

CONSTITUTION DAY IS UNCONSTITUTIONAL

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As violations of constitutional law go, this one might seem harmless or insignificant at first. No branch of the U.S. government is seeking to upset the tri-partite balance of power, no person's physical life, liberty or property is being threatened, and no fundamental human rights are being trampled. The goal behind what the U.S. government is doing appears commendable, and indeed, few Americans are likely to object. Still, no matter how admirable the purpose may be, the recent federal law imposing Constitution Day observances on schools nationwide creates serious constitutional mischief. The validity of the government directive appears all the more questionable as a result of the U.S. Supreme Court decision two years ago in *Rumsfeld v. Forum for Academic and Institutional Rights*.

The problematic government measure is Section 111(b) of Title I of Division J of the Consolidated Appropriations Act of 2005. The provision legislates an oxymoron. It attempts to *order* all federally-aided educational institutions in the country to celebrate American *freedom and democracy*. The brainchild of U.S. Senator Robert C. Byrd of West Virginia, the upper chamber's self-proclaimed champion of the Constitution, the statute aims to attack the sorry state of historical and political knowledge among the nation's youth. The clause, quietly tucked into the omnibus spending bill, mandates the following:

Each educational institution that receives Federal funds for a fiscal year shall hold an educational program on the United States Constitution on September 17 of such year for the students served by the educational institution.¹

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1. Consolidated Appropriations Act, Pub. L. No. 108-447, 118 Stat. 2809 (2005).

The law first went into effect in the fall of 2005 and prompted federally-aided public and private schools around the country to unleash an avalanche of educational activities. From Princeton to Berkeley, colleges and universities assembled countless sets of scholarly panels to dissect everything from original intent, to presidential powers, to the First Amendment, to the Patriot Act. On campus after campus, politicians and judges were invited to pontificate on the virtues of American constitutionalism. In every state, primary and secondary school students participated in plays, readings, signings, debates, art-works, contests, and elections to commemorate the drafting of the U.S. Constitution. In many places, educators also turned to museums, foundations, and think-tanks for ready-made programs specially cranked out to provide ideas and materials.

The massive effort and its associated costs of time, personnel and resources have been rolled out, for the most part, every year since the law was passed. How long this level of commitment can be maintained into the future is open to question, however. Section 111(b) appropriates no specific federal moneys for Constitution Day programs, requiring instead that the educational activities be squeezed out of existing school budgets. The provision attempts to enforce compliance by relying on the implied threat to cut off the flow of federal funds to disobedient schools. Given the law's miserly and punitive construct, it seems only a matter of time before overburdened educators try to develop strategies to get out from under the law's impositions. Many are likely to try to skirt the law with programs that are as thin as possible. Some, however, may be able to muster the courage to challenge Senator Byrd's directive head on, either by lobbying Congress or filing a lawsuit.

The courthouse path appears particularly promising for the nation's colleges and universities.² For these educational institutions, a rich, all-American and very constitutional legal tradition has developed over the years that can be used to limit the government's power to commandeer academic curricula. This tradition, grounded in the First Amendment, was validated by the Supreme Court in the *Rumsfeld* decision.

2. Whether elementary and secondary schools can successfully challenge Section 111(b) in court is much less certain. Existing jurisprudence under the spending clause, commerce clause, First Amendment, and Tenth Amendment does not provide a clear answer.

As an initial matter, *Rumsfeld* affirmed *sub silentio* the critical principle that colleges and universities enjoy a First Amendment right of free speech. Without even questioning the premise, the Court unanimously entertained and ruled on the merits of a claim brought by an association of law schools and law faculties that alleged a violation of the institutions' freedom of speech. Specifically, the law schools challenged, as a breach of their right to speak out against the military's policies on gays, a statutory provision known as the Solomon Amendment which required, under threat of losing federal funds, that institutions of higher education provide military recruiters access to students "that is at least equal in quality and scope" to that "provided to any other employer."³ The Court ruled against the schools' position, but the justices did so on the grounds that the statute did not invade the schools' right to speak freely, and thus did not breach the First Amendment rights possessed by the schools. "Nothing about recruiting," the Justices concluded, "suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."⁴

Rumsfeld's tacit recognition of a right of free speech for academia effectively re-affirmed a half-century of Supreme Court precedents on the issue. The modern Court's concern for academic free speech began in 1957 with *Sweezy v. New Hampshire*, a case involving a state probe into the possible subversive content of a lecturer's presentations at the University of New Hampshire.⁵ Striking down the investigative questioning of the lecturer as unauthorized, a plurality of four justices observed that academic freedom is "almost self-evident" and that "[t]o impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Teachers and students must always remain free to inquire, to study and to evaluate. . . ."⁶ In a concurring opinion, Justice and former Harvard University law professor Felix Frankfurter delivered an even stronger endorsement of academic freedom. Quoting from a statement of South African scholars on open universities, Frankfurter famously declared for himself and another justice:

3. Solomon Amendment, 10 U.S.C. § 983(b) (2005).

4. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 65 (2006).

5. 354 U.S. 234 (1957).

6. *Id.* at 250.

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.⁷

A decade later in *Keyishian v. Board of Regents of the University of the State of New York*, the Court reiterated its solicitude for academic freedom, when it struck down as constitutionally too vague major portions of New York's teacher loyalty laws.⁸ Writing for a Court majority this time, Justice William Brennan stated that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"⁹

Relying and building upon the *Sweezy* and *Keyishian* precedents, Justice Lewis Powell's historic default opinion for the Court in *Regents of the University of California v. Bakke* recognized academic freedom not merely as a right "long . . . viewed as a special concern of the First Amendment,"¹⁰ but also one of such "paramount importance in the fulfillment of [a university's] mission"¹¹ as to justify a narrowly-tailored affirmative action admissions program. Twenty five years later, in *Grutter v. Bollinger*, a Court majority fully endorsed Justice Powell's position.

Speaking through Justice Sandra Day O'Connor, the high bench recognized the "constitutional dimension, grounded in the First Amendment, of educational autonomy"¹² and concluded that it required a "degree of deference to a university's academic decisions"¹³ broad enough to uphold a law school's narrowly-tailored affirmative action plan. In other contexts, too, involving cases where students have challenged academic decisions as arbitrary under the Due Process Clause, the Court has sided with university officials, expressing "reluctance to trench on the prerogatives of state and local educational institutions and our re-

7. *Id.* at 263 (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12 (1957)).

8. 385 U.S. 589, 609 (1967).

9. *Id.* at 603.

10. *Regents of the University of California v. Bakke*, 438 U.S. 265, 312 (1978).

11. *Id.* at 313.

12. *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003).

13. *Id.* at 328.

sponsibility to safeguard their academic freedom. 'a special concern of the First Amendment.'"¹⁴

The protection for academic freedom carved out by these precedents evidently raises significant questions about the constitutionality of Section 111 (b) and its yearly mandatory educational program on the U.S. Constitution. The broad and generous language used to describe the principle and contours of academic freedom verbalize both a judicial aversion to government intrusion and a judicial deference to the independent educational judgment of colleges and universities. Combined with the development of another strand of cases establishing a First Amendment doctrine against compelled speech—a doctrine which was clarified in the *Rumsfeld* decision—the Supreme Court's academic freedom jurisprudence renders the constitutionality of Section 111(b) fragile at best. On a purely First Amendment basis, Senator Byrd's law is highly suspect. Tacked on as an implied condition to a funding measure, the law does not shape up any better.

The fountainhead ruling for the doctrine against compelled speech was the 1943 landmark decision in *West Virginia State Board of Education v. Barnette*.¹⁵ Responding to the conscientious objections of a Jehovah's Witnesses family, the Supreme Court struck down public school regulations that made it compulsory for all students to salute the flag and recite the Pledge of Allegiance.¹⁶ The Court decided it would be incongruous to rule "that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind."¹⁷ In language that has reverberated in judicial decisions, political speeches, and academic writing ever since he penned it, Justice Robert Jackson declared for the Court:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith

14. *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 226 (1985) (quoting *Keyishian v. Board of Regents* 385 U.S. 589, 603 (1967)). See also *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978).

15. 319 U.S. 624 (1943).

16. *Id.* at 629-30, 642.

17. *Id.* at 634.

therein. If there are any circumstances which permit an exception, they do not now occur to us.¹⁸

In more recent times, the Court reiterated this general proposition in *Wooley v. Maynard*. The “right of freedom of thought protected by the First Amendment against state action,” the Justices declared in 1977, “includes both the right to speak freely and the right to refrain from speaking at all.”¹⁹ *Wooley* upheld the right of another Jehovah’s Witnesses family to remove, on moral grounds, the New Hampshire motto “Live Free or Die” embossed on their car license plate. In words laden with significance for the constitutionality of Section 111(b), the Court ruled:

The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State’s interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual’s First Amendment right to avoid becoming the courier for such message.²⁰

Section 111(b)’s mandatory Constitution Day educational directive—although worded in neutral language—also attempts to instill a “proper appreciation” of the U.S. Constitution and its history and to make colleges and universities “the courier for such message.” The legislative history of the provision strongly suggests that honoring the Constitution and its principles was the primary purpose of the statute. Senator Byrd made it clear repeatedly on and off the Senate floor that he envisaged Constitution Day as a patriotic exercise. When he introduced the first version of his Constitution Day proposal, for example, he told his Senate colleagues:

It is fitting and appropriate that we honor the document that established this government, and that we as a nation take steps to ensure that our Constitution and our system of government are known, understood, and cherished by the people they were established to serve.²¹

18. *Id.* at 642.

19. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

20. *Id.* at 717.

21. 150 CONG. REC. S9373 (daily ed. Sept. 20, 2004) (statement of Sen. Robert C. Byrd of West Virginia introducing his initial Constitution Day bill.)

And on the first Constitution Day in September 2005, Byrd told an audience at Shepherd University, in Shepherdstown, West Virginia:

Each and every one of us has a responsibility to understand the Constitution and to view the decisions of our government through the prism of the Constitution. . . . Last year, I introduced legislation to declare September 17 a national holiday, called "Constitution Day," to be celebrated with appropriate ceremonies, much as Flag Day is on June 14th. That legislation was not adopted, but an amendment that I offered to the omnibus appropriations bill was. . . . I hope that each year, each of you will renew your sense of devotion to our great nation and increase your understanding of the mechanisms that make it great.²²

Just as the state of New Hampshire admitted in *Wooley* that its license plate motto was intended to instill an appreciation of "history, state pride, and individualism," Senator Byrd's statements can easily be interpreted to amount to a similar admission regarding the purpose of the Constitution Day mandate. Certainly a court intent on probing legislative history could easily so find—and conclude that the *Barnette* and *Wooley* decisions stand firmly in the way of carrying out such a purpose. The two decisions state as clearly as can be that the government is barred by the First Amendment doctrine against compelled speech from forcing someone to be the courier of a particular view. Moreover, this bar is especially stringent in the context of colleges and universities, because of the deep and broad independent educational autonomy the Court has recognized these institutions also possess under the First Amendment right of academic freedom.

Despite the resonant patriotic undertones in the legislative history of the statute, Section 111(b) was carefully written—it is true—in language that is officially silent on the content of Constitution Day activities so as to permit, at least on paper, programs advocating any point of view on the Constitution. Even so, the statute is not content neutral, and it does not comport with the principles of academic freedom recognized by the Court. The Byrd amendment intermeddles with the autonomy of colleges and universities to select independently what they desire to teach or say on September 17. The law mandates that no mat-

22. Senator Robert C. Byrd, A Celebration of the Constitution of the United States (Sept. 16, 2005), available at http://byrd.senate.gov/speeches/2005_september/constitution_shepherd.html.

ter what they normally choose to teach or say—and even if it interferes with what they would otherwise normally choose to teach or say—colleges and universities must on that date address a particular subject: The United States Constitution. How such a directive can be reconciled, for example, with Justice Frankfurter’s freedom to decide “what may be taught,” or Justice Brennan’s prohibition against the “pall of orthodoxy” in the classroom, or Justice O’Connor’s dimension of “educational autonomy,” is difficult to perceive. The very requirement that colleges and university devote time, space and resources for a Constitution Day program, regardless of their independent educational judgment, starkly contradicts the Supreme Court’s understanding and definition of academic freedom and the associated right against compelled speech.

The *Rumsfeld* decision confirms this conclusion. *Rumsfeld* involved the Solomon Amendment’s requirement that federally-aided colleges and universities open their doors to U.S. military recruiters to the same extent they do for other employers. A group of law schools challenged this open access requirement, on the grounds that the directive forced the schools to let in the military, and thus compelled them, in effect, to convey the military’s policies on homosexuals—a set of policies the schools considered discriminatory and contrary to their views. In an opinion by Chief Justice John Roberts, the Court unanimously judged the law schools’ First Amendment claim to be much too attenuated. The Justices held that a law school’s career placement services are not inherently expressive, and that therefore, any messages expressed by employers allowed to recruit on campus through such services would not be confused as a message from the law school, and would not interfere with the conveyance of any contrary message the law school might wish to make when acting in its expressive capacity.

The *Rumsfeld* decision clarified the critical point that compelled speech jurisprudence hinges on the extent to which a speaker’s expressive capacity is impacted. In the words of the Court, “the compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”²³ The Court relied on several cases to illustrate this concept. Foremost among them was *Hurley v. Irish-American*

23. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 63 (2006).

Gay, Lesbian and Bisexual Group of Boston,²⁴ a case of particular relevance because it addressed a situation closely analogous to academic autonomy.

Hurley was a case in which the Justices unanimously ruled that a Massachusetts anti-discrimination law could not require the organizers of Boston's Saint Patrick's Day Parade to include a gay rights group in their parade.²⁵ To mandate inclusion of the group, the Court decided, would compel the parade organizers to convey a message they did not want to send.²⁶ The *Rumsfeld* Court explained the *Hurley* holding this way:

We concluded that because "every participating unit affects the message conveyed by the [parade's] private organizers," a law dictating that a particular group must be included in the parade "alter[s] the expressive content of th[e] parade" . . . As a result, we held that the State's public accommodation law, as applied to a private parade, "violates the fundamental rule of protection under the *First Amendment*, that a speaker has the autonomy to choose the content of his own message."²⁷

The *Rumsfeld* restatement of *Hurley* is significant because it identifies the reason for protecting the integrity of a parade, and by analogy, the integrity of an educational program, under the First Amendment. Like a parade, a college or university's educational program, consists of numerous "participating units," the alteration of any one of which will seriously "alter the expressive content" of the educational program. Those participating units, or components, consist of the various courses and activities—curricular as well as extracurricular—that have been chosen by the college or university to provide what the institution considers the optimal experience for its students.

These educational components lie at the heart of a college or university's expressive capacity. They identify the unique judgment and philosophy of each college and university. They carry the imprimatur of the institution, just as surely as, in *Hurley's* words, the marching units of a parade carry the organizer's endorsement that the marching units are "worthy of presentation."²⁸ The components that have been included in an educational program—as well as those that have been left out—thus

24. 515 U.S. 557 (1995).

25. *Id.* at 559.

26. *Id.* at 581.

27. *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. at 63–64 (alteration in original) (citations omitted).

28. *Hurley*, 515 U.S. at 575.

reflect the academic values, academic culture, and academic identity that define the institution. They embody and delineate the educational autonomy which the Court's First Amendment academic freedom jurisprudence seeks to protect from government intrusion.

The Byrd Amendment openly tries to invade this precinct of liberty, however. It attempts to alter the mix of educational components independently chosen by institutions of higher learning. And it does so by flatly ordering all colleges and universities within its reach to add a new educational component in their program every year—an annual Constitution Day activity—regardless of each institution's assessment of the educational merit of doing so. The directive baldly contradicts the principles articulated in *Rumsfeld* and *Hurley*.

Accordingly, considered as a straightforward legislative prescription, the Byrd Amendment falters on the steps of the First Amendment. It violates the academic freedom of every college and university affected to decide on its own whether or not to speak on a subject. The Byrd proviso is a funding measure, however. It achieves its command indirectly, by impliedly conditioning the receipt of federal funds on the establishment of a Constitution Day educational program. The measure is constructed in this way, of course, to take advantage of Congress' power to appropriate moneys for the "general welfare," and to maneuver around the absence of a specific enumerated congressional power to legislate directly on education.²⁹ Over the years, the Court has upheld numerous conditional spending arrangements for enacting regulatory legislation with broad reach. But the Justices have not accepted every scheme. They have ruled that there are boundaries to the kinds of conditions Congress may attach to a funding statute—and that one notable limit is the doctrine of unconstitutional conditions. This is a line which the Byrd Amendment, as a funding statute, oversteps because it requests that colleges and universities compromise their academic freedom in order to receive federal money.

As a general proposition, the doctrine of unconstitutional conditions holds that Congress may not impose conditions which require recipients of federal aid to surrender a constitutional right in order to receive a federal benefit. In *Rust v. Sullivan*, the Supreme Court identified a critical feature of the doctrine, in cases involving private recipients of federal funds:

29. U.S. CONST. art. I, § 8, cl. 1.

[O]ur ‘unconstitutional conditions’ cases involve situations in which the government has placed a condition on the *recipient* of the subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.³⁰

For the Court, the distinction between conditions on a recipient and conditions on a program has proved critical. The Justices have held that the first type of conditions—conditions on the use of funds that dictate what a recipient may or may not do outside the realm of a specific program—risk invading the recipient’s constitutional liberties. The second type—conditions on the use of funds that dictate what may or may not be done within a specific program—are usually acceptable, according to the Justices, because these conditions merely insure “that public funds be spent for the purposes for which they were authorized.”³¹ Relying on this distinction in the *Rust* case, for example, the Court approved as constitutional a measure that prohibited programs funded by the Public Health Service Act from providing abortion counseling.³² In the high bench’s view, the Congressional directive did not violate the freedom of speech of the recipients—the family planning organizations receiving the money—because it left them entirely free to pursue abortion-related speech and activities through separate and distinct programs not funded by the Act.³³

In contrast, the Justices decided in *FCC v. League of Women Voters of California* that a funding condition, prohibiting noncommercial educational stations from engaging in any editorializing, violated the First Amendment.³⁴ The general ban applied to any station receiving a grant from the Corporation for Public Broadcasting (CPB).³⁵ Here the Justices concluded that the boundless reach of the prohibition against editorializing, and the indivisible nature of station operations, created a situation that, in effect, regulated the stations—the recipients of the grants—rather than a specific, federally-funded program. No station was able “to segregate its activities according to the source of its funding,” and none had a “way of limiting the use of its

30. *Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (emphasis in original).

31. *Id.* at 196.

32. *Id.* at 177–78.

33. *Id.* at 196–97.

34. 468 U.S. 364, 366, 402 (1984).

35. *Id.* at 366.

federal funds to all noneditorializing activities,” the Court explained.³⁶ Accordingly, the funding condition was struck down as an infringement of the stations’ free speech rights.

In its key essentials, Section 111(b)’s directive on Constitution Day strongly resembles the CPB directive on editorializing that was thrown out in the *FCC* case. Like the CPB order, the Byrd proviso was conceived and constructed as an across-the-board, all-or-nothing mandate on the recipient: Its command applies beyond the confines of any specific federal program; its flat edict becomes effective upon the receipt of any federal funds, irrespective of the amount or purpose of the funding. The Byrd proviso does not permit colleges and universities “to segregate” their Constitution Day activities “according to the source of its funding,” nor is there a reasonable or practical way of “limiting the use of . . . federal funds” to Constitution Day activities only. If colleges and universities receive any federal moneys, they must engage in content-specific speech (a Constitution Day program), just as the stations in the *FCC* case were bound to engage in content-specific speech (no editorializing), if they received any CPB grant.

Thus, contrary to the guideposts laid down in the *Rust* case, the Byrd Amendment was not formulated as a compartmentalized federally-funded program—one that could be voluntarily accepted or rejected by a recipient on its merits, and one that if accepted by a recipient would leave the recipient free to speak out as it wished in any activity not funded by the program. Instead, the law was drawn as a broad-brush, indiscriminating condition that carries the implied threat to withdraw any or all federal funds, regardless of the purpose of the funds, from any recipient choosing to exercise its First Amendment academic right not to speak. The statute defies the *Rust* requirement of attaching funding conditions only to the relevant “particular program or service” so that a recipient can remain free to engage in “protected conduct outside the scope of the federally funded program.”

The Byrd Amendment thus fails all of the constitutional hurdles it must pass. The proviso runs counter to the broad principles of academic freedom that have been recognized by the Court as inherent in the First Amendment. The proviso contradicts the precedents that have established the existence of a First Amendment right not to speak. And the proviso violates the

36. *Id.* at 400.

doctrine against the imposition of unconstitutional conditions in funding statutes. Section 111(b) fails all three of these hurdles for one rather simple reason: It does not follow proper constitutional form. The statute *commands* institutions of higher learning to speak under the threat of losing all federal aid, instead of *inviting* them to speak by offering specifically targeted federal aid. By failing to respect the distinction between government compulsion and government encouragement—in a system founded on the bedrock principle of limited government authority—the statute crosses into fatal unconstitutional territory.

And so, in the final analysis, the Byrd Amendment is not the relatively innocent statute it seemed to be at first glance. The legislation is dangerous. It is dangerous because, of course, any government action that attacks a fundamental constitutional principle subverts the system. But the statute is especially dangerous because the assault comes by pinching ever so mildly the nation's bastions of academic learning into proclaiming a benign message. After all, who in America could be against prodding the nation's colleges and universities to teach respect and appreciation for the U.S. Constitution? The peril is that, if ignored, the Byrd proviso's method of coercion—the unconstitutional conditioning of federal aid upon the surrender of academic freedom and the right not to speak—may be used not only today to dictate a loose, well-intentioned, informational program about the Constitution. It may be used also tomorrow to dictate a uniform educational curriculum on anything the federal government considers important or useful for the nation's youth. That is a dangerous slope on which to tread and to slip.