

Forum for Academic and Institutional Rights, Inc., the Supreme Court upheld the Solomon Amendment, which provides, in the Court's summary, "that if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds."¹⁰²⁷ FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military's discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding. The Court concluded: "Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."¹⁰²⁸ The Court found that "[t]he Solomon Amendment neither limits what law schools may say nor requires them to say anything. . . . It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."¹⁰²⁹ The law schools' conduct in barring military recruiters, the Court found, "is not inherently expressive," and, therefore, unlike flag burning, for example, is not "symbolic speech."¹⁰³⁰ Applying the *O'Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly "promotes a substantial government interest that would be achieved less effectively absent the regulation."¹⁰³¹

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government's message. As for compelling speech, law schools must "send e-mails and post notices on behalf of the military to comply with the Solomon Amendment. . . . This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*. . . . [It] is plainly incidental to the Solomon Amendment's regulation of conduct."¹⁰³² As for forcing one speaker to host or accommodate another, "[t]he compelled-speech violation in each of our prior cases . . . resulted from the fact that the com-

¹⁰²⁷ 547 U.S. 47, 51 (2006).

¹⁰²⁸ 547 U.S. at 60. The Court stated that Congress's authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. *Id.* at 58.

¹⁰²⁹ 547 U.S. at 60.

¹⁰³⁰ 547 U.S. at 64, 65.

¹⁰³¹ 547 U.S. at 67.

¹⁰³² 547 U.S. at 61, 62.