Three Faces of Deference

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ABSTRACT

Deference – the substitution by a decision maker 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 consider the obligations of deferees, which should invoke deference only for those decisions reached in the full and fair exercise of their legal or epistemic authority.

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Second, the 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 and Institutional Rights (“FAIR”), in which the Supreme Court rejected a challenge to the Solomon Amendment, which 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.

Finally, the Article shows that its examination of deference, and of universities as First Amendment institutions, 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 might learn a good deal from each other.
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I. 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 First Amendment law’s 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 Press Clause, because doing so would require courts to consider who qualifies as a journalist, a factual question that raises

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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. __ (forthcoming 2007) (hereinafter Horwitz, Universities as First Amendment Institutions).
⁴ See Paul Horwitz, Grutter’s First Amendment, 46 B.C. L. Rev. 461, 564 (2005) (hereinafter Horwitz, Grutter’s First Amendment).
⁶ See Horwitz, Grutter’s First Amendment, supra note __, at 564.
“practical and conceptual difficulties of a high order.” Thus, the Court’s fear of context has led it to “render[ ] the Press Clause . . . a virtual nullity.” 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.

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

And here is the dilemma: It turns out that context does matter. 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 “are out of place in the context of this case,” and that it must instead “examine the role of libraries in our society.” In another case, the Court abandoned content-neutrality doctrine because the defendant, a government arts funding body, 

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8 Horwitz, Grutter’s First Amendment, supra note __, at 564-65; see also Frederick Schauer, Towards an Institutional First Amendment, 89 Minn. L. Rev. 1256, 1257 (2005) (“existing 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 (2006).
9 For examples, see Horwitz, Universities as First Amendment Institutions, supra note __, at __.
11 Schauer, supra note __, at 120.
12 Schauer, supra note __, at 1256.
15 Id. at 203.
necessarily had to make content-based distinctions.\textsuperscript{16} Still
more recently, the 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.\textsuperscript{17}
Other examples abound.\textsuperscript{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\textsuperscript{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.”\textsuperscript{20} On the other, 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 between the tension between
doctrinal generality and factual specificity.\textsuperscript{21} Courts require
some vehicle to bring responsiveness into the law\textsuperscript{22} despite
their natural urge toward acontextuality.

\textsuperscript{16} See Nat’l Endowment for the Arts v. Finley, 524 U.S. 569 (1998);
see also Schauer, supra note __.
\textsuperscript{18} See Horwitz, Universities as First Amendment Institutions,
supra note __, at __.
\textsuperscript{19} See generally Richard A. Posner, Against Constitutional Theory,
\textsuperscript{20} Hills, supra note __, at 174.
\textsuperscript{21} See Robert C. Post, Recuperating First Amendment Doctrine, 47
Stan. L. Rev. 1249 (1995); see also Schauer, supra note __, 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”).
\textsuperscript{22} Cf. Philippe Nonet & Philip Selznick, Law and Society in
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 government, an administrative agency, a private institutional actor, or a quasi-public actor.

The relationship between law’s contextual dilemma and the role of deference is a complex one. But it is clear 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 conflict between acontextual law and real-world factual diversity and complexity is 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 trans-substantive tool of constitutional law. This gap is especially surprising because deference has been on constitutional law’s scholarly agenda.

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26 See, e.g., Grutter, 539 U.S. at 328-29 (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).
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 jurisprudences.28 It has also been studied at high levels of specificity with respect to various particular constitutional or quasi-constitutional doctrines. Thus, 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 military30 and prisons.31

Nevertheless, between abstraction and specificity, 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 between abstraction and specificity. We need an examination of deference’s role in constitutional law that is both sufficiently abstract and sufficiently practical to shed some much-needed light on this pervasive doctrinal tool, and that might at least lead to its being recognized as a central subject of constitutional law.

30 See infra notes ___ and accompanying text.
31 See infra notes ___ 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 ___.
This Article seeks to fill that gap. In what follows, I will identify and examine deference as a general device in constitutional law. At the same time, I will demonstrate the practical applications of this study by examining the varied faces of deference that appeared in the Supreme Court’s recent decision in *Rumsfeld v. Forum for Academic and Institutional Rights*. In that case, the Supreme Court rejected a variety of First Amendment challenges to the Solomon Amendment, under which Congress threatened to penalize law schools that obstruct the government’s use of military recruiters on campus. That provision was challenged unsuccessfully by law schools that wished to bar on-campus military recruiters, who discriminate on the basis of sexual orientation.

The Court’s decision in *FAIR* nicely illustrates both the pervasiveness of deference as a subject of constitutional law, and the inadequacy of our 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 (or “*Dale* deference”), and deference to higher educational institutions (or “*Grutter* deference”). 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 one might have expected given the Court’s sweeping statements about deference in its prior decision in *Boy Scouts of America v. Dale*. And it gave no weight at all to the *Grutter* deference argument.

In this Article, I show that *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

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34 126 S. Ct. 1297 (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.”
36 See Horwitz, *Grutter’s First Amendment*, supra note __.
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 context of a “First Amendment institution,” the university.

The Article proceeds as follows. Part II 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 deployed 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. As we will see, these categories are hardly watertight. It also examines an aspect of deference that is all too frequently ignored: the obligations of the deferee. I argue that deference carries with it significant obligations on the part of the deferred-to party.

The next sections apply this richer understanding of deference to the FAIR case itself. Part III provides some background on the Court’s ruling in FAIR. Despite the conventional wisdom that this was an easy case, I will suggest, the Court’s opinion actually obscures a host of difficult First Amendment questions. Part IV 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

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38 See generally Horwitz, Grutter’s First Amendment, supra note __.

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 V concludes by linking this Article to larger currents in contemporary constitutional theory. It suggests that deference is positioned 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.

II. A TAXONOMY OF DEFERENCE

A. INTRODUCTION

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. For example, the constitutional doctrine of separation of powers revolves around the extent to which one branch of the federal government must defer to another branch's interpretation of some constitutional question.\(^\text{40}\) Within administrative law, vast forests have been felled on the subject of deference to administrative agencies.\(^\text{41}\) And scholars have often discussed

\(^{40}\) 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 “In recent times, judges have incanted the separation-of-powers mantra as if it were coterminous with deference to the legislative and executive branches”).

\(^{41}\) See supra note __.
deference to other specific government institutions, such as the military,\textsuperscript{42} prisons,\textsuperscript{43} and public schools\textsuperscript{44} and universities.\textsuperscript{45}

What is generally missing from these treatments, however, is an effort to treat deference as a subject worthy of discussion on its own. Commentators often assume the importance of deference as a principle \textit{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,\textsuperscript{46} or as an aspect of cases involving specific government institutions. But these treatments are content to treat deference as a bit player in a larger discussion, generally centered around narrow 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 topic worthy of discussion.\textsuperscript{47} And fewer still have treated deference as a trans-substantive doctrine, unmooring it from specific areas of inquiry and asking what we know about 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,\textsuperscript{48} but his account of deference is rather more genealogical than analytical. Similarly, C. Thomas Dienes’

\textsuperscript{42} \textit{See infra} notes ___ (and accompanying text).
\textsuperscript{44} \textit{See, e.g.}, Chemerinsky, \textit{ supra} note ___; James E. Ryan, \textit{The Supreme Court and Public Schools}, 86 Va. L. Rev. 1335 (2000).
\textsuperscript{45} \textit{See, e.g.}, Diane H. Mazur, \textit{A Blueprint for Law School Engagement With the Military}, 1 Nat’l Security 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).
\textsuperscript{46} \textit{See Solove, supra} note __.
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 circumstances but says relatively little about what, precisely, deference means.\footnote{See C. Thomas Dienes, \textit{When the First Amendment is Not Preferred: The Military and Other Special Contexts}, 56 U. Cin. L. Rev. 779 (1988).} At the other end of the spectrum, Philip Soper has offered up a sophisticated book-length treatment of deference,\footnote{Soper, supra note \textendash.} but it is pitched at a high level of abstraction, focusing more on the broader question of political obligation than on the practical questions raised by the courts’ deference to specific institutions.\footnote{See, e.g., Frederick Schauer, \textit{Deferring}, 103 Mich. L. Rev. 1567, 1576 (2005) (reviewing Soper, \textit{id}).} Still other scholars have noted the trans-substantive 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.\footnote{See, e.g., Chemerinsky, \textit{supra note \textendash}.}

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.”\footnote{Solove, supra note \textendash., at 945.} 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:

\begin{quote}
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
\end{quote}
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.”  

This Part takes up that challenge. I seek here to bring some greater clarity to our understanding of deference as a trans-substantive legal principle. In what follows, I offer a working definition of deference, defend it against at least one competing definition, and distinguish it from some closely related concepts. I then attempt to 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 taxonomy 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 underlooked, 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 party that is the recipient of deference to exercise its own authority responsibly within the boundaries of that deference.

B. DEFINING DEFERENCE

As Henry Monaghan observed some time ago, deference “is not a well-defined concept.” 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

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

variety of judicial approaches.” Nevertheless, I want to begin by attempting to arrive at a general definition of the concept.

For purposes of this Article, we may define deference in terms suggested by Robert Schapiro: deference involves a decision-maker following a determination made by some other individual or institution that it might not otherwise have reached had it decided the same question independently. Although Schapiro is speaking directly in terms of judicial deference to other branches of government, the point can be generalized to a variety of decision-makers. 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.” Similarly, Monaghan concludes that deference to administrative agencies, “to be meaningful,” necessarily implies that the agency’s view displaces “what might have been the judicial view res nova.” Deference, then, involves a decision-maker (call it “D1”) setting aside its own judgment and following the judgment of another decision-maker (“D2”) in circumstances in which the deferring decision-maker, D1, might have reached a different decision.

In adopting this definition, I set aside for now questions of the scope of deference, which often plague judicial decision-makers. 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.

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56 Id.
57 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.”).
58 Soper, supra note __, at 22.
59 Monaghan, supra note __, at 5.
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 decision-maker, courts regularly caution that their deference is “not absolute.” That phrase may refer to at least two different phenomena. A court’s reference to the non-absolute nature of deference may signify the extent to which the court will follow the judgment of D2. Or, as when a court demands that prison officials “present credible evidence to support their stated penological goals,” it may refer to the court’s unwillingness to defer unless certain preconditions for deference have been met.

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, having deferred substantially although not completely to D2, reach a conclusion it would not have reached independently.

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

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

62 Id.

as certain 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.” The, 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.”

This statement is capable of a number of saving constructions. But it may serve nicely 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,” and defer to the other branches at that point. That would indeed constitute deference. But if they mean that that in cases involving the political branches, courts must always engage in an

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64 Lawson & Moore, supra note __, at 1271.
65 Id. at 1278.
66 Id.
“independent” “judgment . . . that a particular Congress or court in a particular circumstances is likely to have correctly interpreted the Constitution,”\(^\text{67}\) then we cannot call this deference.\(^\text{68}\) One does not defer by simply “acting on [one’s] own understanding of what the balance of reasons . . . supports,”\(^\text{69}\) any more than I can be said to have deferred to my neighbor if, having discussed the matter with him, 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.”\(^\text{70}\)

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 \textit{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 because D1 \textit{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 generally policy of deferring to the judgment of

\(^{67}\) \textit{Id.} at 1271.

\(^{68}\) Nor could we call it deference if D1 only \textit{purported} to give consideration to D2, while rejecting any judgment of D2 that it thought wrong. \textit{Cf.} Antonin Scalia, \textit{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”).

\(^{69}\) \textit{Soper, supra note} __, at 22.

\(^{70}\) Schapiro, \textit{supra note} __, at 665.
military officials, it may appear that they are simply obeying the military’s judgment. But although it may follow a general policy of deferring to military judgments, the Supreme Court is not obliged to do so, and might conceivably reject that policy, in isolated cases or altogether. Thus, deference implies that D1 has some power of independent decision-making, 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*, 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.” 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 should 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

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71 See, e.g., *Goldman v. Weinberger*, 475 U.S. 503, 507 (1987) (“[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.”).

72 See, e.g., *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”).


74 *Id.* at 67 (emphasis added).
the Constitution alone in describing its decision to defer to military judgments. More broadly, the Court did not disclaim the possibility that, as an independent interpreter of the Constitution, it might subsequently 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 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. As the foregoing discussion suggests, an important aspect of deference is D1’s choice, as between 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. In short, while the decision to defer is itself an exercise of discretion, deference is ultimately only a sub-set 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 remains available, even if only hypothetically, and the fact that a court in such a situation would be faced with a variety of potential choices – 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.

75 See infra notes ___ and accompanying text.
Thus, 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 reaching a judgment, 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. 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. But this is a rather more casual use of the term. Speaking more precisely, we should be able to distinguish clearly between deference and jurisdiction.

C. WHY AND WHEN COURTS DEFER

To recap, we have defined deference as a decision-maker’s decision to follow a determination made by some other individual or institution that it might not otherwise have

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76 See, e.g., Dienes, supra note __, at 819 (referring to the Court’s deference to the military as “de facto non-justiciability”).
77 See, e.g., Horwitz, Universities as First Amendment Institutions, supra note __, at __; see also Roderick M. Hills, Jr., The Constitutional Rights of Private Governments, 78 N.Y.U. L. Rev. 145, 147, 188, 196 (2003).
78 See Solove, supra note __, at 953.
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,” why should the courts ever defer to the judgments of other decision-makers? If deference consists of following the judgment of another even if one might consider that judgment wrong, why should courts ever willingly displace their own independent judgment?

This section offers a more detailed taxonomy of the reasons why courts defer to others, notwithstanding 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. As we will see, these categories are hardly watertight. In the same general legal category – in cases involving deference to prison authorities, for example – and 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 slide 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 determination 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 status of the body to which the courts are deferring. Because their concern is with the courts’

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80 See Scalia, supra note __, at 513.
81 See Lawson & Moore, supra note __, at 1271 (distinguishing between “epistemological deference” and “legal deference”).
82 See Lawson & Moore, supra note __, at 1278.
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.”\footnote{Id. at 1271.} 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.\footnote{See Solove, supra note __, at 944.}

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 \textit{Chevron}, 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. If the statute is ambiguous on the question at issue, the court must defer to any “permissible [agency] construction of the statute.”\footnote{Chevron, 467 U.S. at 843.} The reviewing court’s position in such cases is deferential in exactly the way I have defined deference: 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 had arisen in a judicial proceeding.”\footnote{Id. at 843 n.11. \textit{Compare SEC v. Sloan}, 436 U.S. 103, 113 (1978) (rejecting an agency interpretation that the Court concluded was not the “most natural or logical”).} \textit{Chevron} ushered in an era of judicial review of agency interpretations of law that is far more deferential than the Court’s prior approach.\footnote{See, e.g., Alfred C. Aman, Jr. and William T. Mayton, \textit{Administrative Law} § 13.7.2, at 471 (1993).}

For present purposes, of equal significance to the Court’s sea change in its approach to judicial review of agency interpretations of law was its justification for its 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 contained greater expertise on the question at issue than did the generalist federal courts.88 *Chevron* also noted the old expertise-based rationale for deference to agency interpretations of law.89 But its primary justification for deference to agency interpretations was based not on expertise, but on the fact that Congress had impliedly delegated its lawmaking power to the agencies.90 Moreover, agencies are, through the President, indirectly “accountable to the people,” 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.”91 In short, *Chevron* “relocated the basis for judicial deference [to agency interpretations of law] from expertise to an implied delegation of lawmaking power.”92 Most scholars have described that move as one sounding in the separation of powers.93

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 congressional legislation. Let us focus on a central example of legal authority-based deference that we will encounter later in discussing *FAIR*: judicial deference in examining legislation based on Congress’s 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

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89 See *Chevron*, 467 U.S. at 844.
90 See id. at 844.
91 Id. at 865-66.
common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” The Court has described Congress’s power to make its own determinations in this area as “broad and sweeping.” In *Rostker v. Goldberg*, 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’s authority to establish and maintain the armed forces.96

As Diane Mazur has noted, this justification is problematic. 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.” But Congress “*always* acts under an explicit constitutional grant of authority.” 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.”

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 be that the Court, in deferring to Congress’s exercise of its military power, is in effect suggesting that this field, having been textually committed to the discretion of another branch, falls within the

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97 *Rostker*, 453 U.S. at 70.


political question doctrine, But, of course, the Court has not totally disclaimed its authority to scrutinize Congress’s actions under its military power. Whatever its weaknesses, however, we can at least conclude that the Court’s deference to congressional actions arising under Congress’s military powers demonstrates that the separation of powers argument for legal authority-based deference is not limited to the *Chevron* doctrine.

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.” 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. Similarly, 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.” 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. But these provisions do not justify deference in areas lying beyond the military justice system. Indeed, we might think of this exclusion of military personnel from certain aspects of the Constitution less as a basis for deference, and more as a limitation on the federal courts’ *jurisdiction* to entertain such questions.

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101 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 (1976).
103 Id., amend. V.
104 Id. amend. VI. *See Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).
105 See generally Mazur, supra note __, at 707-19.
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 decision-maker to engage in policy choices, the decision-maker tasked with those choices should be an agency, which is indirectly “accountable to the people” through the President.\(^{106}\) 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.”\(^{107}\) 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 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*.\(^{108}\) 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.\(^{109}\) He challenged the conviction largely on First Amendment grounds, and the Court upheld his conviction.

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.”\(^{110}\) The distinction

\(^{106}\) *Chevron*, 467 U.S. at 865.
\(^{107}\) *Id.* at 866.
\(^{109}\) *See id.* at 735-40.
\(^{110}\) *Id.* at 743. Justice Rehnquist drew primarily on the Court’s earlier statement in *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), that “[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian.” For an argument that *Orloff* was improperly extended in *Parker*, see Mazur, *supra* note __, at 736-43.
“between the military community and the civilian community,”111 and the “different character of the military community and of the military mission,”112 he continued, required “a different application of those protections” available under the First Amendment in the military context.113 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.114 This line of cases is known as the “separate community doctrine.”115 Under this doctrine, courts give “considerable . . . deference to decisions by Congress or the military” that implicate constitutional rights.116

The separate community doctrine may be regarded 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.”117 Viewed in this light, the Court’s deference to the military can be seen as suggesting that, because the military occupies a separate and distinct sphere, the courts are simply forbidden to enter into that sphere. We might thus view this aspect of deference to the military as a kind of rationale for judicial deference that is, at bottom, legal authority-based, in the sense that the military is treated as occupying a wholly different social and legal sphere.

111 Parker, 417 U.S. at 749.
112 Id. at 758.
113 Id.
114 See id. at 757-59.
116 Id. For discussion of the separate community doctrine, see, e.g., Mazur, supra note __, at 744-70 (criticizing the doctrine); Donald N. Zillman & Edward J. Imwinkelried, Constitutional Rights and Military Necessity: Reflections on the Society Apart, 51 Notre Dame Law. 397 (1976) (same); Dienes, supra note __ (same); but see Hirschhorn, supra note __ (defending the separate community doctrine).
117 Parker, 417 U.S. at 744.
The military is not the only institution that has enjoyed some degree of institutionally oriented legal authority-based deference. Higher educational institutions have often been treated in similar terms. Although, as we will see, the justifications courts give for according substantial deference to the decisions of colleges and universities are usually epistemic in nature, 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.”\footnote{Grutter v. Bollinger, 539 U.S. 306, 329 (2003).} Similarly, in cases involving the freedom of expressive associations, such as the Court’s decision in Boy Scouts of America v. Dale,\footnote{530 U.S. 640 (2000).} 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.”\footnote{Id. at 653.} Although, again, the Court’s deference to educational institutions 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, in which they will enjoy substantial autonomy to shape their own norms.\footnote{John O. McGinnis, Reviving Tocqueville’s America: The Rehnquist Court’s Jurisprudence of Social Discovery, 90 Cal. L. Rev. 485, 533 (2002).} 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 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, the 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 is outside the regular sphere of the courts’ decision-making 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.\(^{122}\) Although the questions raised by the notion of epistemic deference can be subtle and difficult,\(^ {123}\) we can start at a more basic level by simply identifying some of the occasions on which courts will engage in epistemic authority-based judicial deference.

Most commonly, courts defer to other decision-makers on epistemic grounds when they believe that the other decision-maker has greater expertise at its command on the issue in question. This consideration actually entails two separate but related points, both of which can be subsumed under the general concept of institutional competence, which has played a significant role in accounts of judicial deference since at least the rise of the Legal Process school of jurisprudence: institutional competence.\(^ {124}\) When courts defer to other

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

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, 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 decision-making authority to those agencies, 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.” *Chevron* thus exhibits both the positive and negative aspects of epistemic deference, pointing out not only that agencies may

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126 *See supra* notes __-__ and accompanying text.

127 *See supra* notes __-__ and accompanying text; *see also* Michael Herz, *The Rehnquist Court and Administrative Law*, 99 Nw. U. L. Rev. 297, 307 n.43 (2004). But see *Note*, *The Two Faces of Chevron*, 120 Harv. L. Rev. 1562 (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”).

have “great expertise,”129 but also that “[j]udges” may “not [be] experts in the field.”130

As with administrative agencies, courts regularly defer to the military not only on legal authority grounds,131 but also on the grounds that the military possesses greater expertise than the courts do on questions relating to the armed forces.132 The Supreme Court has argued that “deference to the professional judgment of military authorities”133 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.”134 Again, the courts’ deference to the military is not based on the military’s expertise alone. The courts are equally certain that they are themselves “ill-equipped” to make independent determinations about various aspects of military life.135 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.136

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 are complex and intractable,”137 and that running a prison “is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources.”138 Similarly, the

129 Id. at 865.
131 See supra notes __-__ and accompanying text.
132 See, e.g., Fallon, supra note __, 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, 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).
134 Gilligan v. Morgan, 413 U.S. 1, 10 (1973).
136 Gilligan, 413 U.S. at 10.
Court has suggested that decisions with respect to prison security are “peculiarly within the province and professional expertise of corrections officials.” 139 Accordingly, and in order “[t]o ensure that courts accord appropriate deference to prison officials,” 140 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.” 141

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,” 142 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,” 143 and that judgments regarding the needs of educators in that environment rest in the first instance with the educators themselves. 144 Thus, federal courts have “granted [public school] educators substantial deference” in weighing the appropriateness of school actions with respect to student speech. 145

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141  Turner, 482 U.S. at 89: see id. at 89-91 (setting out four factors to be analyzed in “determining the reasonableness of the regulation at issue”); Beard v. Banks, 126 S. Ct. 2572 (2006) (applying Turner in a recent case upholding a prison policy restricting access to newspapers, magazines, and photographs for inmates in highly restricted level of prison’s long-term segregation unit). But see Johnson v. California, 125 S. Ct. 1141 (2005) (declining to apply the Turner standard to a prison policy that temporarily separated inmates by race and national origin).
143  Id.
145  LaVine v. Blaine Sch. Dist., 257 F.3d 981, 988 (9th Cir. 2001).
Similarly, the courts have regularly cited the expertise of universities in deferring to educational judgments made by those institutions. For example, in *Regents of University of Michigan v. Ewing*, 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.’”

The federal courts have accordingly given substantial deference to “a university’s academic decisions” across a range of issues. Most famously, in his concurring opinion in *Sweezy v. State of New Hampshire by Wyman*, Justice Frankfurter argued that universities are entitled to deference with respect to academic decisions concerning “the four essential freedoms of a university” – “who may teach, what may be taught, how it shall be taught, and who may be admitted to study.” This deference to university officials underlay the Court’s decision in *Grutter v. Bollinger*, 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.”

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

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147 *Id.* at 226 (quoting *Bd. of Curators, Univ. of Mo. v. Horowitz*, 435 U.S. 78, 89-90 (1978)).
148 *Grutter*, 539 U.S. at 328.
150 *Id.* at 283 (quotations and citations omitted).
the Supreme Court in its decision in *Boy Scouts of America v. Dale*. Here, the Court made 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.”

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

These instances of institutions to which the courts will grant epistemic deference barely begin to describe the universe of epistemically grounded 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

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153 530 U.S. 640 (2000); see infra Part IV.C.
154 *Dale*, 530 U.S. at 653.
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 sub-sections have offered two broad sets of justification regularly relied on by courts in according substantial 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. 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 virtually all cases? Second, why do courts so often defer for reasons of both legal and epistemic authority?

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.” That is, courts will seek some decision rule by which

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156 Solove, supra note __, at 961.
158 David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. Chi. L. Rev. 190, 193 (1988). See also, e.g., Fallon, supra note __, at 1310-12;
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.”

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 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.

This argument seems to justify approaching particular institutions, and not others, with a presumptive rule of deference. It also rests entirely on the epistemic side of the

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159 Strauss, *supra* note __, at 193 n.12.
universe of justifications for judicial deference. But it does not entirely answer the question I posed above. In particular, it does not answer the question 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. 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?

To answer this question, we must deepen our 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, 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, “some kinds of errors are more serious than others.”  

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. Second, courts may believe that in certain contexts, non-deferential judicial review is likely to result in the underprotection of essential constitutional rights. For example, a court may believe that deferring to an expressive association’s own “view of what would impair its

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160 See, e.g., Solove, supra note __, at 1004-06.
161 Fallon, supra note __, at 1311.
162 Hirschhorn, supra note __, at 238, 239; see also Fallon, supra note __, at 1311-12.
163 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.
expression”\textsuperscript{164} minimizes the risk that a court will underprotect expressive associational rights.

For both these reasons, we can see that although there are important distinctions between legal authority-based and epistemic authority-based arguments for judicial deference, often the two will fuse into one.\textsuperscript{165} 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 \textit{legal} authority on an institution that is also especially likely to have greater \textit{epistemic} authority in this area.

Similarly, as I argue at greater length below, 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. 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\textsuperscript{166} and encouraging public discourse by private citizens, and that it has long enjoyed the kind of autonomous legal status that continues to justify deferring to decisions made by journalists and editors.\textsuperscript{167} Similarly, the courts may believe that religious institutions are epistemically superior to courts in judging threats to their own freedom,\textsuperscript{168} and also that these institutions are, under our Constitution, peculiarly deserving of a substantial measure of decisionmaking autonomy.\textsuperscript{169}

\textsuperscript{164} \textit{Dale}, 530 U.S. at 653.
\textsuperscript{165} \textit{See}, e.g., Lawson and Moore, \textit{supra} note __, at 1278 (noting that “[e]pistemological deference can often shade into legal deference”).
\textsuperscript{167} \textit{See} Bezanson, \textit{supra} note __.
\textsuperscript{168} \textit{See}, e.g., McConnell, \textit{supra} note __.
\textsuperscript{169} \textit{See}, e.g., Horwitz, \textit{Universities as First Amendment Institutions}, \textit{supra} note __, at __; \textit{see also} Richard W. Garnett, \textit{The Freedom of the Church}, 4 J. Cath. Soc. Thought 59 (2006); Ira C. Lupu & Robert C.
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.

D. 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 outweigh the answers I offer. Nevertheless, 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.

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

Tuttle, The Distinctive Place of Religious Entities in Our Constitutional Order, 47 Vill. L. Rev. 37 (2002).
not considered, for example, the degree to which deference pervades the courts’ review of actions taken by players in the criminal justice system, including prosecutors, criminal defense attorneys, and police officers.170 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.171

More broadly, my focus on the explicit use of deference by the courts in cases involving epistemically or legally superior institutions leaves to one side the standard of judicial review 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.172 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 Marshall once complained, the Court’s pronouncements about deference often amount to nothing more than the mouthing of “hollow shibboleths”:173 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 decision-

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170 See generally Solove, supra note __, at 963-64.
maker to whom it is deferring, and why does it sometimes invoke the epistemic authority of the deferred-to body? 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 a particular case?[^174] 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?[^175] If so, why should courts defer to the legal determinations of other bodies? And why do courts defer to legal determinations in some areas but not others?[^176]

Although some of what is said in this Article may provide 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 to anyone seeking to explore the larger puzzles posed by this phenomenon. Second, as we will see, this Article’s attempt to cash out this basic taxonomy of deference in the more concrete surroundings of the FAIR litigation sheds some light

[^174]: For example, in *Rostker v. Goldberg*, 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. 453 U.S. at 65-66 (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)). But the judgment in that case concerned deference to Congress’s 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 __, at 488.

[^175]: For a discussion of the law-fact distinction, see the sources cited in note __, supra.

[^176]: See, e.g., *Mazur*, supra note __, 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’s exercise of its other Article I, section 8 powers, although courts do not generally defer to legal determinations made by Congress in those areas).
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 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 decision-making 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 substantial number of familiar constitutional doctrines, many of which have already been mentioned above: the political question doctrine, the enrolled bill doctrine, Chevron deference, the rational basis test introduced by the Court in <em>McCulloch v. Maryland</em>,177 the Court’s substantial (but, seemingly, shrinking) deference to Congress’s exercise of its enforcement powers under section five of the Fourteenth Amendment,178 and so on.

The problem here is that the Constitution rarely, if ever, speaks in a clear voice about the necessity, propriety, or degree of deference required when the federal courts review the actions of other legal authorities.179 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

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177 17 U.S. 316 (1819).
179 Cf. Monaghan, <i>supra</i> note __, at 9 (“To be sure, this commitment-to-another-branch rationale [for judicial deference] necessitates some judicial interpretation”).
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.\footnote{For a recent example, see Public Citizen v. United States District Court for the District of Columbia, -- F.3d --, 2007 WL 1529482, at *7-8 (D.C. Cir. May 29, 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).} Nor does the Constitution itself tell us in so many terms 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 the discretion of another legal authority; 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.\footnote{The canonical cite is, of course, United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).} 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,\footnote{See generally Brewer, supra note __.} 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 \textit{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 \textit{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 are the courts to determine in a non-arbitrary 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.”\textsuperscript{183} 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, for example, courts often face competing experts, “who testify to contrary or even contradictory scientific propositions.”\textsuperscript{184} 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.”\textsuperscript{185} In other words,

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, prison administrators, and the other institutions I have already canvassed, rather than individual scientific experts. As we will see, \textit{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.\textsuperscript{186} Thus, the question before it was not simply

\begin{footnotesize}
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\item \textsuperscript{183} 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).
\item \textsuperscript{184} Id. at 1538.
\item \textsuperscript{185} Id. at 1680.
\item \textsuperscript{186} In fact, as we will see, the number of competing claims to deference in \textit{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
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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 on the common ground 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 especially significant in our constitutional and social order. Whatever arguments might be made for deference in the common run of cases, some cases involve institutions that most of us recognize 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, and perhaps a few others – are “of special importance to public discourse.” 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. And

\[187\] Horwitz, Grutter’s First Amendment, supra note __, at 571.
\[188\] Incidentally, this answer may help us understand why courts 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 the former institution. For example, courts defer to universities, with which
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. 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, in cases 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.

E. 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”). 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

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. Compare Pamela S. Karlan, Compelling Interests/Compelling Institutions: Law Schools as Constitutional Litigants, 54 UCLA L. Rev. __ (forthcoming 2007) (schools), with Schauer, supra note __ (golf).

189 See Schauer, Deferring, supra note __, at 1574, 1576.
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 offer at least 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 begin with the obligations of the deferee under an epistemic authority-based account of deference.

Under such an account, 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 the epistemic superiority of that institution, we might oblige such an institution to actually bring the weight of its expertise to bear on the problem now 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.¹⁹⁰

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.¹⁹¹ 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,”¹⁹² by invoking deference without engaging in good-faith deliberation on the question at hand.¹⁹³

¹⁹⁰ Cf. Charles, supra note __, 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 matter. Ascertaining the contexts, domains, or subject matters that command epistemic deference is part of the inquiry into epistemic authority.”).
¹⁹¹ See Soper, supra note __, at 182 (“Deference requires good faith on the part of the [deferee]”).
¹⁹² Schauer, Deferring, supra note __, at 1574.
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; we should also expect it to meet a minimum level of appropriate *process* in its deliberations. To the extent that it demands deference for its deliberations, they 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.\(^{194}\)

The qualities we should expect from a faithful deferee are little different if we shift the ground from the epistemic justification for deference to the legal authority-based justification for judicial deference. If the courts are to defer to some institution on the ground that it possesses the sole or superior legal authority to decide in that area, we should expect such a deferee 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.

Other qualities we might expect from a deferee whose exercise of its legal authority is worthy of judicial deference are likely to line up closely with the qualities addressed under the rubric of the epistemic justification for judicial deference. After all, one of the foundations on which legal authority-based

deference is based is that the Constitution has equipped the political branches with a variety of mechanisms to ensure sound, legitimate, and accountable decision-making. These include open, extended, and transparent deliberation, and a meaningful opportunity to air opposing viewpoints. Again, then, we see that in practice both justifications for deference will often share the same obligations.

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 that is not the whole story.

In *United States v. Mead Corp.*, for example, the Court discussed the proper occasions for *Chevron* deference. 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.” 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.” As Richard Murphy has observed, this statement draws on both legal and epistemic authority-based justifications for deference: “‘Relatively formal administrative procedures’ . . . encourage ‘deliberation’ (and thus the deployment of expertise) and ‘fairness’ (e.g., transparency and political accountability).” In short, the Court’s ruling in *Mead* suggests that judicial deference is most fitting where an administrative agency is operating squarely

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196 *Id.* at 226-27.
197 *Id.* at 229-30.
within the terms of a properly delegated legal authority, and operating according to a process that best ensures the sound deployment of its epistemic authority.

Similarly, in a case decided a year before *Mead, Christensen v. Harris County*, 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[s].’” As Ronald Krotoszynski has observed, while *Christensen* was 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.”

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, they are far less likely to do so where a university has failed to adequately support its decision with thoughtful deliberation carried out according to some reasonable process. In *Guckenberger v. Boston University*, for example, a district court facing an suit against the university under the Americans With Disabilities Act, in which students argued that they should be exempt from foreign-language requirements, refused to dismiss the action because the university administration had not “engage[d] in any form of reasoned deliberation as to whether modifications

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*200* Id. at 586-87.

*201* Krotoszynski, *supra* note __, at 745 (citing Jim Rossi, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, 42 Wm. & Mary L. Rev. 1105, 1144-46 (2001)).

*202* 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 Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (deferring substantially to academic decision to dismiss student where university reasonably exercised professional judgment according to “accepted academic norms”).

in the [foreign-language requirement] would change the essential academic standards of [the university’s] liberal arts curriculum.”204 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.205

Although this focus on the obligation of the deferee is fairly common in the caselaw 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,”206 for example, could be seen as being grounded in a consideration of the proper deferral relationship between different public and private decisionmakers.207

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.208 That focus is understandable, but we ought not think about the obligations of the deferrer strictly in terms of what is acceptable to the deferrer. If we are to think of the deferrer as having a kind of moral responsibility to take seriously its privileged status as a subject of deference,209 we ought to give proper consideration to the obligations of the deferrer for their 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, the law school plaintiffs in FAIR might be criticized from within the legal academic community itself for the conclusions they drew

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204 Id. at 87.
205 Id. at 90.
207 See also Hills, supra note __, at 147 & n.3.
208 On the importance of standpoint in considering questions of deference, see Schauer, Deferring, supra note __, at 1573-76.
209 See id. at 1572-74 (drawing on and extending Soper, supra note __).
about their mission as academic institutions, even if the courts ought to have deferred to them.

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.\footnote{See supra notes \_\_\_\_ and accompanying text.} 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 always equally deserving of deference. 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.

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Given the extensive nature of the discussion so far, a brief summary is in order. I have suggested that deference is both pervasive 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 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.\footnote{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 Evan J. Criddle, \emph{Fiduciary Foundations of Administrative Law}, 54 UCLA L. Rev. 117 (2006).} 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, \textit{FAIR} provides precisely such an example.

\section*{III. Rumsfeld v. FAIR}

Placing the question of deference to one side for now, this Part turns to the Supreme Court's decision last Term in \textit{Rumsfeld v. Forum for Academic and Institutional Rights}.\footnote{126 S. Ct. 1297 (2006).} First, some background is in order.\footnote{See also Horwitz, \textit{Grutter's First Amendment}, supra note __, at 516-33.}

\subsection*{A. The Solomon Amendment}

Under the bylaws of the American Association of Law Schools, every member school is bound to a policy of equal opportunity in employment, including equal treatment without regard to sexual orientation.\footnote{AALS Bylaw § 6.4(b). Separate principles apply to religiously affiliated law schools. See American Association of Law Schools, Interpretive Principles to GuideReligiously-Affiliated Member Schools as They Implement Bylaw 6-3(a) and Executive Committee Regulation 6-3.1, \url{http://www.aals.org/about_handbook_sgp_rel.php} (last visited July 3, 2007).} 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.\textsuperscript{215} One potential employer is the United States military, which discriminates against gays and lesbians.\textsuperscript{216} 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.\textsuperscript{217}

In 1994, in response to the law schools' opposition to on-campus military recruiting, Congress passed the so-called Solomon Amendment.\textsuperscript{218} 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.\textsuperscript{219} Failure to comply with this provision carries with it significant funding consequences, for both the law school and the university. A law school's non-compliance may result in the government withdrawing all Defense Department funding from the university as a whole, and a significant portion of non-defense government funding from the law school itself.

An earlier version of the Solomon Amendment simply required that military recruiters be granted "entry" to law school campuses,\textsuperscript{220} without making clear what sort of treatment military recruiters would be entitled to once they

\textsuperscript{215} See id. § 6.19.
\textsuperscript{216} See 10 U.S.C. § 654 (mandating discharge of members of the armed forces who engage in "homosexual acts").
\textsuperscript{219} See 10 U.S.C. § 983(b).
\textsuperscript{220} 10 U.S.C. § 983(b).
arrived there. The Department of Defense interpreted the policy as requiring “not only access to campuses, but treatment equal to that afforded other recruiters,” and its enforcement policies followed suit. After the district court in FAIR questioned whether the Department’s enforcement policy was justified by the plain text of the statute, 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.

In short, “In 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.”

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.’” Its members include a

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221 FAIR, 126 S. Ct. at 1304.
222 FAIR II, 390 F.3d at 227.
223 See, e.g., id. at 227-28 (detailing the experience of Yale Law School and the University of Southern California Law School).
224 See FAIR I, 291 F. Supp. 2d at 321.
226 FAIR, 126 S. Ct. at __.
227 FAIR I, 291 F. Supp. 2d at 275 (quoting Second Amended Complaint ¶ 7(d)).
substantial number of law schools, only some of which have
publicly identified themselves. 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.228 FAIR was joined in the litigation by the
Society of American Law Teachers, by various law student
groups and individual students, and by two faculty members
joining as individual plaintiffs, Erwin Chemerinsky and Sylvia
Law.

FAIR and the other plaintiffs sought a preliminary
injunction enjoining the enforcement of the Solomon
Amendment.229 The district court denied the plaintiffs’ motion.
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.230

In a short opinion by Chief Justice Roberts for a unanimous
Court, the Supreme Court reversed the Third Circuit.231 Chief
Justice Roberts’ substantive analysis begins with the “broad
and sweeping”232 power of Congress to “provide and maintain”
the United States military.233 “[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.234 At
such moments, “judicial deference . . . is at its apogee.”235
Although the Court’s emphasis on deference to Congress’s
exercise of its military powers largely drops out of the Court’s
formal analysis at this point, the Court’s language makes clear
that the rest of the opinion will proceed in the shadow of the
military deference doctrine.

228 See FAIR Participating Law Schools,
http://www.law.georgetown.edu/solomon/participating_schools.html (last
visited Aug. 9, 2006).
229 See FAIR I, 291 F. Supp. 2d at 274.
230 See FAIR II, 390 F.3d at 229-46.
231 FAIR, 126 S. Ct. 1297. Justice Alito did not participate in the
decision.
232 Id. at 1306 (quoting O’Brien, 391 U.S. at 377).
233 Id. (quoting U.S. Const., art. I, § 8, cl. 13).
234 Id.
235 Id. (quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).
Although the Court recognized that even legislation relating to the military is subject to some First Amendment constraints,\textsuperscript{236} it held that no constraints applied in this case. The Court’s First Amendment analysis was nested within the larger question of whether the First Amendment limited “Congress’ ability to place conditions on the receipt of funds.”\textsuperscript{237} 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.\textsuperscript{238} It separated 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.\textsuperscript{239} First, the government in those cases had dictated the actual content of the compelled speech, while the law schools 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.”\textsuperscript{240} 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 \textit{Barnette} and \textit{Wooley} to suggest that” the speech involved in \textit{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.’”\textsuperscript{241}

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.”\textsuperscript{242} Unlike

\begin{flushleft}
\textsuperscript{236} Id.
\textsuperscript{237} Id.
\textsuperscript{238} See id. at 1307.
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Id. at 1309.
\end{flushleft}
prior cases in which it had found forced accommodation, the law schools’ accommodation activities under the Solomon Amendment – hosting interviews, holding recruiting receptions, and so forth – “lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper.” In any event, law students are easily able to distinguish “between speech a school sponsors and speech the school permits because legally required to do so.”

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. The Court wrote that the First Amendment cannot possibly apply to any conduct that “intends . . . to express an idea,” and characterized its earlier holdings as applying only to “conduct that is inherently expressive.” It took a narrow view of such conduct, suggesting that forbidding the presence of military recruiters on campus is expressive, if at all, “only because the law schools accompanied their conduct with speech explaining it.” Even if O’Brien did apply, the Court concluded, the government “clearly satisfie[d]” the test applied under that case.

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.” Since the law schools remain free to protest the military’s presence, nothing about

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243 See id. at 1309 (citing Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557 (1995) (state public accommodation law could not require parade organizers to include a group of gay and lesbian marchers); Pacific Gas & Electric Co. v. Public Utilities Comm’n of Calif., 475 U.S. 1 (1986) (state agency could not require utility company to include a third-party newsletter in its billing envelope)).
244 Id. at 1310.
245 Id.
247 FAIR, 126 S. Ct. at 1310 (quoting O’Brien, 391 U.S. at 376).
248 Id.
249 Id.
250 Id. at 1311.
251 Id. at 1312.
the Solomon Amendment “mak[es] group membership [in the
law school] less desirable.”252 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 its
“attempt[ ] to stretch a number of First Amendment doctrines
well beyond the sort of activities these doctrines protect.”253

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 First Amendment.254 It is a short, seemingly
clear, no-nonsense opinion. It cuts to the heart of the case,
sweeps aside precious 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, distinctions, presumptions, tools, factors, and three-part tests” is already full enough as it is.255
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.256 Even those of us who believed that the case

252 Id. at 1313.
253 Id. at 1313.
254 See, e.g., Marci Hamilton, The Supreme Court Upholds the
Federal Statute Giving Military Recruiters Campus Access, Despite
“Don’t Ask, Don’t Tell,” Writ, Mar. 9, 2006, available at
http://writ.news.findlaw.com/hamilton/20060309.html; David Barron, It’s
Not Just Foreign Law They Don’t Like . . ., LawCulture, March 6, 2006,
available at
255 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 (2000); Robert F. Nagel,
256 Cf. Jack Balkin, All’s Fair in Law and War, Balkinization, March
and-war.html (noting that commentators “suggested that the law schools
didn’t know what they were doing in bringing the case”); Peter
raised serious issues of constitutional law – although not necessarily the same ones raised 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.257 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 dodging every interesting constitutional law question in sight.”258 Since my primary goal in this Article is to consider the role of deference in FAIR, I will not offer a thorough-going doctrinal critique of FAIR here.259 But it is worth pausing to demonstrate just how much FAIR’s seemingly reasonable opinion conflicts with or unsettles current First Amendment doctrine. As we will see, the reasons why this is so ultimately connect deeply to this Article’s larger discussion of deference.

257 See Horwitz, Grutter’s First Amendment, supra note __, at 523 (suggesting that the Third Circuit’s opinion in FAIR II was inconsistent with Supreme Court precedents involving the military), 524 (suggesting that the government would likely ultimately prevail in the litigation).

258 Balkin, supra note __; see also Vikram Amar and Alan Brownstein, A Different Take on the Supreme Court’s Recent Decision Concerning Law Schools’ First Amendment Rights and Campus Military Recruitment, Writ, March 17, 2006, available at http://writ.news.findlaw.com/commentary/20060317_brownstein.html (“[W]e think it was the Court’s opinion last week that didn’t really engage past Court doctrines and precedents; whatever the quality of the plaintiffs’ arguments, the Court need to say much more than it did in explaining its result”). Dale Carpenter and Robert Corn-Revere, Rumsfeld v. FAIR: What does it mean?, First Amendment Center, available at http://www.firstamendmentcenter.org/analysis.aspx?id=16613.

259 For such a critique, see Dale Carpenter, Unanimously Wrong, 2006 Cato Sup. Ct. Rev. 217.
Consider the Court’s cursory treatment of the unconstitutional conditions doctrine, 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.\(^{260}\) 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.\(^{261}\) Thus, in \textit{Rust v. Sullivan},\(^{262}\) 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 means of conditions attached to the expenditure of Government funds” might be especially restricted.\(^{263}\)

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.”\(^{264}\) 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


\(^{261}\) ALA, 539 U.S. at 213 (discussing \textit{Legal Services Corp. v. Velazquez}, 531 U.S. 533 (2001)).


\(^{263}\) \textit{Id.} at 200. \textit{See also ALA,} 539 U.S. at 228 (Stevens, J., dissenting) (suggesting that unconstitutional conditions doctrine might apply differently where government uses its funds “to impose controls on an important medium of expression”).

\(^{264}\) Carpenter, \textit{supra} note __, at 228.
bar recruiters.” 265  FAIR thus leaves 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. 266  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.” 267  That makes the case, in the Court’s view, “a far cry from the compelled speech” at issue in prior cases. 268  But the same option was available in some of the very cases the Court sought to distinguish. In Wooley v. Maynard, 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 motto. 269  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 government as a First Amendment problem on its own terms. 270  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, because only “conduct that is

265 Id. at 254 (emphasis in original).
266 For an excellent recent treatment of compelled speech doctrine, see Larry Alexander, Compelled Speech, 23 Const. Comm. 147 (2006).
267 FAIR, 126 S. Ct. at 1310.
268 Id. at 1308.
269 Wooley, 430 U.S. at 722 (Rehnquist, J., dissenting) (quoting State v. Hoskin, 112 N.H. 332, 336 (1972)).
270 See Pacific Gas, 475 U.S. at 16 (“[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”).
inherently expressive” is entitled to First Amendment expression.271 Flag burning, it suggests, is “inherently expressive.”272 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,”273 and is thus removed from the pale of the First Amendment altogether.274 Any expression on the law schools’ part exists “only because the law schools accompanied their conduct with speech explaining it.”275

The Court’s thin treatment of this issue leaves a host of questions in its wake. In truth, nothing is “inherently” expressive.276 Until now, the Court’s method for determining whether conduct is expressive has been to focus on whether particular conduct carries a combination of speaker’s intent and audience understanding.277 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 message, was expressive conduct.278 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

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271 FAIR, 126 S. Ct. at 1310 (emphasis added). The novel nature of this doctrinal move is discussed in Carpenter and Corn-Revere, supra note __.
272 Id. (discussing Texas v. Johnson, 491 U.S. 397 (1989)).
273 Id.
274 In Frederick Schauer’s terms, rather than treat the Solomon Amendment case as 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 __, at 1769.
275 FAIR, 126 S. Ct. at 1310-11.
276 See Carpenter, supra note __, at 244-45.
278 Johnson, 491 U.S. 397.
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.”\(^\text{280}\)

The FAIR Court, in its eagerness to characterize the law schools’ conduct as non-expressive, 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 non-discrimination, 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.”\(^\text{281}\) 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 at each stage of the Court’s First Amendment analysis in FAIR. I will not rehash all of them here.\(^\text{282}\) 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 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

\(^{279}\) Id. at 406.

\(^{280}\) FAIR, 126 S. Ct. at 1311.

\(^{281}\) Carpenter and Corn-Revere, supra note __.

\(^{282}\) For a superb discussion of these and other First Amendment issues in FAIR, see Carpenter, supra note __.
not as a result of poor judicial craftsmanship, but as a result of problems residing at a more fundamental level of First Amendment jurisprudence. The fault lies in the instability and incoherence that result 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[ ]”? 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 very 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. The Court’s bland opinion thus conceals a host of profoundly difficult questions concerning how the Court knew what purported to know in FAIR, and to whom it should have deferred. I turn to those questions now.

IV. THREE FACES OF DEERENCE IN RUMSFELD V. FAIR

A. INTRODUCTION

\[283\] FAIR, 126 S. Ct. at 1308.
The time has now come to put this Article’s deepened understanding of deference to work in examining the Court’s decision in \textit{FAIR}. Leaving aside the doctrinal problems I have just addressed, \textit{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 \textit{FAIR} confronted the Court not simply with a single institution’s claim of deference, but with three \textit{competing} claims of deference. The Court’s resolution of those competing claims was more than unsatisfactory: in fact, the Court’s assessment of the competing claims to deference in \textit{FAIR} has things exactly backward. This conclusion is best reached by examining each of the competing claims to deference that arose in the case.

\textbf{B. MILITARY DEFERENCE}

The first claim of deference at issue in \textit{FAIR} is also the most central to the Court’s opinion: deference to the military – or, more accurately, deference to Congress in its exercise of its 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.”\textsuperscript{284} 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.”\textsuperscript{285} 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.”\textsuperscript{286}

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

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\item \textsuperscript{284} H.R. Rep. No. 443(1), 108\textsuperscript{th} Cong. 2d Sess. 3-4 (2004).
\item \textsuperscript{285} Brief for Petitioners, \textit{Rumsfeld v. FAIR}, No. 04-1152, at 38.
\item \textsuperscript{286} \textit{Id.} at 39.
\end{itemize}
The 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.  

The Court had little more to say about the government’s invocation of judicial deference.  But deference to the military nevertheless plainly pervades the Court’s opinion in *FAIR*.  

The Court’s opinion “treats the liberty claims [made by the FAIR plaintiffs] almost with contempt,” swallowing whole the claims of necessity made by the government and sweeping aside the respondents’ assertions as a “stretch,” “plainly overstat[ed],” “exaggerat[ed],” and “trivializ[ing] the freedom protected” in prior First Amendment cases.  For good measure, the Court throws in apparently gratuitous references to the terror strikes of September 11, 2001.  In short, deference to the military is a tidal wave in *FAIR*, overwhelming any skepticism concerning Congress’s claims about the necessity of the Solomon Amendment and washing away any doubts as to its constitutionality.
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’s exercise of its military power. The military deference doctrine has been subject to voluminous criticism. The most sustained and interesting work on this subject has come from Professor Diane Mazur, herself a military veteran, who has written to criticize both the court’s deferential approach to the military and the law schools’ own failure to engage on a constructive level with the military. 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 military.” While there is much in Professor Mazur’s work to be commended, we need not go so far here as to subject military deference to general criticism. 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. 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

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293 See, e.g., Mazur, supra note __; Mazur, supra note __; Dienes, supra note __.
295 Mazur, supra note __, at 479.
296 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.
Amendment indicated no serious, informed consideration of whether military recruiters required equal access to law school students in order to achieve any recruiting objectives. If anything, the evidence suggested that Congress was acting in the teeth of a superior epistemic authority in this case: the Department of Defense, whose expertise in military matters surely outstrips that of the generalists in Congress. As the congressional debate disclosed, DoD considered the Solomon Amendment “unnecessary” and “duplicative.” This fact may not destroy Congress’s entitlement to deference. As a matter of epistemic authority, however, it certainly takes the wind out of Congress’s 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’s own behavior. To the extent that an institution claiming legal authority-based deference is obliged to deliberate soundly and meaningfully about subjects that are within the clear scope of its legal authority, Congress fell far 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

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299 See Part II.E, supra.
universities “comes with a price.” 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 military readiness of the military. To the contrary, Congress’s 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, 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, there is simply no good reason why the Court should have deferred as it did in FAIR. In a somewhat different context, Diane Mazur has observed that Congress 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

300 140 Cong. Rec. H3863 (daily ed. May 23, 1994) (statement of Rep. Pombo); see also 140 Cong. Rec. 11,439 (1994) (statement of Rep. Solomon) (indicating 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.”).

301 All this is not to say 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 Marketplace for Legal Education and 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’s 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 “commonsense conclusion[s]” on this question were worthy of deference. Reply Brief for Petitioners in Support of Petition for Write of Certiorari, Rumsfeld v. Forum for Academic and Institutional Rights, at 7.
of the courts. 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 regulators, while invoking military deference doctrine to fend off the courts. 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 is subject to two more criticisms, both of them related to the question of the appropriate scope of deference in such cases. First, the context of 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.” 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.” 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.” 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 tout court. Thus, the need for

\[302\] Mazur, supra note __, at 500.
\[306\] 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, although one may reasonably question just how far the military deference doctrine should apply in such cases –
deference to Congress in its guise as military regulator was not at its “apogee” in *FAIR*; it was at its nadir.

This point about the scope of the military deference doctrine can also be viewed 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.” When the government exercises managerial authority, it “acts to administer organizational domains dedicated to instrumental conduct.”

Where that is the case, it makes sense to permit the government to “constitutionally regulate speech as necessary to achieve instrumental objectives.” In those circumstances, courts ought to defer “to the judgment of institutional officials respecting the need to manage speech.” 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,” no special need for deference is appropriate, and government is bound instead by “ordinary principles of First Amendment jurisprudence.”

In some cases, the line between governance and management may be unclear. One such case is *Greer v. Spock*. There, the Court rejected a challenge by Dr. particularly where a law operates entirely in the civilian world, where it has a significant impact on individual rights, and where Congress’s 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 challenge military laws that “primarily burden[] nonmilitary personnel or entities.” *Id.* at 702.
Benjamin Spock to the military’s refusal to permit him to give a campaign speech at Fort Dix. The case thus involved a civilian challenge to a military regulation involving his 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 here; rather, it was regulating the internal affairs of a military base, a non-public 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.

*FAIR* is quite evidently not such a case. The government here was acting in the realm of governance, not management. That is, 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.

**C. 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*.\(^3\)\(^3\)\(^4\)\(^5\)\(^6\) 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.\(^3\)\(^5\) That 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 an expressive association.

\(^3\)\(^4\) 530 U.S. 640 (2000).

\(^3\)\(^5\) See, e.g., id. at 653.
Dale has been the subject of voluminous discussion and criticism, and I will not rehash it here.\textsuperscript{316} 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.

First, notwithstanding Dale’s sweeping language concerning deference, the Court in FAIR made short shrift of that aspect of its earlier opinion. Professor Carpenter rightly observes that the “deferential posture [of Dale] is completely missing from the FAIR decision both in rhetoric and in substance.”\textsuperscript{317} The Court did not directly reject the law schools’ claim of deference, to be sure. But the Court’s narrow construction of Dale, which read associational rights as implicated only in cases that either directly involve membership rights or make group membership “less attractive,”\textsuperscript{318} effectively allowed 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 . . . .”\textsuperscript{319} It “almost mocks their claims.”\textsuperscript{320} The Court does not simply hold that Dale is inapplicable to the plaintiffs’ claims in FAIR. Rather, FAIR 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

\begin{itemize}
\item \textsuperscript{317} Carpenter, supra note __, at 252.
\item \textsuperscript{318} FAIR, 126 S. Ct. at 1312.
\item \textsuperscript{319} Id. (emphasis in original).
\item \textsuperscript{320} Carpenter, supra note __, 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 __, at 51.
\end{itemize}
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 this absence of deference. First, it seems apparent that *FAIR* is an example of the kind of rhetorical overkill that may occur when a court is faced with competing claims of deference, lacks any specific tools to select between them, 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, or that such situations present a conflict that requires some form of principled resolution. 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’s 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.321

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 sure of 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,”322 is not unreasonable. What is significant, though, is the fact that the

321  *Cf. The Supreme Court, 2005 Term: Leading Cases*, 120 Harv. L. Rev. 253, 259 (2006) (“An association’s privilege of self-interpretation seemingly disappeared, either erased from the law books entirely or merely overwhelmed by the deference owed to Congress’s war powers.”).
322  *FAIR*, 126 S. Ct. at 1313.
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 similar approach in *Dale* itself; surely the Boy Scouts do not rise to the level of an occult mystery. Of course, it did not, preferring instead to defer to the Scouts’ own superior knowledge of their organization’s purposes and of what would impair those purposes. The Court’s change in its 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. Furthermore, there is every reason to think that law schools may vary greatly as expressive associations. Some may meet the Court’s description, and 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 matters is that the Court will not brook any suggestion that the law schools are in a better position than the Court to understand 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.

Having said all this, I must nevertheless confess some ambivalence about the fact that the *FAIR* plaintiffs relied so heavily on their invocation of *Dale* deference. The Court should have paid more attention to the plaintiffs’ *Dale* deference arguments. But that does not mean *Dale* deference should have been the key to the plaintiffs’ argument. *Dale* deference is a catch-all form of deference to a broad universe 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 section.

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

The final form of deference that was potentially at issue in FAIR is what I have called “Grutter deference.” In fact, this form of deference predates by decades the case that gives it its name, *Grutter v. Bollinger.* Nevertheless, *Grutter* serves as such a valuable vehicle for broader explorations of the nature of judicial deference to universities that it has earned the label.\(^\text{324}\)

*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. Writing for the Court, Justice O’Connor declared that “[t]he Law School’s judgment that such diversity is essential to its educational mission is one to which we defer.”\(^\text{325}\) Such “complex educational judgments,” she continued, lie “primarily within the expertise of the university.”\(^\text{326}\) The Court thus deployed deference as a powerful tool in finding that educational diversity was a compelling state interest. As Justice O’Connor observed, that deference followed a long tradition on the Court of “giving a degree of deference to a university’s academic decisions, within constitutionally prescribed limits.”\(^\text{327}\)


\(^{324}\) See Horwitz, *Grutter’s First Amendment,* supra note __; Horwitz, *Universities as First Amendment Institutions,* supra note __.

\(^{325}\) *Grutter,* 539 U.S. at 328.

\(^{326}\) Id.

\(^{327}\) Id. (citing *Regents of Univ. of Mich. v. Ewing,* 474 U.S. 214, 225 (1985); *Board of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 96 n.6)
This brief description understates the powerful effect of deference to the university in *Grutter*. Although *Grutter* was a Fourteenth Amendment case, it was underwritten by 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 signals 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. 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 decisions” made by universities. 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” 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. To that end, the First Amendment substantially insulates them from subservience to the state, preserving a sphere of sovereignty in

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328 See generally Horwitz, *Grutter’s First Amendment*, supra note __.

329 See generally Horwitz, *Grutter’s First Amendment*, supra note __; Horwitz, *Universities as First Amendment Institutions*, supra note __. See also Hills, supra note __ (2003) (discussing the constitutional importance of a wide variety of groups that he labels “private governments,” and arguing that their contributions to the polity merit a substantial degree of legal autonomy).


which these intermediate institutions can operate independently.\textsuperscript{332}

Having explored this form of deference at length elsewhere, I will be sparing here.\textsuperscript{333} In brief, \textit{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.”\textsuperscript{334} To be sure, the courts may defer only in cases in which a university is genuinely exercising academic judgment; in other words, to earn deference, the university must exercise a meaningful judgment within its sphere of legal and epistemic authority. But “the courts should be careful not to police the boundaries of the ‘genuinely academic’ too rigorously.”\textsuperscript{335} 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.”\textsuperscript{336}

Notwithstanding those who have argued that the decision in \textit{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 \textit{Grutter} just a few terms earlier, would have counseled a very different set of reasons, if not a different outcome. Under an approach that took \textit{Grutter}...

\textsuperscript{332} See, e.g., Julian N. Eule & Jonathan D. Varat, \textit{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, \textit{Foreword: Nomos and Narrative}, 94 Harv. L. Rev. 4, 32 (1983)).

\textsuperscript{333} See Horwitz, \textit{Universities as First Amendment Institutions}, supra note __.

\textsuperscript{334} \textit{Grutter}, 539 U.S. at 328.

\textsuperscript{335} Horwitz, \textit{Universities as First Amendment Institutions}, supra note __, at ___.

\textsuperscript{336} \textit{Id.}
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. 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” 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. Instead, it ignored altogether the arguments in favor of deference to the law schools as educational institutions.

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. That the Court relied so heavily on the first form of deference, paid lip service to the second, and ignored the third speaks volumes about the Court’s difficulty in addressing cases in which it confronts competing claims to deference, all of which are strongly grounded in the epistemic or legal authority of the would-be deferee and all of which are supported by its prior precedents.

337 Grutter, 539 U.S. at 328.
Indeed, in many respects the claim to *Grutter* deference was not the weakest, but the strongest claim to deference in *FAIR*. As we have seen, the invocation of deference to Congress’s 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 certainly plausible arguments in favor of the *FAIR* plaintiffs’ invocation of *Dale* deference, that form of deference is not the most relevant one to 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 that tradition 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.\(^{339}\)

Thus, there was 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

\(^{339}\) 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 (2006-2007).
outweighed the law schools’. 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 fully 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 claims involving competing invocations of deference.

That is not 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. 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.

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 deeper 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 the law school plaintiffs in *FAIR* genuinely believed that their academic missions would be endangered by the presence of military recruiters on campus, and that their mission thus required them to exclude those recruiters. Certainly the *FAIR* plaintiffs were willing to make such assertions before the Court, and *Grutter* deference suggests that the courts should have deferred to those

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340  *Cf.* Posner, *supra* note __, at 57 (“The military has its needs as well, and perhaps even some expertise.”).


342  *See supra* Part II.E.
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 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 act of reasoned elaboration” on this question.343

In order to answer these questions, one would have to inquire further. One might ask whether the law school plaintiffs 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 faculty – or did they shunt responsibility for recruiting onto their administrative staff?344 We might also ask whether those schools, in deciding to restrict 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.”345

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343 Guckenberger, 8 F. Supp. 2d at 85.
344 See Horwitz, Grutter’s First Amendment, supra note __, 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).
345 See Horwitz, Universities as First Amendment Institutions, supra note __, at __; J. Peter Byrne, Academic Freedom and Political Neutrality in Law Schools: An Essay on Structure and Ideology in Professional Education, 43 J. Legal Educ. 316, 321 (1993) (noting that law schools in some senses “have less autonomy than traditional
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. Obviously, those schools would 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 non-discrimination 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. 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 the military’s discriminatory policies – Congress not least among them. And for such institutions, we would also want to ask whether they are 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.

In sum, in a variety of circumstances, one might reasonably question the good faith of an institution that sought to argue that it was acting within its academic mission when it sought to exclude military recruiters. Much would depend on how

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346 Morriss, supra note __, at 471 n.154, 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.

347 See id.; see also Mazur, supra note __, at 516 (calling such an argument “disingenuous” when it is made by defenders of the military’s recruitment policies and 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 __, at 51.

348 See Mazur, supra note __, at 505.
clearly “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 from the civilian world. Before we reach that issue, 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 due 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 compelled the conclusion that they could not expel the military recruiters consistently with their own understanding of their mission. Thus, we might suspect that some of the law school plaintiffs in FAIR, by invoking judicial deference for a set of assertions that were motivated more by political views or tactical legal considerations 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 putative deferees.

Some concluding observations are in order. First, I may be wrong. Perhaps these law schools saw their academic mission as distinctly normative, and genuinely believed, as an academic matter and after careful deliberation, that on-campus recruiting was essential to their missions as law schools, and that it must be carried out in a non-discriminatory fashion. If so, that sort of academic judgment possesses an epistemic and

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349 See id.; see also Posner, supra note __, 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”).

350 Cf. Katyal, supra note __, at 566 (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 convert their policy into something that appears and sounds more lofty and principled than it really is.”).
legal authority that is fully entitled to substantial deference. Indeed, I am sure that at least some of the schools involved in the \textit{FAIR} litigation easily met this obligation.\footnote{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 broad swath of the Yale Law School faculty.} However, if some of the \textit{FAIR} plaintiffs’ claims were essentially a litigation position and not a genuinely academic judgment, then it is fair to say they failed to meet their obligations as deferees.

Second, I should make clear that there is a distinction between the judgment the broader academic community reaches about the \textit{FAIR} plaintiffs’ actions, and the judgment that the \textit{Court} ought to have reached. If the \textit{FAIR} plaintiffs made what appeared to be a good-faith argument to the Court that their academic mission required excluding military recruiters, and that the Solomon Amendment interfered with that mission, then the Court ought to have deferred to it. But the Supreme Court is not the only, or even the most important, forum of judgment. 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 \textit{FAIR} plaintiffs met those moral obligations. I have argued that the \textit{courts} were not entitled to second-guess the law schools. But as fellow members of the academic community, we are fully entitled, if not obliged, to do so.\footnote{J. Peter Byrne makes a similar point in a discussion of the judicial invalidation of university speech codes. \textit{See} J. Peter Byrne, \textit{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, \textit{“even if incorrect, should have been left to [university] institutional authorities”} rather than the courts) (emphasis added). Similarly, Michael Stokes Paulsen has argued that private non-religious law schools may have a legal right to discriminate against certain religious employers in providing access to its placement services, while arguing that such schools would be wrong to do so and should be criticized by others if they do. \textit{See} Michael Stokes Paulsen, \textit{How Yale Law School Trivializes Religious Devotion}, 27 Seton Hall L. Rev. 1259 (1997).}
These conclusions are clarified further by comparison with those of another commentator on the *FAIR* decision, Richard Posner.\(^{353}\) Posner, writes that the law schools’ arguments in *FAIR*, which he believes ranged from the merely weak to frivolous, tell us much about the stultification that results from being ensconced within the “left-liberal domination of elite law school faculties.”\(^{354}\) He pooh-poohs most of the claims made by law schools that would fall under the rubric of *Grutter* deference. Thus, 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.”\(^{355}\) 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.”\(^{356}\) And he says that the *FAIR* plaintiffs’ description of themselves as normative communities demonstrates the “uncritical assumption that legal education has a liberal agenda.”\(^{357}\)

My disagreement with Posner has less to do with the substance of his argument. I do think he dramatically overstates his points, and that he understates the intellectual and political diversity of the elite law schools he picks on – which may be greater, in fact, than at 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 rubbed up against this principle in an uncomfortable way.\(^{358}\) And I share Diane Mazur’s

\(^{353}\) See Posner, *supra* note __.

\(^{354}\) *Id.* at 57.

\(^{355}\) *Id.* at 52-53 (quotations and citation omitted).

\(^{356}\) *Id.* at 54.

\(^{357}\) *Id.* at 56.

\(^{358}\) 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 speakers to advocate for 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 engage in open disagreement with it on campus. That is, of course, what some of the law school plaintiffs in *FAIR* sought to do.
eloquent view that elite and liberal law schools, far from seeking to keep the military off campus, ought to welcome it, in an effort to bridge the increasing gap between the military and civilian cultures.\(^{359}\) They should engage with all the players in our constitutional order, and not just their favorites.

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 statement that it must be hyperbole to state that the Solomon Amendment forces law schools to abandon key aspects of their mission suggests that Posner knows what the law school’s 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.\(^{360}\) Therefore, they cannot or should not be the kind of “normative institutions” the FAIR plaintiffs claimed they were.\(^{361}\)

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 very 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 antidiscrimination 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 different missions or not.\(^{362}\) FAIR’s mistake, and Posner’s too, I think, 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—

\(^{359}\) See Mazur, supra note __.
\(^{360}\) Posner, supra note __, at 56.
\(^{361}\) Id. (quotations and citation omitted).
\(^{362}\) See, e.g., Horwitz, Universities as First Amendment Institutions, supra note __, at __.
including the exclusion of military recruiters – with respect to achieving those goals.

My second objection is, of course, 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 when it is the opinion of the Court. It may be a reasonable enough view, but it is an insufficiently deferential one. 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.” 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 it – 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. 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.” The question in these cases should be 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

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363 Posner, supra note __, at 52, 56.
364 Id. at 56.
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 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 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 fail simply because they craft a particular identity as a normative institution and seek to live by those values.

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 non-academic 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 – and also, perhaps, ought never to have brought the litigation in the first place.

E. 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 genuinely academic judgment. If that is so, they can and should be criticized for it. But that criticism should be a matter for the judgment 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. That it failed to do even that is evidence that the Court simply failed to understand the real, and difficult, questions of deference that were present in FAIR.

V. 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. 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.” 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.”

This literature has been referred to as “constitutional decision rules” theory. Under various labels, this project has been pursued in recent works by such writers as Richard Fallon, Mitchell Berman, Kermit Roosevelt, and David Chang. More controversially, the interest in constitutional decision rules also finds a home in the recent writings of Daryl Levinson and Rick Hills.

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365 See Berman, infra note __, at 220 (the last ten years have “witnessed a steady increase in scholarly attention to the meaning/doctrine distinction”).

366 Fallon, supra note __, at 1276.


373 See, e.g., Hills, supra note __. 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.” Hills, id. at 175 (emphasis in original). 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
All of these writers can trace their ancestry back to seminal works by Henry Monaghan374 and Larry Sager,375 who began exploring questions of constitutional implementation in the 1970s – and still further back to Thayer, whose classic work on judicial review first brought to light questions of constitutional implementation.376 But these more recent efforts have brought renewed and focused attention to questions of constitutional implementation. Whether or not it is accurate to say that such views now command academic consensus,377 there is no doubt that this is a burgeoning field of constitutional scholarship. Despite the advances made, however, much remains to be done

“constitutional rights are inevitably shaped by, and incorporate, remedial concerns.” Levinson, supra note __, at 873. These scholars have thus been described as writing against “antipragmatist” constitutional theory, see Hills, supra note __, at 173, or against the “taxonomical” approach of scholars such as Fallon or Berman, see Berman, supra note __, 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 set argues that there is only implementation, all the way down. But both ultimately highlight 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 __, at 1314; see also Hills, supra note __, 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 uneasily inhabit the same corner of constitutional law scholarship. See also Roosevelt, supra note __, at 195 (arguing that Professor Levinson’s article, see supra note __, “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”).

376 See Thayer, supra note ___; see also Roosevelt, supra note ___, at 193 n.3 (characterizing Thayer’s famous article as “mark[ing] the distinctive nature of judicial decision rules”).
377 See Roosevelt, supra note __, at 36 (“The basic idea that there is a significant difference between doctrine and meaning is fairly widely accepted among legal scholars.”).
in exploring implementation as a central subject of constitutional law, especially at the operational level.378

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 the sort of top-down, institutionally agnostic approach discussed above,379 in favor of a bottom-up, institutionally sensitive approach that openly “takes First Amendment institutions seriously.”380 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.”381 Accordingly, courts should “defer[] to the practices of [these] particular kinds of First Amendment actors,”382 in ways shaped by the norms and practices of the institutions themselves.383

378 See, e.g., Fallon, supra note __, 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, supra note __, at 193-94 & 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”).

379 See supra notes __ and accompanying text.

380 Horwitz, Grutter’s First Amendment, supra note __, at 589.

381 Id.

382 Id. at 570.

383 See, e.g., id. at 572-73; see also Hills, supra note __, 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, 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.” The charter member of this school is surely Frederick Schauer, although other signal contributions have been made by Rick Hills, Daniel Halberstam, Mark Rosen, and David Fagundes. I have made my own modest contributions to this literature. This Article, too, contributes to that body of work, by examining the Court’s missed

384 See, e.g., Schauer, supra note __; Horwitz, Grutter’s First Amendment, supra note __, at 569–71.
385 Horwitz, supra note __, at 61.
387 See Hills, supra note __.
391 See Horwitz, Grutter’s First Amendment, supra note __ (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, supra note __ (discussing the press generally, and blogs specifically, as First Amendment institutions); Horwitz, Universities as First Amendment Institutions, supra note __ (further exploring 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 __, at 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, supra note __. Post’s writing, however, is more concerned with “broader organizing principles for social discourse” than it is with identifying particular First Amendment institutions. Horwitz, Grutter’s First Amendment, supra note __, at 567 n.488; see also Schauer, supra note __, at 1273 n. 88.
opportunity to defer to the law school plaintiffs in *FAIR* as First Amendment institutions. Here, too, however, although much has already been done, much remains to be said in fleshing out this approach.\textsuperscript{392} 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.\textsuperscript{393}

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.\textsuperscript{394} 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.\textsuperscript{395} Furthermore, to the extent that decision rules theorists focus on describing and refining the tools by 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

\textsuperscript{392} See Schauer, *supra* note __, at 1273 (describing his argument for an institutional First Amendment as “a relatively new avenue of inquiry”).


\textsuperscript{394} Ironically so, given that Professor Hills has contributed to both bodies of literature. See Hills, *supra* note __ (contribution to constitutional decision rules literature); Hills, *supra* note __ (contribution to institutional First Amendment literature).

\textsuperscript{395} See, e.g., Fallon, *supra* note __, at 1300-02.
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 other institutions, 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, 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 is seeking.

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 in the broader corpus 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

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396 See, e.g., Berman, supra note __, 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”).
current First Amendment doctrine. 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 approach to First Amendment doctrine.

Thus we see that, linked at the focal point of deference, both of these emerging bodies of constitutional literature 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 legitimacy and a place on the constitutional map. Although these schools have emerged separately, this Article suggests – and hopefully exemplifies the point – that they might profit considerably from a deeper mutual engagement.

VI. CONCLUSION

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

 As I have argued, when faced with these competing claims in FAIR, the Court fumbled, placing far too much emphasis on Congress’s invocation of deference and far too little on the universities’ invocation of deference. In particular, the Court

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paid far too less 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 have come, not 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 dialogue between the two.