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## Article

### IS THE SOLOMON AMENDMENT “F.A.I.R.”? SOME THOUGHTS ON CONGRESS’S POWER TO IMPOSE THIS CONDITION ON FEDERAL SPENDING

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#### I. INTRODUCTION

The United States Supreme Court has granted certiorari to review the Third Circuit’s decision in *Forum for Academic and Institutional Reform (F.A.I.R.) v. Rumsfeld*.<sup>1</sup> This ongoing litigation is challenging the constitutionality of the Solomon Amendment,<sup>2</sup> which requires the department of defense to withhold federal funding from institutions of higher education if they restrict military recruitment on campus.<sup>3</sup> Before addressing the validity of the Solomon Amendment itself, it is important to assess the source of federal authority for the underlying federal spending program to which the conditions of the Solomon Amendment are attached. The several public and private universities who have challenged the Solomon Amendment in *F.A.I.R.* litigation all receive federal funds in support of

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1. 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (U.S. May 2, 2005) (No. 04-1152).

2. *See id.* at 228-29 (explaining current litigation).

3. *See* 10 U.S.C. § 983(b) (2004) (“No funds [as described by this statute] . . . may be provided by contract or by grant to an institution of higher education . . . if the Secretary of Defense determines that that institution . . . has a policy or practice . . . that either prohibits, or in effect prevents . . . access to campuses . . . for the purposes of military recruiting[.]”). The funds that are withheld are those that are made available to a wide range of Departments, including funds from the Department of Defense, Labor, Health and Human Services, Transportation and Education. *See id.* § 983(d) (listing funds made unavailable).

their educational efforts—funds conditioned on compliance with the Solomon Amendment.

The Constitution contains no enumerated power delegating to the federal government specific authority over education. Additionally, federal funding for education does not fall within Congress's broad power—properly understood—to tax and spend for the *general* welfare,<sup>4</sup> as the grants to particular local or state institutions are primarily for local, rather than national, benefit. Neither is the underlying federal spending program at issue here a valid exercise of Congress's near-plenary power over federal territory,<sup>5</sup> as none of the institutions involved in this litigation are in the District of Columbia or other federal territories.

Rather, the most solid footing for federal financial grants to local institutions of higher education appears to be the power delegated to Congress in Article I, Section 8 of the Constitution “[t]o raise and support Armies,”<sup>6</sup> combined with the Article I, Section 8 power afforded to Congress to adopt means that are both “necessary and proper” to effect the enumerated ends.<sup>7</sup> While the breadth of federal spending on education may well press the limits of even these powers as originally understood, at least some measure of federal spending for local institutions of higher learning is constitutionally permissible when directly tied to Congress's efforts to raise and support Armies. The Solomon Amendment provides that necessary nexus; it would be odd, therefore, for the very condition which renders federal spending permissible to be unconstitutional. Further, it is well and correctly established that conditions on federal spending designed to ensure compliance with the permissible ends of spending programs do not intrude upon constitutionally-protected speech and association rights.

## II. THE ORIGINAL SPENDING CLAUSE

As originally conceived, Congress's power to spend for the general welfare was limited to spending for national, as opposed to merely local or regional, concerns. Article I, Section 8, Clause 1 of the Constitution provides that “[t]he Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States; but all Duties, Imposts, Excises shall be uniform throughout the United States.”<sup>8</sup> On its face, the

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4. U.S. CONST. art. I, § 8, cl. 1 (“The Congress shall have the Power to lay and collect Taxes, Duties, Imposts and Excises to pay the Debts and provide for the common Defence and general Welfare of the United States . . .”).

5. U.S. CONST. art. I, § 8, cl. 17 (“[Congress shall have the power] [t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States . . .”).

6. U.S. CONST. art. I, § 8, cl. 12.

7. U.S. CONST. art. I, § 8, cl. 18.

8. U.S. CONST. art. I, § 8, cl. 1.

Clause allows Congress to levy taxes only for two purposes: 1) to pay the debts of the United States and 2) to provide for the common defense and general welfare of the United States. To the modern eye, however, those two purposes are so broad as to amount to no limitation at all. Indeed, the contemporary view is that the power to provide for the "general welfare" grants Congress the ability to spend for anything it views as beneficial in some way, even if beneficial only to a small segment of the population or to a single locale.<sup>9</sup>

Such was not the view of those who drafted and ratified the Constitution, nor the view which prevailed in the political branches of government for the first half century of our nation's history, nor the view which prevailed in this Court until after its New Deal-era decision in *United States v. Butler*.<sup>10</sup> James Madison and Thomas Jefferson held the limited view that the power to spend for the "general welfare" only authorized Congress to spend to further the other powers enumerated in Article I, Section 8.<sup>11</sup> Alexander Hamilton viewed the Clause more expansively, but still believed it only authorized spending for the national welfare rather than local welfare.<sup>12</sup> Justice Story agreed with Madison and Hamilton on this limitation on the Spending Clause, writing:

[a] power to lay taxes for the common defence and general welfare of the United States is not in common sense a general power. . . . [I]f the welfare be not general, but special, or local, as contradistinguished from national, it is not within the scope of the constitution.<sup>13</sup>

From 1800 to 1860, almost every president adhered to the view that the Spending Clause was limited, either by its own text or by the enumeration of powers which followed. In the closing days of his second term as

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9. See, e.g., Erwin Chemerinsky, *Protecting the Spending Power*, 4 CHAP. L. REV. 89, 93 (2001) (noting that "[i]t is hard to imagine a broader statement of the scope of Congress's power" than "common [d]efence" and "general [w]elfare" language of Spending Clause).

10. 297 U.S. 1 (1936).

11. See, e.g., 3 ANNALS OF CONG., 362, 386-87 (1792) (presenting James Madison, Debate on the Cod Fishery Bill, warning Congress about generally defined spending power); Thomas Jefferson, *Opinion on the Constitutionality of the National Bank* (Feb. 15, 1791), reprinted in THOMAS JEFFERSON, WRITINGS 416, 418 (Merrill D. Peterson ed., 1984) (stating that without such limit on "general welfare" clause, Congress would have "power to do whatever would be for the good of the United States; and, . . . it would be also a power to do whatever evil they please"); THE FEDERALIST NO. 41, at 263-64 (James Madison) (Clinton Rossiter ed., 1961) (interpreting Congress's power to spend for "general welfare" as authorizing only that spending aimed at achieving specifically enumerated powers of Article I, Section 8).

12. See, e.g., Alexander Hamilton, *Report on Manufactures* (Dec. 5, 1791), reprinted in 2 FOUNDERS CONSTITUTION 446, 446-47 (Philip B. Kurland & Ralph Lerner eds., 1987) (describing founders' intent).

13. JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 919, at 382 (1833).

President, for example, Madison vetoed an internal improvements bill that would have funded the construction of roads and canals “in order to facilitate, promote, and give security to internal commerce among the several States, and to render more easy and less expensive the means and provisions for the common defence.”<sup>14</sup> Madison rejected the contention that the Spending Clause authorized such expenditures, stating that such a broad reading would render “the special and careful enumeration of powers, which follow the clause, nugatory and improper.”<sup>15</sup> President James Monroe vetoed as unconstitutional a bill to preserve and repair the Cumberland Road, noting in his veto message that Congress’s power to spend was restricted “to purposes of common defence, and of general, not local, national, not State, benefit.”<sup>16</sup>

President Andrew Jackson vetoed as unconstitutional an effort by Congress to improve navigation of the Wabash River.<sup>17</sup> He conceded that the improvements in the navigable portions of the river qualified as “general” or national welfare, but he deemed improvements above the point of navigability to be unconstitutional appropriations for local improvements rather than improvements in the general welfare.<sup>18</sup> Presidents Tyler, Polk and Buchanan likewise vetoed internal improvements bills as unconstitutional exercises of Congress’s power under the Spending Clause.<sup>19</sup> President Buchanan took it as a given that the spending of funds raised by Congress from taxation was limited to “certain, precise, and specific objects” in accordance with the execution of the enumerated powers delegated to Congress.<sup>20</sup> The idea that the resources of the federal government—either taxes or public lands—could be diverted to carry into effect any measure of state domestic policy that Congress saw fit to support:

would be to confer upon Congress a vast and irresponsible authority, utterly at war with the well known jealousy of federal power which prevailed at the formation of the Constitution. The

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14. 30 ANNALS OF CONG. 211, 211 (1817).

15. *Id.* at 212.

16. 46 ANNALS OF CONG. 1838, 1849 (1822).

17. See 28 H.R. JOURNAL 9, 27-32 (1834) (recording President Andrew Jackson’s veto message on “An act to improve the navigation of the Wabash river”).

18. See *id.* (stating that act to improve navigation of Wabash River goes too far by prescribing unnecessary improvements that border on extravagance).

19. See, e.g., 55 H.R. JOURNAL 501, 505-08 (1859) (recording President James Buchanan’s veto message on “An act donating public lands to the several States and Territories which may provide colleges for the benefit of agricultural and the mechanic arts”); 43 H.R. JOURNAL 82, 87-88, 91 (1847) (recording President James K. Polk’s veto message on “An act to provide for continuing certain works in the Territory of Wisconsin, and for other purposes”); 39 H.R. JOURNAL 1081, 1081 (1844) (recording President John Tyler’s veto message on “An act making appropriations for the improvement of certain harbors and rivers”).

20. See 55 H.R. JOURNAL 501, 506 (1859) (rejecting contention that money raised by sale of public lands is not subject to limitations of Constitution).

natural intendment would be, that as the Constitution confined Congress to well-defined specific powers, the funds placed at their command, whether in land or money, should be appropriated to the performance of the duties corresponding with these powers. If not, a government has been created with all its other powers carefully limited, but without any limitation with respect to the public lands.<sup>21</sup>

In addition to the positions taken by the Founders and the early presidents, strong evidence for interpreting the Spending Clause as being limited to the general rather than local welfare comes from the structure of the enumerated powers outlined in the Constitution. The enumerated powers given to Congress in the rest of Article I, Section 8 were themselves limited to matters that required national rather than local legislation. For example, early in the constitutional convention, Roger Sherman proposed that Congress should have power to legislate "in all cases which may concern the common interests of the Union: but not to interfere with the government of the individual States in any matters of internal police which respect the government of such States only, and wherein the general welfare of the United States is not concerned."<sup>22</sup> Gunning Bedford proposed giving Congress the power "to legislate in all cases for the general interests of the Union, and also in those to which the States are separately incompetent."<sup>23</sup> The proposals by Sherman and Gunning, and others like them, were referred to the Committee of Detail, which on August 6, 1787 gave substance to the proposals by reporting back a list of enumerated powers.<sup>24</sup> This list would eventually become those Article I, Section 8 powers designed to further the common interests or general welfare of the nation without interfering unnecessarily with the internal police powers of the states. Thus, the limitations implicit in the very idea of the enumerated powers doctrine paralleled the "general welfare" limitation in the Spending Clause.

The Supreme Court has also at times recognized that the Spending Clause is limited to the general rather than local welfare. In *Butler*, the Court held that "[w]hile . . . the power to tax is not unlimited, its confines are set in the clause which confers it, and not in those of Section 8 which bestow and define the legislative powers of the Congress."<sup>25</sup> Though the Court rejected the long-standing Madisonian position that the power to spend for the "general welfare" only authorized Congress to spend to further other enumerated powers, the Court nevertheless concluded that the

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21. *Id.*

22. Journal (July 17, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION 21, 21 (Max Farrand ed., 1911).

23. *Id.*

24. See Madison (Aug. 6, 1787), in 2 THE RECORDS OF THE FEDERAL CONVENTION, *supra* note 22, at 177, 181-83 (listing enumerated powers of Congress).

25. *United States v. Butler*, 297 U.S. 1, 65-66 (1936).

“General Welfare” Clause imposed another limitation on Congress’s spending power, namely, that the purpose of the spending “must be ‘general, and not local.’”<sup>26</sup> Justice Stone, in dissent, shared the majority’s view that the Constitution limited federal spending to national as opposed to merely local purposes.<sup>27</sup> “The power to tax and spend,” he wrote, “is not without constitutional restraints. One restriction is that the purpose must be truly national.”<sup>28</sup> The Court then invalidated the Agricultural Adjustment Act as exceeding this textual limit,<sup>29</sup> demonstrating that the interpretive gloss that has subsequently been placed on the *Butler* decision is really more of a matte finish serving to obscure rather than reflect the actual holding of the case.

In recent years, several members of the Supreme Court have recognized the limits on the Spending Clause, as originally conceived. In her dissent in *South Dakota v. Dole*,<sup>30</sup> for example, Justice O’Connor warned:

If the spending power is to be limited only by Congress’ notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives “power to the Congress to tear down the barriers, to invade the states’ jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed.”<sup>31</sup>

Justice O’Connor emphasized in *Dole* that this “was not the Framers’ plan and it is not the meaning of the Spending Clause.”<sup>32</sup>

In two recent concurrences, Justice Thomas has also acknowledged the possibility that various pieces of federal legislation may exceed the Spending Clause, even when combined with the Necessary and Proper Clause. In *Sabri v. United States*,<sup>33</sup> for example, Justice Thomas questioned whether a prosecution under the federal bribery statute for a bribe of a local elected official in a non-federally funded program was plainly adapted to further Congress’s power under the Spending Clause and therefore a valid, necessary and proper means to advance a legitimate, constitutionally-permissible Spending Clause end.<sup>34</sup> Finally, just this past

26. See *id.* at 66-67 (discussing various and specific limitations on Congress’s spending power).

27. See *id.* at 87 (Stone, J., dissenting) (stating that power to spend has constraints such that it should be truly national and not avenue used to usurp state control).

28. *Id.* (Stone, J., dissenting).

29. See *id.* at 68 (reasoning that Agricultural Adjustment Act exceeds powers of federal government by providing “means to an unconstitutional end”).

30. 483 U.S. 203 (1987).

31. *Id.* at 217 (O’Connor, J., dissenting) (quoting *Butler*, 297 U.S. at 78).

32. *Id.* (O’Connor, J., dissenting).

33. 541 U.S. 600 (2004).

34. *Id.* at 610-14 (Thomas, J., concurring) (questioning scope of Necessary and Proper Clause given by majority opinion).

Term in *Cutter v. Wilkinson*,<sup>35</sup> Justice Thomas repeatedly noted that the Religious Land Use and Institutionalized Persons Act "may well exceed Congress' authority under . . . the Spending Clause."<sup>36</sup> He recognized, however, that the Court properly declined to consider the issue because it was outside the scope of the question present and was not addressed by the court below.<sup>37</sup>

Justices O'Connor and Thomas are correct: as originally understood, the Spending Clause was limited to spending that benefited national rather than local interests, whether that limitation was defined exclusively by the text of the General Welfare Clause itself, as Hamilton believed, or by resort to the other enumerated powers delegated to Congress as necessary for national rather than merely local purposes, as Madison believed.<sup>38</sup> The trend of recent scholarship supports this view. In addition to my own prior work on the subject,<sup>39</sup> for example, Professor Robert Natelson has noted that "the goal of the General Welfare Clause was to limit all congressional taxation and spending to general interest, as opposed to local or special interest, purposes."<sup>40</sup> Additionally, Professor Laurence Clause wrote that "[t]he 'general Welfare,' for promotion of which the Constitution was created, is the welfare of the *whole* United States. It is not an abstraction that authorizes any spending which benefits anyone within the United States."<sup>41</sup> Finally, Professor Jeffrey Renz concluded in a comprehensive 1999 article that "Congress can tax for national, but not for local, purposes."<sup>42</sup>

### III. UNCONDITIONAL FEDERAL GRANTS TO LOCAL EDUCATIONAL INSTITUTIONS PRIMARILY SERVE LOCAL RATHER THAN NATIONAL PURPOSES

The second step in the inquiry requires us to assess whether unconditional grants of federal funds to *local* institutions of higher education qual-

35. 125 S. Ct. 2113 (2005).

36. *Id.* at 2125 n.2 (Thomas, J., concurring) (quoting *Sabri*, 541 U.S. at 613 (Thomas, J., concurring)).

37. *See id.* at 2127 (Thomas, J., concurring) ("Ohio's Spending Clause and Commerce Clause challenges . . . may well have merit.").

38. *See* 3 ANNALS OF CONG. 362, 386-87 (1792) (recording Madison describing limits of Congress's spending power); Hamilton, *supra* note 12, at 446-47 (explaining Spending Clause intent of founders).

39. *See* John C. Eastman, *Restoring the "General" to the General Welfare Clause*, 4 CHAP. L. REV. 63, 87 (2001) ("For the eighty-five years of our nation's history . . . the language of 'general welfare' was viewed as a limitation on the powers of Congress, not as a grant of plenary power.").

40. Robert G. Natelson, *The General Welfare Clause and the Public Trust: An Essay in Original Understanding*, 52 U. KAN. L. REV. 1, 49 (2003).

41. Laurence Clause, "Uniform Throughout the United States": *Limits on Taxing as Limits on Spending*, 18 CONST. COMMENT. 517, 540 (2001).

42. Jeffrey T. Renz, *What Spending Clause? (Or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 127 (1999).



ify as a valid exercise of Congress's power to tax and spend for the "general welfare," as originally understood. Only then can the Solomon Amendment's conditions on that spending be assessed properly.

To draw the line between spending programs that are considered to be for the general welfare (and hence constitutional) and those viewed as primarily for the local welfare (and hence unconstitutional), one should look to the views of the founders and our earliest presidents regarding which programs they believed would violate the Spending Clause and which were permissible. Most of the rejected programs dealt with grants to the states for internal improvements, whether for roads, rivers, harbors or canals.<sup>43</sup> Harbor improvements on the seaward side of ports of entry, however, were found to be acceptable because such improvements directly benefited the entire coastal trade.<sup>44</sup> Loans and stock purchases for private companies were rejected, while refunds of commercial duties were allowed.<sup>45</sup> And most directly relevant to the inquiry at hand, grants of land for insane asylums and agricultural colleges were also rejected as being unconstitutional.<sup>46</sup> The line, therefore, must be between spending that primarily benefits the nation as a whole versus spending that primarily benefits local interests (and perhaps collaterally benefits national interests as well). Dredging a river in Georgia above the point of navigability primarily benefits the people of Georgia, while erecting lighthouses on coastal waterways broadly benefits the entire national intercoastal trade.<sup>47</sup>

In the *F.A.I.R.* case currently pending before the Supreme Court, therefore, the Court should first determine whether federal spending on

43. See, e.g., Act of July 22, 1790, 1 Stat. 53, 54 (1789) (terminating payment for upkeep on harbor installations unless ceded to federal government); 43 H.R. JOURNAL 82, 83-86 (1847) (stating President Polk's objections to disparate spending on internal harbors and rivers); 28 H.R. JOURNAL 9, 29-30 (1834) (recording President Jackson stating that "the constitution did not confer upon [Congress] the power to authorize the construction of ordinary roads and canals within the limits of a State"); 5 H.R. JOURNAL 466, 469 (1806) (noting President Jefferson concluding that congressional spending on roads, rivers and canals was not authorized and thus constitutional amendment was required).

44. See 28 H.R. JOURNAL 9, 31-32 (1834) (recording President Andrew Jackson's veto message on "An act to improve the navigation of the Wabash river").

45. See 3 ANNALS OF CONG. 362, 397-98 (1792) (discussing aid to cod fisheries through refunds of duties); 2 ANNALS OF CONG. 1685, 1686 (1790) (noting debate concerning propriety of government loans to individuals); see also 28 H.R. JOURNAL 9, 29-30 (1834) (providing President Jackson's explanation of objection to government stock purchases in local railroad).

46. See 45 S. JOURNAL 361, 361-69 (1854) (recording President Franklin Pierce's veto message on "An act making a grant of public lands to the several States for the benefit of indigent insane persons"); President James Buchanan to House of Representatives (Feb. 24, 1859), in 5 A COMPILATION OF MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, 543, 543-50 (James D. Richardson ed., 1897) (recording President James Buchanan veto message on "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agricultural and the mechanic arts").

47. See Act of July 22, 1790, 1 Stat. 53, 54 (1789) (stating that lighthouses will benefit national interest).

institutions of higher education primarily benefits national or local interests. A look to history shows that the original understanding of the Spending Clause did not view such spending as being for the general welfare. In 1806, for example, President Thomas Jefferson proposed an amendment to the Constitution that would allow Congress to spend its surplus for "the great purposes of the public education, roads, rivers, canals, and such other objects of public improvement as it may be thought proper to add to the constitutional enumeration of the federal powers."<sup>48</sup> He felt that such an amendment was necessary "because the objects now recommended are not among those enumerated in the Constitution, and to which it permits the public moneys to be applied."<sup>49</sup> In 1859, President Buchanan vetoed, as unconstitutional, an act donating public lands to the several states for the establishment of agricultural colleges.<sup>50</sup>

In addition to this and other historical evidence that unadorned and unconditioned spending on higher education violates the Spending Clause by primarily benefiting local interests, contemporary cases continue to emphasize the local nature of education. In the landmark case of *Brown v. Board of Education*,<sup>51</sup> the Supreme Court recognized that "education is perhaps the most important function of state and local governments."<sup>52</sup> This view has been repeatedly reinforced in the decades since that case was decided. In *Epperson v. Arkansas*,<sup>53</sup> the Court reaffirmed: "By and large, public education in our Nation is committed to the control of state and local authorities."<sup>54</sup> In *Milliken v. Bradley*,<sup>55</sup> the Court noted that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools."<sup>56</sup> And in *United States v. Lopez*,<sup>57</sup> the Court noted that "education [is an area] where States historically have been sovereign."<sup>58</sup> Even if Congress were to fund institutions in every state, this aggregation of several local benefits would still not be funding for the general, national welfare.

#### IV. CONGRESS'S POWER TO RAISE AND SUPPORT ARMIES

Our examination of the original understanding of the Spending Clause shows that, as originally conceived, the Clause does not authorize Congress to provide unconditional federal funding to institutions of higher education. Nevertheless, such funding may still be authorized

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48. 5 H.R. JOURNAL 466, 469 (1806).

49. *Id.*

50. See Buchanan, *supra* note 46, at 543-50 (declaring act unconstitutional).

51. 347 U.S. 483 (1954).

52. *Id.* at 493.

53. 393 U.S. 97 (1968).

54. *Id.* at 104.

55. 418 U.S. 717 (1974).

56. *Id.* at 741.

57. 514 U.S. 549 (1995).

58. *Id.* at 564.

under some other power granted to Congress in the Constitution. Funding of higher education under the restrictions of the Solomon Amendment is still permissible under Congress's power to raise and support armies, for example.

The Supreme Court has repeatedly and correctly recognized that "[t]he constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."<sup>59</sup> In its opinion considering the constitutionality of the Solomon Amendment, the United States Court of Appeals for the Third Circuit presumed that "the United States has a vital interest in having a system for acquiring talented military lawyers."<sup>60</sup> The national interest in educating prospective soldiers has long been a motivating factor in federal funding of education. Historically, the first federal funding of private institutions of higher education came through government sponsorship of military officer training programs at private schools during World War I and World War II. It was only after this inroad that peacetime funding of private institutions began.<sup>61</sup>

If the education of future soldiers is to be successful, the government must have the ability to recruit the students whose education is being subsidized. In this context, the Solomon Amendment is not a separate restriction or penalty imposed on a broader funding program, but instead is a tool to condition spending for the purposes for which it was authorized. The Amendment guarantees that these federal programs funding higher education really do go to help raise and support armies. This is why Judge Aldisert was right in his dissent to say that the Solomon Amendment was "not only authorized . . . but commanded by" Congress's power to raise and support armies.<sup>62</sup>

Nor does the Solomon Amendment serve as an unconstitutional condition,<sup>63</sup> restricting (as has been alleged) the freedom of speech or association of those who choose to accept federal funding. Indeed, just the opposite is true; once the Solomon Amendment is seen as a necessary component of ensuring that federal funding of higher education goes to

59. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (citing *Lichter v. United States*, 334 U.S. 742, 755-58 (1948)) (ruling on extent of Congress's power).

60. *Forum for Academic and Institutional Rights v. Rumsfeld (F.A.I.R.)*, 390 F.3d 219, 245 (3d Cir. 2004) (asserting United States' interest).

61. See H. Kathryn Merrill, *The Encroachment of the Federal Government into Private Institutions of Higher Education*, 1994 *BYU EDUC. & L.J.* 63, 64-65 (1994) (tracing rise of federal funding).

62. *F.A.I.R.*, 390 F.3d at 250 (Aldisert, J., dissenting) (arguing Amendment's validity).

63. The unconstitutional conditions doctrine provides that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." Perry v. Sindermann, 408 U.S. 593, 597 (1972). On the other hand, however, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program." *Rust v. Sullivan*, 500 U.S. 173, 194 (1991).

support the military, it becomes clear that it is perfectly constitutional. By virtue of the Solomon Amendment, Congress "is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."<sup>64</sup> In *Rust v. Sullivan*,<sup>65</sup> the Supreme Court upheld a restriction barring federal family planning services funds from being used in programs providing abortion counseling.<sup>66</sup> In *United States v. American Library Ass'n*,<sup>67</sup> the Supreme Court likewise upheld a statutory requirement that libraries accepting federal funds agree to block obscene Internet sites.<sup>68</sup> In such cases, the unconstitutional conditions doctrine does not apply because "the Government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized."<sup>69</sup> The key, then, is determining whether the Solomon Amendment is a component of the funding programs that was put in place to ensure that the money was spent for the authorized purposes; or whether the Solomon Amendment is a separate denial of a benefit (or imposition of a penalty) that takes away funds from some recipients for reasons unconnected with the government's purposes for providing the funding.

As described above, the most valid basis for federal funding of *local* higher education is Congress's power to raise and support armies. By permitting funding only to those institutions that allow military recruiters on campus, the Solomon Amendment serves to ensure that the federal money is really going to help educate potential soldiers. As such, the Amendment is not imposing a penalty but simply requires institutions receiving public funds to spend those funds "for the purposes for which they were authorized."<sup>70</sup> Strike down the Solomon Amendment and the entire federal education spending edifice is constitutionally suspect under the original understanding of the Constitution's spending power.

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64. *See Rust*, 500 U.S. at 196 (explaining operation of unconstitutional conditions doctrine).

65. 500 U.S. 173 (1991).

66. *See id.* at 203 (holding that restriction was valid use of congressional power).

67. 539 U.S. 194 (2003).

68. *See id.* at 211 (holding unconstitutional conditions doctrine did not render statute invalid).

69. *See Rust*, 500 U.S. at 196 (reasoning that restriction is valid because it does not condition funding on recipient foregoing certain activity).

70. *See Rust*, 500 U.S. at 196 (explaining why funding restriction is valid).

