (FAIR) brought suit challenging the Solomon Amendment. FAIR is "an association of law schools and law faculties" whose "stated mission is to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education."[241] Its members include a substantial number of

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234 National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994), *repealed by* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549(b)(1), 113 Stat. 512, 611 (1999).

235 *See FAIR*, 547 U.S. at 54.

236 Forum for Academic & Inst'l Rights, Inc. v. Rumsfeld (*FAIR II*), 390 F.3d 219, 227 (3d Cir. 2003), *rev'd*, 547 U.S. 47 (2006).

237 *See, e.g.*, *id.* at 227–28 (detailing the experience of Yale Law School and the University of Southern California Law School).

238 *See* Forum for Academic & Inst'l Rights, Inc. v. Rumsfeld (*FAIR I*), 291 F. Supp. 2d 269, 321 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2003), *rev'd*, 547 U.S. 47 (2006).

239 10 U.S.C. § 983(b) (2000 & Supp. V 2005).

240 *FAIR*, 547 U.S. at 55.

241 *FAIR I*, 291 F. Supp. 2d at 275.

law schools, only some of which have publicly identified themselves.[242] While some of those schools joined as institutions, the remainder are members by virtue of a majority vote of the faculty rather than through any formal institutional action.[243] FAIR was joined in the litigation by the Society of American Law Teachers; various law student groups and individual students; and two faculty members joining as individual plaintiffs, Erwin Chemerinsky and Sylvia Law.[244]

FAIR and the other plaintiffs sought a preliminary injunction enjoining the enforcement of the Solomon Amendment.[245] The district court denied the plaintiffs' motion.[246] A divided panel of the Third Circuit reversed. The panel found that the Solomon Amendment violated the plaintiffs' First Amendment right not to engage in compelled speech and their rights as expressive associations.[247]

In a short opinion by Chief Justice Roberts for a unanimous Court, the Supreme Court reversed the Third Circuit.[248] Chief Justice Roberts' substantive analysis begins with the "'broad and sweeping'"[249] power of Congress to "'provide and maintain'" the United States military.[250] "[T]he fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality," the Court observed.[251] At such moments, "'judicial deference . . . is at its apogee.'"[252] Although the Court's emphasis on deference to Congress' exercise of its military powers largely drops out of the Court's formal analysis at this point, this language makes clear that the rest of the opinion will proceed in the shadow of the military deference doctrine.

Although the Court recognized that even legislation relating to the military is subject to some First Amendment constraints,[253] it held

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242 *See id.* (noting that usually "FAIR membership is kept secret").

243 *See* FAIR Participating Law Schools, http://www.law.georgetown.edu/solomon/participating_schools.html (last visited Jan. 27, 2008).

244 *See FAIR I*, 291 F. Supp. 2d at 271.

245 *Id.* at 274.

246 *Id.* at 275.

247 *See* Forum for Academic and Inst'l Rights, Inc. v. Rumsfeld (*FAIR II*), 390 F.3d 219, 229–46 (3d Cir. 2003), *rev'd*, 547 U.S. 47 (2006).

248 Rumsfeld v. Forum for Academic & Inst'l Rights, Inc. (*FAIR*), 547 U.S. 47, 70 (2006). Justice Alito did not participate in the decision.

249 *Id.* at 58 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

250 *Id.* (quoting U.S. CONST. art. I, § 8, cl. 13).

251 *Id.*

252 *Id.* (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

253 *See id.*

that no such constraints applied in this case.[254] The Court's First Amendment analysis was nested within the larger question of unconstitutional conditions: that is, whether the First Amendment limited "Congress' ability to place conditions on the receipt of funds."[255] The Court sidestepped that issue, asking instead whether the Solomon Amendment's conditions would be unconstitutional if they were imposed directly on the law schools.[256] It divided that inquiry into three separate First Amendment questions: a compelled speech question, an expressive conduct question, and an expressive association question. It rejected each of these claims in turn.

With respect to the compelled speech claim, the Court distinguished the Solomon Amendment from its prior compelled speech cases.[257] First, the government in those cases had dictated the actual content of the compelled speech, while the law schools here were merely required to provide the same "speech" in assisting military recruiters that they provided to other employers. Second, nothing in the Solomon Amendment involved "a Government-mandated pledge or motto that the school must endorse."[258] Third, while speech was central to those cases, the speech implicated by the Solomon Amendment was incidental to the statute's regulation of *conduct*. In short, "it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that" the speech involved in *FAIR* is the same as "forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die.'"[259]

The Court made similarly short work of the FAIR plaintiffs' assertion that the Solomon Amendment effectively forced them to "host or accommodate another speaker's message."[260] Unlike prior cases in which it had found forced accommodation,[261] the law schools' accommodation activities under the Solomon Amendment—hosting interviews, holding recruiting receptions, and so forth—"lack the

254 *Id.* at 70.

255 *Id.* at 60.

256 *See id.* at 59–60.

257 *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

258 *FAIR*, 547 U.S. at 62.

259 *Id.*

260 *Id.* at 63.

261 *See id.* (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 566 (1995) (holding that a state public accommodation law could not require parade organizers to include a group of gay and lesbian marchers); Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 19–21 (1986) (plurality opinion) (holding that a state agency could not require a utility company to include a third-party newsletter in its billing envelope)).

expressive quality of a parade, a newsletter, or the editorial page of a newspaper."[262] In any event, law students are easily able to distinguish "between speech a school sponsors and speech the school permits because [it is] legally required to do so."[263]

The Court next rejected the claim that barring military recruiters from campus constitutes expressive conduct, an argument stemming from the Court's decision in *United States v. O'Brien*.[264] The Court wrote that the First Amendment cannot possibly apply to all conduct that "'intends . . . to express an idea,'"[265] and characterized its earlier holdings as applying only to "conduct that is inherently expressive."[266] It took a narrow view of such conduct, suggesting that forbidding the presence of military recruiters on campus was expressive, if at all, "only because the law schools accompanied their conduct with speech explaining it."[267] Even if *O'Brien* did apply, the Court concluded, the government "clearly satisfie[d]" the test applied under that case.[268]

Finally, the Court rejected the FAIR plaintiffs' expressive association claims. It observed that military recruiters are only visitors to campus, and do not seek "to become members of the school's expressive association."[269] Since the law schools remain free to protest the military's presence, nothing about the Solomon Amendment "mak[es] group membership [in the law school] less desirable."[270] Thus, the Solomon Amendment's effect on the law schools' associational rights raised no significant First Amendment concerns. The Court concluded with a somewhat gratuitous slap at the FAIR plaintiffs for their "attempt[ ] to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."[271]

C. *FAIR Measure?: The Solomon Amendment Decision and First Amendment Doctrine*

The Supreme Court's decision in *FAIR* may represent what we will come to think of as the Roberts Court's standard approach to the

262 *Id.* at 64.
263 *Id.* at 65.
264 391 U.S. 367, 375 (1968).
265 *FAIR*, 547 U.S. at 65–66 (quoting *O'Brien*, 391 U.S. at 376).
266 *Id.* at 66.
267 *Id.*
268 *Id.* at 67.
269 *Id.* at 69.
270 *Id.* at 70.
271 *Id.*

First Amendment.[272] It is a short, seemingly clear, no-nonsense opinion. It cuts to the heart of the case, sweeps aside specious or overreaching arguments, and applies generous helpings of common sense to reach its result. All this is seemingly to the good. The "arsenal of First Amendment rules, principles, standards, distinctions, presumptions, tools, factors, and three-part tests" is already full enough as it is.[273] There surely is much virtue in a Court declining to add to it.

Nor was the result in *FAIR* a surprise. If anything, it is fair to say that the Court's ruling was largely a foregone conclusion.[274] Even those of us who believed that the case raised serious issues of constitutional law—although not necessarily the same ones presented by the FAIR plaintiffs themselves—understood that these arguments entailed moving beyond the current state of First Amendment law, and that the plaintiffs ultimately would likely fail.[275] One might thus conclude quite reasonably that *FAIR* was a decision compelled by both precedent and common sense.

But there is more to it than that. The simplicity of Chief Justice Roberts' opinion in *FAIR* comes at the expense of genuine clarity and consistency. As Jack Balkin has observed, Chief Justice Roberts' opinion "makes the result look easy, and he makes it look easy by artfully

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272 *See, e.g.*, Marci Hamilton, *The Supreme Court Upholds the Federal Statute Giving Military Recruiters Campus Access, Despite "Don't Ask, Don't Tell,"* FINDLAW'S WRIT, Mar. 9, 2006, http://writ.news.findlaw.com/hamilton/20060309.html; Posting of David Barron to LawCulture, http://lawculture.blogs.com/lawculture/2006/03/its_not_just_fo.html (Mar. 6, 2006, 19:08).

273 Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004). *See generally* Paul Horwitz, *Law's Expression: The Promise and Perils of Judicial Opinion Writing in Canadian Constitutional Law*, 38 OSGOODE HALL L.J. 101, 121–25 (2000) (arguing in favor of "open-textured minimalism" to ensure that constitutional decisions decide cases narrowly while encouraging public dialogue on the meaning of the Constitution); Robert F. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165 (1985) (arguing that the Court's multipronged tests and formulaic styles isolate it from both the Constitution and the public at large).

274 *See, e.g.*, Richard A. Posner, *A Note on* Rumsfeld v. FAIR *and the Legal Academy*, 2006 SUP. CT. REV. 47, 47 (calling the decision in *FAIR* "neither momentous nor unexpected"); *cf.* Peter Berkowitz, *U.S. Military: 8, Elite Law Schools: 0, How Many Professors Does It Take to Misunderstand the Law?*, WKLY. STANDARD, Mar. 20, 2006, at 10, 10–13 ("How could so many law professors of such high rank and distinction be so wrong about such straightforward issues of constitutional law?"); Posting of Jack M. Balkin to Balkinization, http://balkin.blogspot.com/2006/03/alls-fair-in-law-and-war.html (Mar. 15, 2006, 18:34) (noting that commentators "suggested that the law schools didn't know what they were doing in bringing the case").

275 *See* Horwitz, *supra* note 4, at 523–26.

dodging every interesting constitutional law question in sight."[276] Since my primary goal in this Article is to consider the role of deference in *FAIR*, I will not offer a thorough doctrinal critique of *FAIR* here.[277] But it is worth pausing long enough to demonstrate just how much of *FAIR*'s seemingly reasonable opinion conflicts with or unsettles current First Amendment doctrine. As we will see, these doctrinal tensions ultimately are deeply connected to this Article's larger discussion of deference.

Consider the Court's cursory treatment of the unconstitutional conditions doctrine,[278] which was implicated here by virtue of the Solomon Amendment's use of federal funds as a means of imposing conditions on the law schools' treatment of military recruiters. This is, of course, a notoriously difficult area of constitutional law.[279] What is noteworthy about the Court's opinion here, however, is not what it says, but all that it leaves unsaid. In prior cases, the Court had suggested that the doctrine might apply differently in cases in which a funding condition "would distort the usual functioning of" particular institutions as First Amendment speakers.[280] Thus, in *Rust v. Sullivan*,[281] the Court noted 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

276 Balkin, *supra* note 274; *see also* Vikram Amar & Alan Brownstein, *A Different Take on the Supreme Court's Recent Decision Concerning Law Schools' First Amendment Rights and Campus Military Recruitment*, FINDLAW'S WRIT, Mar. 17, 2006, http://writ.news.findlaw.com/commentary/20060317_brownstein.html ("[W]e think . . . the Court's opinion last week . . . didn't really engage past Court doctrines and precedents; whatever the quality of the plaintiffs' arguments, the Court needed to say much more than it did in explaining its result."); Dale Carpenter & Robert Corn-Revere, Rumsfeld v. FAIR*: What Does It Mean?*, FIRST AMENDMENT CENTER, Mar. 9, 2006, http://www.firstamendmentcenter.org/analysis.aspx?id=16613 (exploring some of the questions left unanswered by *FAIR*).

277 For such a critique, see Dale Carpenter, *Unanimously Wrong*, 2006 CATO SUP. CT. REV. 217, 233–53.

278 Rumsfeld v. Forum for Academic & Inst'l Rights, Inc. (*FAIR*), 547 U.S. 47, 54 (2006).

279 For exemplary discussions, see, for example, Richard A. Epstein, *Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 26–28 (1988); Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1326–51 (1984); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413 (1989); William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1445–49 (1968).

280 United States v. Am. Library Ass'n (*ALA*), 539 U.S. 194, 213 (2003) (plurality opinion) (discussing Legal Servs. Corp. v. Velazquez, 531 U.S. 533 (2001)).

281 500 U.S. 173 (1991).

means of conditions attached to the expenditure of Government funds" might be especially restricted.[282]

The Court here simply ignores such concerns altogether. It avoids the issue by finding that because the underlying First Amendment claims at issue in the case fail, Congress can "directly require the schools to allow the military to recruit on campus."[283] As Dale Carpenter has noted, we are left with the striking conclusion that "the government could [directly] *require* schools to admit military recruiters under threat of criminal sanction, not merely withdraw funds from schools that bar recruiters."[284] *FAIR* thus leaves the unconstitutional conditions doctrine in the same unsettled state it was in before, and does so in a way that raises broad and troubling implications for future cases.

More difficult questions of coherence and consistency are raised by the Court's direct treatment of the First Amendment issues raised in *FAIR*. Consider the Court's treatment of the compelled speech issue.[285] The Court's rejection of the compelled speech claim is ultimately grounded on its conclusion that "nothing in the Solomon Amendment restricts what [the law schools] may say about the military's policies."[286] That makes the case, in the Court's view, "a far cry from the compelled speech" at issue in prior cases.[287] But the same option was available in some of the very cases the Court sought to distinguish. In *Wooley v. Maynard*,[288] for instance, Justice Rehnquist noted in his dissent that Maynard was free to "place on [his] bumper a conspicuous bumper sticker explaining in no uncertain terms" his "violent[] disagree[ment]" with the "Live Free or Die" license plate motto.[289] Indeed, in another compelled speech case the *FAIR* Court attempted to distinguish, the Court treated the very fact that the speaker would be forced to voice its disagreement with the govern-

282 *Id.* at 200; *see also ALA*, 539 U.S. at 227 (Stevens, J., dissenting) (suggesting that the unconstitutional conditions doctrine might apply differently where the government uses its funds "to impose controls on an important medium of expression").

283 Carpenter, *supra* note 277, at 228.

284 *Id.* at 254.

285 Rumsfeld v. Forum for Academic & Inst'l Rights, Inc. (*FAIR*), 547 U.S. 47, 60–68 (2006). For an excellent recent treatment of the compelled speech doctrine, see Larry Alexander, *Compelled Speech*, 23 CONST. COMMENT. 147 (2006).

286 *FAIR*, 547 U.S. at 49.

287 *Id.* at 62.

288 430 U.S. 705 (1977).

289 *Id.* at 721–22 (Rehnquist, J., dissenting) (discussing State v. Hoskin, 295 A.2d 454, 457 (N.H. 1972)).

ment as a First Amendment problem in and of itself.[290] In short, whatever the merits of the conclusions ultimately reached by the Court on the compelled speech claim in *FAIR*, it fails either to show that the questions raised by the case are as easy as it says, or to provide a decent justification for its conclusions.

Similar difficulties are evident in the Court's rejection of FAIR's expressive conduct claim on the grounds that only "conduct that is *inherently* expressive" is entitled to First Amendment expression.[291] Flag burning, it suggests, *is* "inherently expressive."[292] By contrast, "the conduct regulated by the Solomon Amendment"—namely, the law schools' efforts to welcome or to bar military recruiters—"is not inherently expressive,"[293] and is thus removed from the pale of the First Amendment altogether.[294] Any expression on the law schools' part exists "only because the law schools accompanied their conduct with speech explaining it."[295]

The Court's thin treatment of this issue leaves a host of questions in its wake. In truth, *nothing* is "inherently" expressive.[296] Until now, the Court's method for determining whether conduct is expressive had been to focus on whether particular conduct carries a combination of speaker's intent and audience understanding—the so-called *Spence* test.[297] In short, the Court examined the *context* in which particular conduct occurred to determine whether it was expressive or not. It was this contextual approach that led the Court in *Johnson* to conclude that burning a flag, in circumstances in which an individual intended to convey a message of disdain for the United States and in which audience members understood him to be conveying that mes-

290 *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 16 (1986) (plurality opinion) ("[T]here can be little doubt that appellant will feel compelled to respond to arguments and allegations made by [the third party] in its messages to appellant's customers. That kind of forced response is antithetical to the free discussion that the First Amendment seeks to foster.").

291 *FAIR*, 547 U.S. at 66 (emphasis added). The novel nature of this doctrinal move is discussed in Carpenter & Corn-Revere, *supra* note 276.

292 *FAIR*, 547 U.S. at 66 (discussing Texas v. Johnson, 491 U.S. 397 (1989)).

293 *Id.*

294 In Frederick Schauer's terms, rather than treat the Solomon Amendment case as raising a question of the appropriate level of *protection*, the Court treats it as raising a question of *coverage*, and concludes that, at least with respect to the plaintiffs' expressive conduct claims, the case is just not covered by the First Amendment. *See* Schauer, *supra* note 273, at 1769–74.

295 *FAIR*, 547 U.S. at 66.

296 *See* Carpenter, *supra* note 277, at 244–45.

297 *See* Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam).

sage, was expressive conduct.[298] It was the context in which the flag burning occurred, and not anything immanent in the act of flag burning itself, that made it expressive. Indeed, some of the contextual factors considered by the Court in *Johnson* included the fact that Johnson's actions took place at a political demonstration, and that Johnson subsequently described his actions as expressive at trial.[299] In other words, a substantial part of the reason the *Johnson* Court treated the flag burning in that case as expressive conduct had to do, not with "the conduct itself," but "the speech that accompanie[d] it."[300]

The *FAIR* Court, in its eagerness to characterize the law schools' conduct as nonexpressive, neglects the *Spence* test altogether. Thus, it fails to ask whether the law schools' decision to deliberately exclude military recruiters from campus, in a context in which they sought to advance a policy of nondiscrimination, could be treated as sending a "message," and whether an audience of law faculty and students, among others, could understand that message. Dale Carpenter has plausibly suggested that "[t]he answer . . . should have been 'yes' to both questions."[301] Again, whatever the answer to these questions ought to be in the final analysis, the Court hardly provides an adequate justification of its conclusion, and it leaves in its wake a variety of difficult and unanswered questions about the shape and scope of First Amendment doctrine.

Similar difficult questions arise with respect to each aspect of the Court's First Amendment analysis in *FAIR*. I will not rehash all of them here.[302] My goal, after all, has not been to argue that the Court was wrong on the First Amendment issues raised in *FAIR*. Rather, it has been to suggest that, despite the conventional wisdom on *FAIR*, the Court's opinion in this case was not preordained, and its reasoning is far from clearly correct. For all its seeming simplicity, *FAIR* obscures a host of troubling issues that should be cause for real concern among First Amendment scholars.

This conclusion in turn suggests two somewhat subtler points, which point both to the beginning of this Article and to its next Part. First, looking back to the Introduction, we can view the troubling doctrinal questions that emerge from *FAIR* not as a result of poor judicial craftsmanship, nor as an example of the compromises necessary to pull together a unanimous Court. Rather, they are the product of

298 *See* Texas v. Johnson, 491 U.S. 397, 403–06 (1989).

299 *Id.* at 406.

300 *FAIR*, 547 U.S. at 66.

301 Carpenter & Corn-Revere, *supra* note 276.

302 For a superb discussion of these and other First Amendment issues in *FAIR*, see Carpenter, *supra* note 277, at 233–53.

problems residing at a more fundamental level of First Amendment jurisprudence. The fault lies in the instability and incoherence that emerge from the tension between the Court's desire to arrive at an acontextual set of governing rules for the First Amendment, and the competing desire to respond to the complexity and diversity of the actual facts on the ground in First Amendment cases.

Second, the critique of the opinion I have offered thus far is ultimately intimately connected to this Article's examination of deference. Whether or not the Court said so directly, many of the most troubling questions about the Court's treatment of First Amendment doctrine in *FAIR* are ultimately questions about how the Court *knows* what it purports to know in this case. How does it know when the government's requirement that an entity comply with various directives—assisting military recruiters, placing messages on license plates, and so on—rises to the level of meaningful compelled speech, and when it is mere "trivia[]"?[303] How does it know when particular conduct is expressive, and from whose perspective should we answer that question?

These are all ultimately questions about how the Court can form the knowledge that it needs to make its judgments—knowledge about the real world in which speech and association occur. As I have shown, deference is one of the central devices that the Court uses to acquire this knowledge, or to substitute for its own lack of knowledge. The Court's terse opinion in *FAIR* thus conceals a host of profoundly difficult questions concerning how the Court knew what it purported to know in *FAIR* and to whom it should have deferred. I turn to those questions now.

III. THREE FACES OF DEFERENCE IN *RUMSFELD V. FAIR*

The time has now come to put this Article's deepened understanding of deference to work in examining the Court's decision in *FAIR*. Leaving aside the doctrinal problems I have just addressed, *FAIR* suffers from two principal flaws. First, the undertheorized nature of deference in constitutional law left the Court ill-equipped to deal with a case that so substantially relied on deference as a decisive factor. Second, that difficulty was compounded by the fact that *FAIR* presented the Court not simply with a single institution's claim of deference, but with three *competing* claims of deference. The Court's resolution of those competing claims was more than unsatisfactory: indeed, its assessment of the competing claims to deference in *FAIR*

303 *FAIR*, 547 U.S. at 62.

got things exactly backward. This conclusion is best reached by examining each of the competing claims to deference that arose in the case.

A. Military Deference

The first claim of deference at issue in *FAIR* is also the most crucial to the Court's opinion: deference to the military—or, more accurately, deference to Congress in its exercise of supervisory power over the military. Congress, in asserting the need for the expansion of the Solomon Amendment, asserted that "[t]he military's ability to perform at [a high] standard can only be maintained with effective and uninhibited recruitment programs."[304] The government argued before the Court that this and similar statements about the necessity of the Solomon Amendment demanded a deferential posture from the Court, because the case "involve[d] a challenge to a military judgment."[305] It added that deference was appropriate because the Court had no business "second-guessing empirical claims about military readiness made by the political Branches and the military."[306]

To say the Court accepted the petitioners' claim of deference is an understatement. The Court spoke briefly but bluntly on the matter:

> [T]he fact that legislation that raises armies is subject to First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality; as we recognized in *Rostker*, "judicial deference . . . is at its apogee" when Congress legislates under its authority to raise and support armies.
>
> . . . Congress' decision to proceed indirectly [through its spending power rather than directly under its military power] does not reduce the deference given to Congress in the area of military affairs.[307]

The Court had little more to say about the government's invocation of judicial deference.[308] But deference to the military neverthe-

304 150 CONG. REC. H1695 (daily ed. Mar. 30, 2004) (statement of Rep. Myrick).

305 Brief for the Petitioners at 38, *FAIR*, 547 U.S. 47 (No. 04-1152).

306 *Id.* at 39.

307 *FAIR*, 547 U.S. at 58 (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

308 In rejecting the Third Circuit's conclusion that the government had failed to "produce evidence establishing that the Solomon Amendment was necessary and effective," the Court did add that such judgments are "for Congress, not the courts," again citing *Rostker*. *Id.* at 67 (citing U.S. CONST., art. I, § 8, cls. 12–13; *Rostker*, 453 U.S. at 64–65).

less plainly pervades the Court's opinion in *FAIR*.[309] The Court's opinion "treats the liberty claims [made by the FAIR plaintiffs almost with contempt,"[310] swallowing whole the claims of necessity made by the government and sweeping aside the respondents' assertions as a "stretch," "plainly overstat[ed]," "exaggerate[ed]," and "trivializ[ing] the freedom protected" in prior First Amendment cases.[311] For good measure, the Court throws in apparently gratuitous references to the terror strikes of September 11, 2001.[312] In sum, deference to the military is a tidal wave in *FAIR*, overwhelming any skepticism concerning Congress' claims about the necessity of the Solomon Amendment and washing away any competing claims to deference raised by the law school plaintiffs.

The Court's approach to the military deference claim in *FAIR* is subject to criticism on several grounds. First, one might launch a frontal assault on judicial deference to the military, or to Congress' exercise of its military power. The military deference doctrine has been subject to extensive criticism.[313] Perhaps the most sustained and interesting work on this subject has come from Professor Diane Mazur, who has written to criticize both the Court's deferential approach to the military and the legal academy's own failure to engage on a constructive level with the military.[314] Mazur argues persuasively that military deference doctrine has long since slipped loose of any reasonable restraints, and has instead become "an all-purpose tool to avoid detailed scrutiny of factual and legal assertions about the

309 *See* Carpenter, *supra* note 277, at 235 ("While the Court has always been deferential to Congress' judgment about military needs, this deference in cases like *FAIR* becomes almost complete submission.").

310 *Id.* at 234.

311 *FAIR*, 547 U.S. at 62, 69.

312 *See id.* at 53 ("[T]he Government—after the terrorist attacks on September 11, 2001—adopted an informal policy of 'requir[ing] universities to provide military recruiters access to students in equal quality and scope to that provided other recruiters.'" (quoting Forum for Academic & Inst'l Rights v. Rumsfeld (*FAIR I*), 291 F. Supp. 2d. 269, 283 (D.N.J. 2003))); *see also* Carpenter, *supra* note 277, at 234–35 (noting that "[t]here is . . . no evidence that the government was addressing any problem arising from 9/11 when it decided to expand the reach of the Solomon Amendment," and arguing that such references do little more than "try to silence serious critics of government policy" while demonstrating an "unthinking acceptance of almost any security claim made by the government").

313 *See, e.g.*, Mazur, *supra* note 49, at 487–98; Mazur, *supra* note 104; Dienes, *supra* note 51, at 798–827.

314 *See* Mazur, *supra* note 49, at 487–510; Diane H. Mazur, *Is "Don't Ask, Don't Tell" Unconstitutional After* Lawrence*? What It Will Take to Overturn the Policy*, 15 U. FLA. J.L. & PUB. POL'Y 423, 431–41 (2004); Mazur, *supra* note 104, at 703; Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 553, 580 (2003).

military."[315] While there is much in Professor Mazur's work to be commended,[316] we need not go that far here. Surely there are occasions in which, for reasons of legal or epistemic authority or both, judicial deference to the military or to Congress as the regulator of the military is appropriate.[317] So we may set aside a general critique of military deference. Even so, the Court's treatment of military deference in *FAIR* leaves much to be desired.

First, as a matter of epistemic authority, there is good cause to question the Court's deference to Congress with respect to the needs of military recruiters. Nothing in the record before the Court indicated that Congress had acted from a position of epistemic authority. The debate over the Solomon Amendment showed no serious, informed consideration of whether military recruiters required equal access to law school students in order to achieve any recruiting objectives.[318] If anything, the evidence suggested that Congress was acting in the teeth of a superior epistemic authority: the Department of Defense, whose expertise in military matters surely outstrips that of the generalists in Congress. As the congressional debate disclosed, the Department of Defense considered the Solomon Amendment "unnecessary" and "duplicative."[319] This fact alone does not eliminate Congress' entitlement to deference, of course. As a matter of epistemic authority, however, it certainly takes the wind out of Congress' sails, and demonstrates again that invocations of judicial deference alone cannot supply a final answer to the Court in cases in which competing claims of epistemic authority are at issue.

As a matter of legal authority, too, the Court's willingness to surrender its judgment to Congress was unwarranted by Congress' own behavior. To the extent that an institution claiming legal authority-

315 Mazur, *supra* note 49, at 481.

316 In particular, her focus on law schools' failure to bridge the military-civilian gap by engaging more closely with the military is a valuable argument that deserves far wider attention. *See generally id.* at 477, 498–510 (taking law schools "to task for a counterproductive over-reliance on expressive shunning of the military from the law school community").

317 *See, e.g.*, Lichter v. United States, 334 U.S. 742, 755–64 (1948) (finding Congress' power to raise and support armies justified deference to congressional decisions regarding conscription of manpower, supplies and equipment, and compensation for such conscription during the "previously unimagined" conditions of World War II).

318 This lack of evidence is well canvassed in the amicus brief of the Servicemembers Legal Defense Network in *FAIR*. Brief for Servicemembers Legal Defense Network as Amici Curiae Supporting Respondents at 17–28, Rumsfeld v. Forum for Academic & Inst'l Rights, Inc. (*FAIR*), 547 U.S. 47 (2006) (No. 04-1152).

319 140 CONG. REC. 11,440 (1994) (statement of Rep. Underwood).

based deference is obliged to deliberate soundly and meaningfully about subjects that are within the clear scope of its legal authority,[320] Congress fell short of this obligation. The legal authority argument for judicial deference to Congress in military matters is not that Congress may do what it likes where the military is concerned; rather, it is that Congress should be given substantial deference where it is genuinely attempting to regulate the affairs *of the military*. Here, Congress was not acting to regulate the military so much as it was acting to punish the universities. The record is replete with indications that Congress was far less concerned with military readiness than it was with "send[ing] a message over the wall of the ivory tower of higher education" that the "starry-eyed idealism" of the universities "comes with a price."[321] Nothing in any of this rhetoric suggests that Congress passed the Solomon Amendment with any regulatory interest in mind that related specifically to the well-being and readiness of the military. To the contrary, Congress' clear interest here was to send *universities* a message of harsh disapproval about their access policies with respect to military recruiters.

My point here is not that Congress was wrong to disapprove of the law schools' actions, or that it could not, within constitutional limits, seek a legislative means of registering its disapproval. Of course it could. Rather, the question is whether, having acted as it did and for the reasons it did, Congress was entitled to invoke judicial deference for its general assertion that requiring equal access to military recruiters was necessary to ensure military readiness. Given that Congress was acting outside the proper scope and subject matter of its legal authority as the military's regulator, there is simply no good reason why the Court should have deferred as it did in *FAIR*.[322] In a somewhat different context, Diane Mazur has observed that Congress

320 *See supra* Part I.E.

321 140 CONG. REC. 11,441 (1994) (statement of Rep. Pombo); *see also id.* at 11,439 (statement of Rep. Solomon) (suggesting that the purpose of the Solomon Amendment was to "tell[] 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," but "do not expect Federal dollars to support your interference with our military recruiters").

322 This does not mean that an equal access policy might not, indeed, serve the interests of military recruiters. There are certainly common sense reasons to suppose that it would. *See, e.g.*, 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, 429 (2005). The question is whether, given the extent of Congress' evident interest in sending a message to universities with the Solomon Amendment, and its equally evident indifference to the actual question of whether the Amendment served military needs, its general and unsupported "common-sense conclusion[s]" on this question were worthy of deference as a

sometimes relies on the military deference doctrine not to assert its legal or epistemic superiority to the courts on military matters, but to "state its views about equality" and other constitutional matters while insulating itself from the independent judgment of the courts.[323] That is precisely what happened in *FAIR*. Congress wished to make a statement about the way in which universities exercised their speech rights, a matter in which the courts often defer to universities but certainly do not defer to external regulators, while invoking military deference doctrine to fend off the more searching judicial review that would normally be triggered by such a statement. Such a stratagem is simply not worthy of deference, on epistemic or legal authority grounds.

The Court's excessive deference to the military in *FAIR* suffers from two other flaws, both of them related to the question of the appropriate scope of deference in such cases. First, *FAIR* is far afield from those cases in which the legal and epistemic authority of the military, or of Congress as the author of military regulations, is most pertinent. Recall that one of the foundations of the military deference doctrine is that "the military is, by necessity, a specialized society separate from civilian society."[324] In those circumstances, it makes sense to conclude that constitutional rights must be interpreted in a way that respects the military's need to "foster instinctive obedience, unity, commitment, and esprit de corps."[325] In other words, the military deference doctrine is most applicable in cases that involve *internal* matters of military discipline and order. *FAIR* was not such a case. It concerned the internal operations of universities, not of the military. To be sure, this doctrine is also based on the view that the political branches are uniquely tasked with the responsibility of governing the armed forces, and that those branches "have particular expertise in assessing military needs."[326] But where, as in *FAIR*, Congress offered no evidence in support of its military readiness claims, and the legislation operated primarily in the civilian sphere, the grounds for deference were far weaker than they would have been in a case involving the military alone.[327] Thus, the need for deference to Congress in its

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matter of epistemic or legal authority. Reply Brief for Petitioners in Support of Petition for Writ of Certiorari at 8, *FAIR*, 547 U.S. 47 (No. 04-1152).

323 Mazur, *supra* note 49, at 500.

324 Parker v. Levy, 417 U.S. 733, 743 (1974).

325 Goldman v. Weinberger, 475 U.S. 503, 507 (1986).

326 John F. O'Connor, *Statistics and the Military Deference Doctrine: A Response to Professor Lichtman*, 66 MD. L. REV. 668, 676 (2007).

327 O'Connor's article insists that the military deference doctrine may still apply in cases involving civilians. *See id.* at 700–03. As a descriptive matter, that is true,

guise as military regulator was not at its "'apogee'" in *FAIR*;[328] it was at its nadir.

This point about the proper scope of the military deference doctrine can also be appreciated from a broader theoretical perspective. Consider Professor Robert Post's seminal discussion of the different domains of government authority in which the First Amendment operates. Post distinguishes between the domains of "governance" and "management."[329] When the government exercises managerial authority, it "acts to administer organizational domains dedicated to instrumental conduct."[330] When it acts managerially, it makes sense to permit the government to "constitutionally regulate speech as necessary to achieve instrumental objectives."[331] In those circumstances, courts ought to defer "to the judgment of institutional officials respecting the need to manage speech."[332] Prominent examples of the government's exercise of managerial authority include its supervision of public employees, of prisoners, and of the military. By contrast, where government is exercising its "governance" authority to regulate the affairs of everyday citizens in the "public realm,"[333] judicial deference is not appropriate. In these cases, government is bound instead by "ordinary principles of First Amendment jurisprudence."[334]

In some cases, the line between governance and management may be unclear. One such case is *Greer v. Spock*.[335] There, the Court rejected a challenge by Dr. Benjamin Spock to the military's refusal to permit him to give a campaign speech at Fort Dix.[336] The case thus involved a civilian challenge to a military regulation affecting both his

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although one may question just how far the military deference doctrine should apply in such cases—particularly where a law operates entirely in the civilian world, where it has a significant impact on individual rights, and where Congress' invocation of military needs is cursory at best. In any event, O'Connor concedes that the doctrine is less applicable where a law primarily involves "the constitutional guarantees of everyday citizens," *id.* at 700, and suggests that the courts should give substantial consideration to the rights of individual civilians in cases involving laws that "primarily burden[] nonmilitary personnel or entities" *id.* at 702.

328 Rumsfeld v. Forum for Academic & Inst'l Rights, Inc. (*FAIR*), 547 U.S. 47, 58 (2006) (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

329 POST, *supra* note 65, at 200, 240.

330 *Id.* at 200.

331 *Id.*

332 *Id.* at 240.

333 *Id.* at 200.

334 *Id.* at 240.

335 424 U.S. 828 (1976).

336 *See id.* at 840.

First Amendment rights and those of his listeners. At the same time, it is clear that the government was not simply regulating the general public domain; rather, it was regulating the internal affairs of a military base, a nonpublic forum in which the military's desire to govern its own affairs in order to ensure a well-disciplined fighting force was genuinely deserving of deference.[337]

FAIR is far less ambiguous. The government here was clearly acting in the realm of governance, not management. It was not regulating the internal affairs of the military, but rather was seeking to use its regulatory power over the military to colonize the realm of public discourse. In those circumstances, Post is right: "ordinary principles of First Amendment jurisprudence," and not deference, should be the order of the day. Indeed, as we shall shortly see, if there was a strong argument in *FAIR* for judicial deference based on respect for managerial institutions, it was owed to the *law schools*, not the military.

B. Dale *Deference*

The second competing claim for judicial deference came from the law school plaintiffs: the claim that the law schools, as expressive associations, were entitled to substantial deference under the Court's decision in *Boy Scouts of America v. Dale*.[338] In that case, the Court made clear that it would defer substantially to an expressive association in evaluating its claims about its own purposes as an association and in considering whether particular laws or conduct would impair its ability to express itself.[339] A claim of "*Dale* deference," if fully accepted by the Court in *FAIR*, would have led it to defer substantially to the law schools' own description of their expressive interests and to defer to their assertion that the Solomon Amendment significantly interfered with their ability to function as expressive associations.

Dale has been the subject of voluminous discussion and criticism, and I will not rehash it here.[340] For now, I shall assume that the Court's opinion in *Dale* was correct, or at least that it was sincere: that the Court genuinely intended to extend substantial deference to the views of expressive associations. Given that assumption, a few observations about the role of *Dale* deference in *FAIR* are in order.

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337 *See id.* at 837–40.

338 530 U.S. 640 (2000).

339 *See, e.g., id.* at 653.

340 *See, e.g.*, Symposium, *The Freedom of Expressive Association*, 85 MINN. L. REV. 1475 (2001); Symposium, *Perspectives on Constitutional Exemptions to Civil Rights:* Boy Scouts of America v. Dale, 9 WM. & MARY BILL RTS. J. 591 (2001).

First, one finds few traces in *FAIR* of the *Dale* Court's sweeping language concerning deference. Professor Carpenter rightly observes that the "deferential posture [of *Dale*] is completely missing from the *FAIR* decision both in rhetoric and in substance."[341] The Court did not directly reject the law schools' claim of deference, to be sure. But the Court's narrow construction of *Dale*, which reads associational rights as implicated only in cases that either directly involve membership rights or make group membership "less attractive,"[342] effectively allows the Court to sidestep the law schools' expressive association claim altogether.

But there is more to *FAIR*'s treatment of *Dale* deference than this. The Court's language brims with skepticism toward the FAIR plaintiffs' claims: "The law schools *say* that allowing military recruiters equal access impairs their own expression by requiring them to associate with the recruiters . . . ."[343] It "almost mocks their claims."[344] *FAIR* does not simply hold that *Dale* is inapplicable to the plaintiffs' claims. Rather, it suggests that the Court is exasperated by the law schools' insistence that they are affected as expressive associations by the Solomon Amendment. Certainly there is not so much as a hint of deference to FAIR or its law school members as expressive associations.

There are at least two possible reasons for the absence of deference here. First, it seems apparent that *FAIR* is an example of the kind of rhetorical overkill that may occur when a court lacks any specific tools to select between competing claims of deference, and yet feels obliged to privilege one over the other. At no point does the Court openly acknowledge that more than one claim of deference might be relevant in the case. Nor does the Court offer a blueprint for the principled resolution of cases involving competing claims of deference. Instead, it launches its opinion with a statement in support of deference to Congress' exercise of its war powers that is so strong that it sweeps aside any possibility of even acknowledging the law school plaintiffs' competing claims of epistemic or legal authority as expressive associations.[345]

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341 Carpenter, *supra* note 277, at 252.

342 Rumsfeld v. Forum for Academic & Inst'l Rights, Inc. (*FAIR*), 547 U.S. 47, 69 (2006).

343 *Id.*

344 Carpenter, *supra* note 277, at 252. Judge Posner puts it more kindly, noting the opinion's "polite but unmistakable rebuke of the legal professoriat for overreaching." Posner, *supra* note 274, at 51.

345 *Cf. The Supreme Court, 2005 Term: Leading Cases*, 120 HARV. L. REV. 125, 259 (2006) ("[A]n association's privilege of self-interpretation seemingly disappeared,

Second, it seems evident that the *FAIR* Court refuses to defer not simply because it concludes that *Dale* was not meant to apply in situations like this one, but because the Court is confident that, on epistemic and legal authority grounds, it is at least equal to the law school plaintiffs, if not superior. The Court's strong conclusion that the law schools lose none of their associational freedom under the Solomon Amendment suggests that it simply believes that nothing about requiring the on-campus presence of military recruiters can meaningfully affect the mission of the law schools. And that in turn suggests that the Court is confident that it understands what the mission of those law schools is, and what it entails. To say, as the Court does, that "[a] military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message,"[346] is not entirely unreasonable. What is significant, though, is the fact that the Court feels entitled to reach that conclusion on its own, without deferring to the expertise of the expressive association itself.

The Court could have taken a similarly assertive approach in *Dale* itself. Surely the Boy Scouts do not rise to the level of an occult mystery, and the Court could have drawn its own conclusions about the Scouts' mission. Of course, it did not, preferring instead to defer to the Scouts' own superior knowledge concerning their organization's purposes and what would impair those purposes.[347] The change in the Court's approach to such questions in *FAIR* is unjustified. There is no reason to think that law schools are any less epistemically superior to courts with respect to their understanding of their own mission than the Boy Scouts were. Moreover, there is every reason to think that law schools are not uniform, and may vary greatly as expressive associations. Some may match the Court's description; others may prize nondiscrimination so greatly that even trivial cooperation with the military might significantly affect their ability to carry out their mission. The Court's confident assessment of the law school plaintiffs in *FAIR* suggests a broad implicit conclusion: "All law schools are the same. They teach and sponsor research. Anything else just isn't part of the core purpose of the law school." That is not necessarily true for every law school. Even if it were, however, what is troubling is the Court's very confidence that it is right, its refusal to acknowledge that the law schools are in a better position than the Court to understand

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either erased from the law books entirely or merely overwhelmed by the deference owed to Congress's war powers.").

346 *FAIR*, 547 U.S. at 70.

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

what they do and what would impair them. Had the Court taken *Dale* more seriously, it would have deferred far more to the law schools on these questions. That it did not is disturbing.[348]

Having said all this, I must nevertheless confess some ambivalence about the FAIR plaintiffs' heavy reliance on *Dale* deference. The Court should have paid more attention to the plaintiffs' *Dale* deference arguments. But that does not mean those arguments should have been central to the plaintiffs' case. *Dale* deference is a catchall form of deference involving a broad spectrum of expressive associations. But universities are a more specific subset of expressive association, one with a long history of professional norms and practices, and an equally long history of deferential judicial treatment. *Dale* deference is thus not the most precise legal tool available to evaluate whether, when, and how much courts ought to defer to plaintiffs like the FAIR plaintiffs. The law schools could have turned to the longer tradition of judicial deference to universities. What that form of deference entails, what the Court did with it in *FAIR*, and what it might have meant for the law school plaintiffs, are the subjects of the next subpart.

C. Grutter *Deference and Universities as First Amendment Institutions*

The final form of deference at issue in *FAIR* concerns deference to universities as educational institutions. Although this form of deference has been around for decades, I will call it "*Grutter* deference," after *Grutter v. Bollinger*,[349] a recent and particularly prominent and important example of this approach.[350]

Grutter involved a challenge to the use of race as a factor in the admissions program for the University of Michigan Law School. The Law School argued that its use of race was essential to its mission of seeking a diverse student body, and that this interest in diversity should be counted as a compelling state interest.[351] Writing for the Court, Justice O'Connor declared that "[t]he Law School's educational judgment that such diversity is essential to its educational mis-

348 Some of the flavor of the Court's presumptuous approach here is nicely captured by Pamela Karlan, who observes that the Justices, who all have firsthand knowledge of "elite law schools," "are perhaps simultaneously more trusting, and more skeptical, about how [law] schools operate." Karlan, *supra* note 199, at 1614–15. Put slightly differently, *FAIR* suggests that the Court is willing to "defer" to law schools and universities—provided that they do not diverge from the Justices' own expectations about the function of those institutions.

349 539 U.S. 306 (2003).

350 *See* Horwitz, *supra* note 4, at 464; Horwitz, *supra* note 1, at 1529.

351 *Grutter*, 539 U.S. at 327–28.

sion is one to which we defer."[352] Such "complex educational judgments," she continued, lie "primarily within the expertise of the university."[353] The Court thus deployed deference as a powerful tool in finding that educational diversity was a compelling state interest. As Justice O'Connor observed, this determination was consistent with a long tradition on the Court of "giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits."[354]

This brief description understates the powerful effect of deference to the university in *Grutter*.[355] Although *Grutter* was a Fourteenth Amendment case,[356] it relied to a significant degree on the Court's willingness to defer to the university's assessment of the importance of diversity to its academic mission, a deference that stemmed in turn from the Court's treatment of academic freedom under the First Amendment.

Grutter deference thus bespeaks a separate, and more specific, form of deference than *Dale* deference. It represents a form of deference to universities as "First Amendment institutions"—institutions that are vital to public discourse, that have a distinct and well-established character, and that generally follow a specific set of norms and practices that make it possible for courts to treat them as substantially autonomous institutions.[357] Under *Grutter* deference, courts recognize that universities are entitled to deference for reasons of both epistemic and legal authority. Epistemically, courts are aware that they are ill-suited to "evaluate the substance of the multitude of academic

352 *Id.* at 328.

353 *Id.*

354 *Id.* (citing Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985)); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 319 n.53 (1978) (opinion of Powell, J.); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 96 n.6 (1978)).

355 *See generally* Horwitz, *supra* note 4, at 467, 495–97 (arguing that "the Law School was accorded deference far beyond that granted to any other institution whose affirmative action policies had come before the Court").

356 *Grutter*, 539 U.S. at 317.

357 *See* Horwitz, *supra* note 4, at 567–74 (noting the *Grutter* Court's sensitivity to the institutional character of First Amendment subjects); Horwitz, *supra* note 1, at 1510–12 (arguing that such institutions contribute significantly to public discourse and are largely self-regulating); Schauer, *supra* note 172, at 919–26 (suggesting that granting institutions a "considerable degree" of political autonomy "may be both normatively attractive and highly consistent with First Amendment doctrine"); *see also* Hills, *supra* note 81, 175–96 (discussing the constitutional importance of a wide variety of groups that the author labels "private governments," and arguing that their contributions to the polity merit a substantial degree of legal autonomy).

decisions" made by universities.[358] And whether they are public or private, universities also partake of a quality of legal authority that is equally deserving of deference. They are "intermediate institutions"[359] of ancient historical pedigree, which serve a vital function at one remove from the state, and on which the state is ultimately dependent for the formation and development of public discourse.[360] To that end, the First Amendment substantially insulates these intermediate institutions from subservience to the state, preserving a sphere of sovereignty in which they can operate independently.[361]

Having explored this form of deference at length elsewhere,[362] I will be sparing here. In brief, *Grutter* deference, or deference to universities as First Amendment institutions, involves the willingness, if not obligation, of the courts to defer substantially to universities' own judgments on matters such as what their academic mission requires, within "constitutionally prescribed limits."[363] To be sure, the courts will defer only in cases in which a university is genuinely exercising academic judgment;[364] in other words, to earn deference, the university must act within the sphere of its legal and epistemic authority. But "courts should be careful not to police the boundaries of the 'genuinely academic' too rigorously."[365] Thus, courts should defer substantially to universities' own judgment about what their academic mission requires, provided that they are actually making an academic decision; and courts should *also* take a fairly deferential approach "in determining what *constitutes* an academic decision."[366]

Notwithstanding those who have argued that the decision in *FAIR* was an easy one, an approach to the case that took seriously the kind of deference the Court had displayed in a host of prior cases dealing with academic freedom, and which had featured so prominently in *Grutter* just a few terms earlier, would have counseled a very different

358 *Ewing*, 474 U.S. at 226.

359 Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1843 (2001).

360 *Id.* at 1848.

361 *See, e.g.*, Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1625 (1998) ("Freedom of private association 'implies a degree of norm-generating autonomy on the part of the association'—'a liberty and capacity to create and interpret law—minimally, to interpret the terms of the association's own being'" (quoting Robert M. Cover, *Foreword:* Nomos *and Narrative*, 97 HARV. L. REV. 4, 32 (1983))).

362 *See* Horwitz, *supra* note 1, at 1504–32.

363 Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

364 *See* Horwitz, *supra* note 1, at 1542.

365 *Id.*

366 *Id.* (emphasis added).

set of reasons, if not a different outcome. Under an approach that took *Grutter* deference seriously, the Court would have been obliged to defer substantially to the FAIR plaintiffs' assertion that their desire to exclude military recruiters from campus, or to grant them something less than absolutely equal access, was compelled by their own sense of their academic mission, and that compliance with the Solomon Amendment would do serious violence to that academic mission.[367] If the Court took a strongly deferential approach, that assertion might have sufficed to defeat the government's own interest in placing military recruiters on campus. Even if the Court had openly weighed the competing interests of the military and the academy, the presumption in favor of educational institutional autonomy, in cases that go to the core of what *the university* asserts is its own mission, might well outweigh the admittedly significant government interests at stake in *FAIR*.

Of course, that is not what happened. Having relied so heavily on deference to the university's own "complex educational judgments"[368] just three years earlier in *Grutter*, the Court's response to the FAIR plaintiffs' invocation of *Grutter* deference was . . . silence. The Court did not conclude that any claim of deference to the universities as academic institutions was outweighed by the government's strong interest in military recruiting. Nor did it pay lip service to the *Grutter* deference claim while quietly eviscerating it, as it did with the plaintiffs' *Dale* deference arguments.[369] Instead, it ignored altogether the arguments in favor of deference to the law schools as educational institutions.[370]

That silence is an important failure on the Court's part. Viewed properly, *FAIR* was a tale of competing claims to deference: military deference, *Dale* deference, and *Grutter* deference. Rather than confront these competing claims openly and directly, the Court overrelied heavily on the first form of deference, paid lip service to the second, and ignored the third. This clumsy approach speaks volumes about the Court's difficulty in resolving competing claims to deference, all of which are grounded in the epistemic or legal authority of the would-be deferee and all of which are supported by its prior precedents.

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367 *See* Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 863 (2008) ("As with agency interpretations of their own regulations, organizations' interpretations of their animating institutional norms should be entitled to deference.").

368 *Grutter*, 539 U.S. at 328.

369 *See supra* Part III.B.

370 *See* Roger W. Bowen, *Unfair to FAIR*, INSIDE HIGHER ED, Mar. 9, 2006, http://www.insidehighered.com/views/2006/03/09/bowen.

Indeed, in many respects the claim to *Grutter* deference was not the weakest claim to deference in *FAIR*, it was the strongest. As we have seen, the invocation of deference to Congress' exercise of its war powers was arguably far afield from the kinds of cases—cases involving the exercise of genuine expertise by the military or Congress, or involving the internal affairs of the armed forces—that most warrant this form of deference. Similarly, although there were plausible arguments in favor of the FAIR plaintiffs' invocation of *Dale* deference, that form of deference is not the most relevant for the university as a First Amendment institution. But there *is* a long tradition of judicial deference to universities' own sense of their academic mission, and it should have applied in *FAIR*. The kinds of questions occasioned by the case—questions about whether particular law schools are neutral institutions or are, instead, "normative" institutions; questions about whether certain law schools prize equality and nondiscrimination, not just as general values, but as essential aspects of their educational mission; and questions about whether the forced provision of equal access to discriminatory employers such as the military offended that mission—were squarely within the law schools' epistemic authority, and directly implicated the kinds of academic questions that are at the heart of the law schools' legal authority.[371]

Thus, there was at least a faint reason to hope that the Court would defer substantially to the law schools' own assertions that the Solomon Amendment interfered with their academic missions. Had it done so, what seemed to some like a quixotic argument on the part of the law schools might have stood a far greater chance of success. At the very least, the Court would have dignified the law schools' argument for *Grutter* deference with serious consideration by engaging in a meaningful balancing of the military's claims to deference with those of the law schools, even if it ultimately concluded that the government's interest outweighed the law schools'.[372] That the claim to *Grutter* deference faced such an ignominious fate in *FAIR* speaks less to its vitality as a form of deference than it does to the Court's own failure fully to confront and provide an adequate account of the occasions on which it defers to various institutions. And it speaks even more clearly to the Court's failure to arrive at some method of resolving cases involving competing claims of deference.

371 For a recent discussion along these lines, organized around the philosophical principle of subsidiarity and comparing the law schools' descriptions of their missions in *Grutter* and *FAIR*, see Peter Widulski, *Subsidiarity and Protest: The Law School's Mission in* Grutter *and* FAIR, 42 GONZ. L. REV. 415, 420–24, 431–56 (2006–2007).

372 *Cf.* Posner, *supra* note 274, at 57 ("The military has its needs as well, and perhaps even some expertise.").

That is not yet the end of the matter, however. The institutional First Amendment approach to the university that I have called *Grutter* deference is not simply a license for universities to act as they please.[373] As we have seen, a vital element of deference is the corresponding obligation of the deferee to act responsibly when it invokes the deference of the courts. The deferee must act in a way that demonstrates that it is exercising the kind of epistemic and legal authority that warrants deference in the first place.[374] More particularly, in the case of *Grutter* deference, universities are under an obligation to exercise their autonomy in a way that is consistent with the deepest values of those institutions. If we are willing to grant universities substantial autonomy as First Amendment institutions, it is because we trust and expect that they will seriously consider just what their own sense of their academic mission entails and act accordingly, within the best traditions of those institutions.

It is possible that all of the law school plaintiffs in *FAIR* genuinely believed that their academic missions would be critically endangered by the presence of military recruiters on campus, and that their mission thus required nothing less than the exclusion of those recruiters. Certainly the FAIR plaintiffs were willing to make such assertions before the Court, and *Grutter* deference suggests that the Court should have respected those assertions rather than second-guess them. But *judicial* deference is one thing, and credulity on the part of fellow legal academics is quite another. From that perspective, one might reasonably suspect that *some* of these institutions, at least, either did not believe that their academic missions really required any such thing, or simply had not given much sincere thought to the question. Although the Solomon Amendment litigation made it expedient for the FAIR plaintiffs to describe their desire to exclude military recruiters in terms of academic mission, surely at least some of these schools and faculty members lacked a genuinely *academic* interest in doing so, or at least failed to "engage in any form of 'reasoned deliberation'" on this question.[375]

Considering this possibility gives rise in turn to a further set of questions. One might start by asking whether the law school plaintiffs

373 *See* Horwitz, *supra* note 1, at 1553; *cf.* David Barnhizer, *Freedom To Do What? Institutional Neutrality, Academic Freedom, and Academic Responsibility*, 43 J. LEGAL EDUC. 346, 348 (1993) ("Academic freedom is a privilege and a responsibility, not a personal and unfettered license for the misuse of the increasingly scarce social resource represented by each faculty position.").

374 *See supra* Part I.D.

375 Guckenberger v. Boston Univ., 8 F. Supp. 2d 82, 85 (D. Mass. 1998) (quoting Guckenberger v. Boston Univ., 974 F. Supp. 106, 149 (D. Mass. 1997)).

in *FAIR* actually treated on-campus recruiting as a core aspect of their missions. Did they, for instance, treat it as an important *faculty* matter, subjecting it to reasoned discussion and supervision among the deans and faculty—or did they shunt responsibility for recruiting onto their administrative staff?[376] We might also ask whether the schools that restricted access to military recruiters made a genuinely independent academic decision, or whether they acted under actual or perceived duress from some third party, such as the American Bar Association or the American Association of Law Schools, both of which may exert considerable pressure on law schools' practices in a way that reduces the very possibility that *any* law school can be said to have an authentic and independent sense of "mission."[377]

One might also ask broader questions about these law schools' perception of their own academic missions, and how they follow those missions. For example, most law schools generally favor permitting a wide diversity of viewpoints and arguments on the law school campus, or permitting the presence of student groups or legal clinics whose own policies are in some way exclusionary. Those schools would arguably be in a poor position to argue that their missions required restricting on-campus access to military recruiters.

Conversely, if a law school did adhere to a strong sense of nondiscrimination in its academic mission, and *did* treat on-campus recruiting as an integral part of that mission, one might ask whether the schools were similarly vigilant in restricting the on-campus access of other discriminatory employers.[378] In particular, one would ask whether these schools also restricted access to their recruiting programs by a variety of employers who are also involved in sanctioning

376 *See* Horwitz, *supra* note 4, at 525 n.312; *see also* Neal Kumar Katyal, *The Promise and Precondition of Educational Autonomy*, 31 HASTINGS CONST. L.Q. 557, 566 (2003) (noting, in a slightly different context, that "[m]any [educational] institutions . . . may be tempted to plead academic autonomy" with respect to programs that are wholly run by administrators and involve no meaningful faculty oversight at all).

377 *See* J. Peter Byrne, *Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education*, 43 J. LEGAL EDUC. 315, 321 (1993) (noting that law schools, in some sense, "have less autonomy than traditional academic departments" because of their affiliation with professional bodies such as the ABA and state bar examiners); Horwitz, *supra* note 1, at 1555 n.305 (suggesting that "[o]ne might . . . suspect that at least some law schools have . . . surrendered to the hard or soft coercions of other organizations, such as the American Association of Law Schools (AALS), whose policies require member schools not to permit discrimination on campus").

378 Professor Morriss suggests that most schools in fact do not make strong efforts to toss out other employers, including private law firms, that have engaged in discriminatory conduct. *See* Morriss, *supra* note 322, at 447 n.154.

the military's discriminatory policies—Congress not least among them.[379] One might also ask whether these schools were equally determined to restrict access to the military and other discriminatory institutions in a variety of contexts besides recruiting—for example, in providing access to guest speakers.[380]

In sum, in a variety of circumstances, one might reasonably question the good faith of a law school that invoked its academic mission as the basis for the exclusion of military recruiters. Much would depend on how "academic" that decision really was, and how consistently the law school followed its purported mission. Diane Mazur makes a strong case that the law schools' mission would be far better served if law schools welcomed the military to campus, in order to engage with it and reduce the divide that separates the military and civilian worlds.[381] Before we get to that point, however, we must first ask whether all of the law school plaintiffs in *FAIR* really meant what they said, or whether their course of conduct in other areas belied the position they took in the Solomon Amendment litigation.

In short, for at least some of the plaintiffs in *FAIR*, a full consideration of their own sense of their academic mission, and their own sense of what academic freedom required for them as university departments, might have led them to conclude that they could not expel the military recruiters consistently with their own understanding of their mission. We might thus conclude that at least *some* of the law school plaintiffs in *FAIR*, by invoking judicial deference for a set of assertions that were motivated more by their political views or legal strategies than by genuinely academic considerations, and that were dictated more by the desire to oust the military from campus than by any serious consideration of their academic missions as law schools, failed their moral obligations as would-be deferees.[382]

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379 *See id.*; *see also* Mazur, *supra* note 49, at 516 (calling such an argument "disingenuous" when it is made by defenders of the Solomon Amendment, but acknowledging that "this argument raises a fair point," and suggesting that "[t]he singular focus of law schools on the military as a target of their expressive disagreement may well be misdirected and incomplete"); Posner, *supra* note 274, at 51 (noting that "the offices of the general counsel of . . . the Defense Department," among other employers, are welcome at law school functions).

380 *See* Mazur, *supra* note 49, at 505.

381 *See id.*; *see also* Posner, *supra* note 274, at 57 (noting "the possibility that by discouraging military recruiters," elite schools with a substantially liberal student body "are helping to perpetuate a conservative military culture").

382 *Cf.* Katyal, *supra* note 376, at 566 (stating that where universities plead educational autonomy with respect to choices that are not the product of meaningful faculty deliberation, *Grutter* deference "becomes a lawyer's trick, a way to help a client

Some concluding observations are in order. First, I may be wrong. Perhaps all of the plaintiff law schools saw their academic mission as distinctly normative and genuinely believed, as an *academic* matter and after careful deliberation, that nondiscriminatory on-campus recruiting was essential to their missions as law schools. If so, that sort of academic judgment possesses an epistemic and legal authority that is fully entitled to judicial deference.[383] Indeed, I am sure that at least some of the schools involved in the *FAIR* litigation easily met this obligation.[384] However, if some of the FAIR plaintiffs' claims were essentially a litigation position and not a genuinely academic judgment, then those plaintiffs failed to meet their obligations as deferees.

Second, it should be clear that there is a distinction between the judgment the broader academic community might reach about the FAIR plaintiffs' actions, and the judgment that the *Court* ought to have reached. If the FAIR plaintiffs made what appeared to be a good-faith argument to the Court that their academic missions required excluding military recruiters and that the Solomon Amendment interfered with their missions, then the Court ought to have deferred to this argument. But the Supreme Court is not the only forum of judgment, or even the most important forum.[385] If universities are entitled to deference on epistemic and legal authority grounds, and if that entitlement carries with it significant moral obligations on the part of the deferee, then the legal academic community is surely in the best position to judge whether the FAIR plaintiffs met those moral obligations. I have argued that the *courts* were not entitled to second-guess the law schools. But as members of the academic community, we are fully entitled, if not obliged, to do so.[386]

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convert their policy into something that appears and sounds more lofty and principled than it really is").

383 *Cf.* Blocher, *supra* note 367, at 863 ("As with agency interpretations of their own regulations, organizations' interpretations of their animating institutional norms should be entitled to deference.").

384 I am informed, for instance, that the Solomon Amendment, and the appropriate response to it, was a subject of substantial and meaningful discussion among a substantial number of the Yale Law School faculty.

385 *See* Blocher, *supra* note 367, at 864–65 ("[I]nstitutions, rather than the state, are the primary regulators of speech. The most powerful—though perhaps not the most obvious—speech 'regulations' are social norms and mores, backed by the threat of social ostracism or sanction.").

386 J. Peter Byrne makes a similar point in a discussion of the judicial invalidation of university speech codes. *See* J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 101 (2004) (criticizing such decisions and suggesting that the decision whether to impose such codes, "*even if incorrect*, should have been left to [university] institutional authorities" rather than the courts (emphasis added)). Simi-

My conclusions may be clarified further by comparison with those of another commentator on the *FAIR* decision, Judge Richard Posner. Posner writes that the law schools' arguments in *FAIR*, which he believes ranged from the merely weak to the frivolous, tell us much about the stultification that results from the "left-liberal domination of elite law school faculties."[387] He pooh-poohs most of the claims made by the law school plaintiffs in *FAIR* that would fall under the rubric of *Grutter* deference. For example, he suggests it is "hyperbole" for the American Association of Law Schools, which served as an amicus in the case, to argue that law schools are being forced to "abandon [their] commitment to fight discrimination."[388] He notes, disapprovingly, that the law schools are effectively "limit[ing] their students' exposure to views concerning military policy that are contrary to the orthodoxy that dominates the law school community."[389] And he says that the FAIR plaintiffs' description of themselves as normative communities demonstrates the "uncritical assumption that legal education has a liberal agenda."[390]

Posner, in his typically vivid way, dramatically overstates his case. Among other things, he understates the intellectual and political diversity of the elite law schools he picks on—which may be greater, in fact, than that of some of the less elite law schools that belonged to FAIR. But that does not mean there is not a kernel of truth here. Like Posner, I think most law schools should encourage a heterodoxy of views, and that the exclusion of military recruiters was in some tension with this principle.[391] And I agree with Diane Mazur's important argument that elite and liberal law schools, far from seeking to keep

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larly, Michael Stokes Paulsen has argued that private nonreligious law schools may have a legal right to discriminate against certain religious employers in providing access to their placement services, while arguing that such schools would be wrong to do so and should be criticized by others if they do. *See* Michael Stokes Paulsen, *How Yale Law School Trivializes Religious Devotion*, 27 SETON HALL L. REV. 1259, 1262–63 (1997).

387 Posner, *supra* note 274, at 57.

388 *Id.* at 52–53 (internal quotation marks and citation omitted).

389 *Id.* at 54.

390 *Id.* at 56.

391 My point should not be overstated. There is a vast difference between attempting to exclude discriminatory recruiters and attempting to exclude dissenting viewpoints; one might allow on-campus speakers to defend discrimination in military recruiting, for example, while refusing to permit discriminatory *conduct* on campus. There is a *tension*, though, in encouraging vigorous campus speech, while excluding the military rather than engaging in open disagreement with it on campus. That is, of course, what the law school plaintiffs in *FAIR* sought to do.

the military off campus, ought to welcome it, in an effort to bridge the increasing gap between the military and civilian cultures.[392]

I part ways more sharply with Posner in two respects. First, like the *FAIR* Court itself, Posner is implicitly imposing an orthodoxy of his own: the view that all law schools have essentially the same mission, and should be denied relief where they claim otherwise. His view that it must be hyperbole to state that the Solomon Amendment forces law schools to abandon key aspects of their mission suggests that Posner, like the *FAIR* Court, *knows* what the law schools' mission is, and this isn't it. "American law schools are professional schools, not secular *madrasahs*," he writes, loading the dice more than a little with his phrasing.[393] Therefore, they cannot or should not be the kind of "normative institutions" the FAIR plaintiffs claimed they were.[394]

Many law schools doubtless fit the professional model Posner describes, and one may question their good faith where they act inconsistently with this mission. Perhaps some of the institutions in *FAIR* are subject to this criticism. But there is no reason to assume, let alone require, that all law schools, or all universities generally, share precisely the same mission. Some law schools *may* require orthodoxy; they *may* consider nondiscrimination in all aspects of school life to be central to their missions; they *may*, to use his loaded phrase, be closer to secular *madrasahs* than plain-vanilla professional schools. There is ample room for diversity of mission in the world of law schools, just as there is ample room for students and faculty members to choose to join law schools with distinct normative missions or not.[395] *FAIR*'s mistake, and Posner's too, is to imply that law schools all come in one flavor, and to dismiss any claim that some law schools might just have a different set of educational goals and a different set of needs—including the exclusion of military recruiters—with respect to achieving those goals.[396]

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392 *See* Mazur, *supra* note 49, at 498–510.

393 Posner, *supra* note 274, at 56.

394 *Id.* (internal quotation marks and citation omitted).

395 *See, e.g.*, Horwitz, *supra* note 1, at 1547–49.

396 *See* Kathleen M. Sullivan, *First Amendment Intermediaries in the Age of Cyberspace*, 45 UCLA L. REV. 1653, 1656 (1998) ("[S]ome private communities have expressive identities that themselves ought be permitted to be diverse, including with respect to the diversity of speech they tolerate within themselves."). Consider again Professor Karlan's observation that the Justices, who all graduated from "elite law schools," are both "more trusting, and more skeptical," about how law schools operate. Karlan, *supra* note 199, at 1615. Of course, not all law schools must look and act like "elite law schools," and some may choose to depart from the nonnormative "professional" model that Posner (and the Court) point to as the presumptive standard in legal education. *See* Posner, *supra* note 274, at 56.

Posner's commentary on *FAIR* raises a second important issue: the question of who decides. Like the *FAIR* Court, Posner effectively holds the FAIR plaintiffs up to the standard of his own vision of what a university does. But that approach is one thing in an academic article, and quite another in an opinion of the Court. It may be a reasonable view, but it is insufficiently deferential. It is not enough to conclude that the law schools were engaging in "hyperbole" when they argued for the importance of excluding military recruiters, or to say that the schools assume "uncritic[ally]" that "legal education has a liberal agenda."[397] Rather, the courts should start with the assumption that where a law school asserts such a mission, they are obliged to defer to it, on epistemic and legal authority grounds. Conversely, the law schools themselves must remember their moral obligation as deferees to live by their words: to act meaningfully and consistently in accordance with the educational mission that they invoke as a basis for judicial deference.

Thus, the assertions about the importance of nondiscrimination put forward by the AALS were not "hyperbole" *if* the law schools in question genuinely believed them—if they genuinely reached such a conclusion after meaningful academic deliberation, *and* acted in accordance with this conclusion. Similarly, many law schools may "uncritical[ly]" assume that legal education has a liberal agenda.[398] But other schools may have reached a *critical*, considered academic judgment that their mission involves "a liberal agenda in which homosexual rights occupy a high place."[399] The question in these cases should not be whether this is a good or bad thing, but whether the schools have reached a meaningful academic decision that this is so; if they have, the courts should defer substantially to the schools' own sense of the requirements of their mission.

Of course, the rest of us need not defer, and we academics will be in a fair position to ask whether these schools have met their obligations as deferees. Thus, for schools with such a sense of mission, consistency might well require that faculty become meaningfully involved in the on-campus recruitment process rather than leaving that task to administrators, or that such schools exclude other bodies that are also responsible for "Don't Ask, Don't Tell"—Congress, the Department of Defense, and the rest of the executive branch among them—as recruiters, and, perhaps, as speakers too. We may criticize such schools, as deferees, for failing to live up to the mission they told the

397 Posner, *supra* note 274, at 52, 56.

398 *Id.* at 56.

399 *Id.*

Court was so essential to their continued flourishing. Or we may disagree with such missions altogether. Again, however, that judgment is primarily a question of the moral obligations of the law schools as deferees. It does not justify either the Court's or Posner's assumption that the law schools must comply with a particular conception of the academic mission of the law school, however familiar it may be.

In short, the Court was too quick to dismiss the law schools' case in *FAIR*. The argument for *Grutter* deference in this case was far stronger than the Court's silence suggests. But it is also possible that some of the law school plaintiffs in *FAIR* were wrong to bring the case. The approach to deference that I have argued for here demands that law schools and other entities fully consider, and then make every effort to live consistently with, their own sense of their academic mission rather than use deference as a mere tool to achieve nonacademic objectives. Again, I am sure that at least some of the law schools involved in the *FAIR* litigation lived up to that obligation. But we are entitled to reasonable suspicion as to whether all of them did. If that suspicion is justified, we are left with the conclusion that the law schools ought, perhaps, to have won the day in *FAIR*, but also ought to be subject to substantial criticism *outside* the courts.

D. Conclusion

The story of *FAIR* is ultimately about the Court's failure to fully confront the occasions for, and complexities of, deference as a tool in constitutional law. The Court's treatment of the competing claims to deference in this case was clumsy at best. It drastically overplayed the military deference hand, and paid lip service to the claim of *Dale* deference while eviscerating the case from which it stems.

More disappointing still was the Court's failure even to acknowledge that universities, as First Amendment institutions that are central to the formation of public discourse and that possess significant expertise about their own missions, are entitled to deference *as* universities. Had it done so, and had it untangled more skillfully the competing claims to deference that were present in the case, the outcome in *FAIR* might have been significantly different.

This conclusion does not let the law schools themselves off the hook. Deference involves significant obligations on the part of the deferee, and it is far from clear that all of the law school plaintiffs truly met those obligations. There are good reasons to think that, in some instances, their position was one of convenience rather than an exercise of genuine academic judgment. If that is so, they can and should be criticized for it. But that criticism should be a matter for the judg-

ment of their academic peers, not the federal courts. The Court might have asked whether the law schools were genuinely acting within the scope of their epistemic and legal authority, and thus whether deference was really warranted. If they were, it should have deferred; if they were not, then perhaps no deference would be warranted. That it failed to even ask the question is evidence that the Court simply failed to understand the real, and difficult, questions of deference that were present in *FAIR*.

IV. DEFERENCE, CONSTITUTIONAL DECISION RULES, AND INSTITUTIONAL FIRST AMENDMENT THEORY

In this last Part, I want to situate this Article within the larger firmament of constitutional theory, and show that this Article ultimately contributes to, and draws connections between, two broad developments in recent constitutional scholarship. To make this argument, it is necessary to step back for a moment and introduce two emerging themes in constitutional and First Amendment theory.

Consider first the growth in recent years of a substantial body of scholarly literature exploring the gap between constitutional *meaning* and constitutional *implementation*.[400] This literature argues that "a gap can exist between the meaning of constitutional guarantees, on the one hand, and judicially enforceable rights, on the other."[401] Thus, "we should understand the Supreme Court's role" not in terms of "a search for the Constitution's one true meaning," but "as a more multifaceted one of 'implementing' constitutional norms."[402] This literature has been referred to as "constitutional decision rules" theory.[403] Under various labels, this project has been pursued in recent works by such writers as Richard Fallon,[404] Mitchell Berman,[405] Kermit Roosevelt,[406] and David Chang.[407] More controversially, the interest

400 *See* Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 220 (2006), http://www.harvardlawreview.org/forum/issues/119/march06/berman.pdf (noting that the last ten years have "witnessed a steady increase in scholarly attention to the meaning/doctrine distinction").

401 Fallon, *supra* note 129, at 1276.

402 RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION 5 (2001).

403 *See* Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004).

404 *See, e.g.*, FALLON, *supra* note 402; Richard H. Fallon, Jr., *Foreword: Implementing the Constitution*, 111 HARV. L. REV. 54 (1997); Fallon, *supra* note 129.

405 *See, e.g.*, Berman, *supra* note 403, at 13; Berman, *supra* note 400.

406 *See, e.g.*, KERMIT ROOSEVELT III, THE MYTH OF JUDICIAL ACTIVISM (2006); Roosevelt, *supra* note 162; Kermit Roosevelt III, *Aspiration and Underenforcement*, 119 HARV. L. REV. F. 193 (2006), http://www.harvardlawreview.org/forum/issues/119/march06/roosevelt.pdf [hereinafter Roosevelt, *Underenforcement*].

in constitutional decision rules also finds a home in the recent writings of Daryl Levinson[408] and Rick Hills.[409]

All of these writers can trace their ancestry back to seminal works by Henry Monaghan[410] and Larry Sager,[411] who began exploring questions of constitutional implementation in the 1970s—and still further back to James Thayer, whose classic work on judicial review first brought to light these questions of constitutional implementation.[412]

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407 *See* David Chang, *Structuring Constitutional Doctrine: Principles, Proof, and the Functions of Judicial Review*, 58 RUTGERS L. REV. 777 (2006).

408 *See, e.g.*, Daryl J. Levinson, *Rights Essentialism and Remedial Equilibration*, 99 COLUM. L. REV. 857, 861 (1999).

409 *See, e.g.*, Hills, *supra* note 2, at 175. I say "controversially" because scholars like Levinson and Hills purport to write against scholars like Fallon, arguing that no "gap exists between 'pure' constitutional meaning and implementing doctrine," because "the meaning of a constitutional provision *is* its implementation." *Id.* Similarly, Professor Levinson argues that "[t]he rights-essentialist picture, in which courts begin with the pure, Platonic ideal of a constitutional right and only then pragmatically apply the right through the vehicles of implementation and remediation, bears little resemblance to the actual judicial practice of rights-construction," in which "constitutional rights are inevitably shaped by, and incorporate, remedial concerns." Levinson, *supra* note 408, at 873. These scholars have thus been described as writing against "antipragmatist" constitutional theory, *see* Hills, *supra* note 2, at 173, or against the "taxonom[ical]" approach of scholars such as Fallon or Berman, *see* Berman, *supra* note 400, at 220.

I do not mean to elide the differences between these two groups of scholars. Nevertheless, for my purposes they have much in common. One set of scholars argues that it is still meaningful to talk about constitutional meaning as distinct from constitutional implementation, while the other argues that there is only implementation, all the way down. But both ultimately stress the importance of the "forward-looking, empirical, and all-things-considered analyses [that] pervade constitutional adjudication," as against attempts to see constitutional law only in light of historical meaning or pure "principle." Fallon, *supra* note 129, at 1314; *see also* Hills, *supra* note 2, at 181 ("Professor Fallon agrees that implementation of the law has critical importance for constitutional doctrine. Our only difference is that he would distinguish between pure constitutional meaning and implementation, whereas I maintain that implementation is inextricably a part of constitutional meaning."). In ways that are relevant to this Article, then, both sets of scholars inhabit the same corner of constitutional law scholarship. *See* Roosevelt, *Underenforcement*, *supra* note 406, at 195 (arguing that Professor Levinson's article, *see* Levinson, *supra* note 408, "is a contribution, and an excellent one, to the body of decision rules scholarship," although Professor Levinson "does not seem to see it that way").

410 *See* Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975).

411 *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978).

412 *See* Thayer, *supra* note 27, at 129–32; *see also* Roosevelt, *Underenforcement*, *supra* note 406, at 193 n.3 (characterizing Thayer's famous article as "mark[ing] the distinctive nature of judicial decision rules").

But these more recent efforts have brought renewed and focused attention to the importance of constitutional implementation. Whether or not it is accurate to say that such views now command academic consensus,[413] there is no doubt that this is a burgeoning field of constitutional scholarship. Despite the advances made, however, much remains to be done in exploring implementation as a central subject of constitutional law, especially at the operational level.[414]

Alongside the developing scholarship on the importance of constitutional implementation, another body of constitutional scholarship has also emerged, more or less simultaneously and separately. This literature argues for a dramatic rethinking and refashioning of the First Amendment. It argues that First Amendment doctrine should partially or wholly abandon its customary top-down, institutionally agnostic approach[415] in favor of a bottom-up, institutionally sensitive approach that openly "takes First Amendment institutions seriously."[416] It argues that courts "ought to recognize the unique social role played by a variety of institutions," such as universities, the press, religious associations, and libraries, "whose contributions to public discourse play a fundamental role in our system of free speech."[417] Accordingly, courts should "defer[] to the practices of [these] particular kinds of First Amendment actors,"[418] in ways shaped by the norms and practices of the institutions themselves.[419]

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413 *See* ROOSEVELT, *supra* note 406, at 36 ("The basic idea that there is a significant difference between doctrine and meaning is fairly widely accepted among legal scholars.").

414 *See, e.g.*, Fallon, *supra* note 129, at 1321 ("Frank recognition of the judicial function in crafting and choosing among judicially manageable standards triggers questions about judicial power and competence that have not received much helpful study. . . . Questions about the empirical predicates for constitutional analysis cry out for further examination."); *id.* at 1322, 1331 (arguing that the notion of a meaning/implementation gap in constitutional law "furnishes an agenda" for further academic work, and suggesting some possible lines of inquiry); *see also* Roosevelt, *Underenforcement*, *supra* note 406, at 193–95 & n.4 (collecting some examples of recent uses of the "distinction between decision rules and operative propositions" to "examine and critique particular areas of doctrine").

415 *See supra* notes 2–20 and accompanying text.

416 Horwitz, *supra* note 4, at 589.

417 *Id.*

418 *Id.* at 570.

419 *See, e.g.*, *id.* at 572–73; *see also* Hills, *supra* note 81, at 188 ("Institutional theories define rights as rules that allocate preemptive jurisdiction to [certain] institutions . . . based on that institution's likelihood of making decisions appropriate to the social sphere in which it operates.").

Although these ideas are sometimes discernible within the existing body of First Amendment doctrine,[420] this literature aims to bring this approach to the fore and refine it, urging the Court to adopt an institutional approach to the First Amendment "explicitly, transparently, and self-consciously."[421] The charter member of this school is surely Frederick Schauer,[422] although other signal contributions have been made by Rick Hills,[423] Daniel Halberstam,[424] Mark Rosen,[425] David Fagundes,[426] and Joseph Blocher.[427] I have made my own modest contributions to this literature.[428] This Article, too, contributes to that body of work, by examining the *FAIR* Court's missed opportunity to defer to the law school plaintiffs as First Amendment institutions.[429] Here, too, however, although much has already been done, much remains to be said in fleshing out this approach.[430]

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420 *See, e.g.*, Horwitz, *supra* note 4, at 569–71; Schauer, *supra* note 4, at 1759–60.

421 Horwitz, *Blog*, *supra* note 8, at 61.

422 *See, e.g.*, Schauer, *supra* note 4, 1759–60; Schauer, *Principles*, *supra* note 3, at 84–86; Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803, 1815–16 (1999).

423 *See* Hills, *supra* note 2, at 175.

424 *See* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 778, 828 (1999).

425 *See, e.g.*, Mark D. Rosen, *Institutional Context in Constitutional Law: A Critical Examination of Term Limits, Judicial Campaign Codes, and Anti-Pornography Ordinances*, 21 J.L. & POL. 223, 224 (2005); Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513, 1516 (2005).

426 *See* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637, 1676–78 (2006).

427 *See* Blocher, *supra* note 367, at 847–51.

428 *See* Horwitz, *supra* note 4, 471–72 (offering an approach to thinking about the Court's treatment of "First Amendment institutions," and applying that approach to universities as First Amendment institutions); Horwitz, *Blog*, *supra* note 8, at 61 (discussing the press generally, and blogs specifically, as First Amendment institutions); Horwitz, *supra* note 1, at 1503–04 (exploring further the question of universities' status as First Amendment institutions). Just as the constitutional implementation literature has its forebears, so does the institutional First Amendment literature, which finds a progenitor in the work of Robert C. Post. *See, e.g.*, Post, *supra* note 21, at 1272, 1280–81 (arguing that "[t]he Court must reshape its [First Amendment] doctrine so as to generate a perspicuous understanding of the necessary material and normative dimensions of . . . [various] forms of social order and of the relationship of speech to these values and dimensions"). Post's writing, however, is more concerned with "broader organizing principles for social discourse" than it is with identifying particular First Amendment institutions. Horwitz, *supra* note 4, at 567 n.488; *see also* Schauer, *supra* note 8, at 1273 n.87 (noting that Post's work is "concerned with social structure and the identification of special free speech domains").

429 *See supra* Part III.D.

430 *See* Schauer, *supra* note 8, at 1273 (describing his argument for an institutional First Amendment as "a relatively new avenue of inquiry").

Indeed, an institutional approach to the First Amendment may simply be the leading edge of a developing study of the role institutions play across a broad range of constitutional doctrines.[431]

Although the literature on constitutional decision rules and the literature on the institutional First Amendment have developed separately, one goal of this Article is to suggest that there are a variety of important links between these two discussions, although it is not clear that the two groups of scholars have recognized this connection.[432] What connects them is deference.

With respect to constitutional decision rules theory, the courts' substantial reliance on deference to a variety of public and private institutions serves as valuable evidence of the existence of the gap between constitutional meaning and constitutional implementation.[433] Furthermore, to the extent that decision rules theorists focus on describing and refining the ways in which courts implement the Constitution, deference is obviously a vital tool in the array of devices that the courts rely on in carrying out that task of implementation. Likewise, with respect to institutional First Amendment theory, deference is the doctrinal device by which courts are able to clear a space for the autonomy of various First Amendment institutions.

Once deference is identified as the fulcrum between constitutional decision rules scholarship and institutional First Amendment scholarship, one can identify the ways in which each of these schools feeds into and enriches the other. Scholars writing about the importance of constitutional decision rules have recognized that their approach opens up a space for shared constitutional interpretation by

431 *See* Symposium, *Constitutional "Niches": The Role of Institutional Context in Constitutional Law*, 54 UCLA L. REV. 1463 (2007). Michael Dorf and Charles Sabel, in a series of powerful articles, have also explored the ways in which courts can "devolve[] deliberative authority for fully specifying norms to local actors" instead of "laying down specific rules" to guide the conduct of various public and private actors. Michael C. Dorf, *Legal Indeterminacy and Institutional Design*, 78 N.Y.U. L. REV. 875, 961, 978 (2003); *see also* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 283–88 (1998) (arguing for "a new model of institutionalized democratic deliberation that responds to the conditions of modern life," in which judicial review, among other devices of government, would "leave room for experimental elaboration and revision to accommodate varied and changing circumstances" while still protecting individual rights).

432 Ironically so, given that Professor Hills has contributed to *both* bodies of literature. *See* Hills, *supra* note 81 (contribution to institutional First Amendment literature); Hills, *supra* note 2 (contribution to constitutional decision rules literature).

433 *See, e.g.*, Fallon, *supra* note 129, at 1300–02.

other institutions,[434] but much remains to be said about what this shared space should look like and how it should operate. Moreover, their focus has been primarily on how decision rules theory can help us understand the role of other *public* bodies, especially Congress and the administrative agencies. Institutional First Amendment theory, which has already discussed at some length the ways in which institutions such as universities or the press might be treated as autonomous institutions under the First Amendment,[435] fleshes out our understanding of how a shared approach to the implementation of constitutional doctrine might operate. It also suggests that the focus on how courts might share the task of constitutional implementation with other branches of government is too narrow. Courts also may create a space for shared constitutional interpretation by a variety of *private* actors, especially First Amendment institutions like law schools, the press, religious associations, and others. Institutional First Amendment theory thus helps supply some of the details that constitutional decision rules theory lacks.

Conversely, those writers who have argued in favor of an institutional approach to the First Amendment have provided a detailed discussion of how that institutional approach might work, but have not fully situated their approach within the broader framework of constitutional theory. Moreover, their work has given rise to concerns about the *legitimacy* of an institutional approach, inasmuch as it might require modifications to current First Amendment doctrine.[436] Constitutional decision rules theory provides an answer to both of these problems. It situates institutional First Amendment theory by arguing that such an approach finds a home in the space between constitutional meaning and constitutional implementation. And by linking it to a larger theoretical framework, it legitimates the institutional approach as a theoretically grounded alternative to current First Amendment doctrine.

Thus we see that both of these emerging bodies of constitutional literature, with their shared interest in deference, have much to gain from each other. Institutional First Amendment theory advances the practical goals of constitutional decision rules theory. In turn, decision rules theory supplies First Amendment institutionalism with legit-

434 *See, e.g.*, Berman, *supra* note 403, at 112 (noting that "the decision-rule characterization is likely to open up more space for (appropriate) congressional involvement in the shaping of constitutional doctrine").

435 *See supra* notes 422–28 (citing sources).

436 *See, e.g.*, Dale Carpenter, *The Value of Institutions and the Values of Free Speech*, 89 MINN. L. REV. 1407, 1410 (2005); David McGowan, *Approximately Speech*, 89 MINN. L. REV. 1416, 1432 (2005).

imacy and a place on the constitutional map. Although these schools have emerged separately, this Article suggests that they might profit considerably from a deeper mutual engagement.

CONCLUSION

Although deference is a pervasive tool in constitutional doctrine, it is surprisingly underdeveloped as an area of study in constitutional law. This Article seeks to contribute to a deeper understanding of when, why, and how the courts go about deferring to a variety of other public and private actors. In that sense, *FAIR* offers a useful opportunity for us to assess just how undertheorized the Court's own use of deference is, and how this failure to fully understand its own doctrinal tool left the Court at sea when it faced competing claims to deference in the same case.

When faced with these competing claims in *FAIR*, the Court fumbled, placing far too much emphasis on Congress' invocation of deference and far too little on the universities' invocation of deference. In particular, the Court paid far too little attention to the epistemic and legal authority of law schools as First Amendment institutions—sites in which public discourse is shaped autonomously in accord with the best traditions of such institutions. By the same token, even if *FAIR* represents a failure by the Court, it is not clear that the law school plaintiffs performed much better. As deferees, they too had an obligation—to invoke only so much deference as they deserved, depending on the extent to which their desire to exclude military recruiters was genuinely a thoughtful *academic* judgment. If it was not, it deserves criticism. But that criticism should not have come from the courts, but from the law schools' peers in epistemic and legal authority—the legal academy and other members of the broader university community. If the law schools failed in their obligations as deferees, we can criticize them without absolving the Court.

Finally, a study of *FAIR*, and of the phenomenon of deference in constitutional law, yields benefits far beyond this one case. It offers evidence of a significant link between two emerging areas of constitutional scholarship, which thus far have traveled along separate tracks: the study of constitutional decision rules, and the study of First Amendment institutions. This Article may thus be the opening move in what might prove to be a very profitable discourse between these two important additions to the scholarly dialogue on the Constitution.