

WHY THE SUPREME COURT WAS WRONG ABOUT THE SOLOMON AMENDMENT

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From the first week of law school, I try to teach my students that a decision from the Supreme Court is not necessarily right and that they, and everyone, should feel free to disagree with the Court. They should do so even when the Court is unanimous. I was reminded of this lesson when the Court, by an 8-0 margin, upheld the constitutionality of a federal law that requires law schools to allow military recruiters on campus. In *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*,¹ the Supreme Court upheld the Solomon Amendment,² which provides that if any part of an institution of higher learning denies military recruiters access equal to that provided other recruiters, the entire institution will lose federal funds.³

The Court's ruling means that law schools now must give preferred status to the military.⁴ The schools may bar any other

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1. 126 S. Ct. at 1313.
2. 10 U.S.C. § 983 (2000).
3. *Id.*
4. See *FAIR*, 126 S. Ct. at 1312 (stating that the Solomon Amendment requires schools to treat the military like other employers).

employer that discriminates on the basis of race, gender, religion or sexual orientation, but may not exclude the United States military. This principle undermines the freedom of speech and freedom of association of law schools across the country that do not wish to facilitate further discrimination against some of their students.

Law schools long have had policies excluding from career service facilities employers who discriminate on the basis of race, gender, religion, or sexual orientation. Because a federal statute excludes gays and lesbians from military service,⁵ most law schools refused to allow the military to use career service offices. However, a federal statute, referred to as the “Solomon Amendment,” was enacted 1995.⁶ It provides that educational institutions will lose virtually all federal funds if any part of the university denies military recruiters access equal to that provided other recruiters.⁷

Thus, the issue in *Rumsfeld v. FAIR* was whether the Solomon Amendment violates the First Amendment rights of law schools and their faculty and students.⁸ In a unanimous decision, the Supreme Court rejected the constitutional challenge and upheld the law.⁹

My thesis in this Article is that the Supreme Court in *Rumsfeld v. FAIR* abandoned basic First Amendment principles. The decision cannot be reconciled with other cases concerning freedom of speech and association. Indeed, if followed, *Rumsfeld v. FAIR* sets a disturbing and dangerous precedent.

5. 10 U.S.C. § 654 (2000). The Supreme Court correctly described this statute as providing that “a person generally may not serve in the Armed Forces if he has engaged in homosexual acts, stated that he is a homosexual, or married a person of the same sex.” *FAIR*, 126 S. Ct. at 1303.

6. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994) *codified at* 10 U.S.C. § 983 (2000).

7. *Id.*

8. 126 S. Ct. at 1302.

9. *Id.* at 1306.

Part I of the Article briefly describes the Solomon Amendment and the history of the litigation over it. Part II describes the Supreme Court's decision and explains how it is inconsistent with long-standing First Amendment principles. Finally, Part III suggests that the decision must be understood as part of the Supreme Court's historic—and misguided—deference to the military, especially in wartime. I also discuss what happens now that this battle in the fight for equality has been lost.

At the outset, I should admit that I am hardly disinterested when it comes to this issue. I am a member of the board of directors of the Forum for Academic and Institutional Rights and a named plaintiff in *Rumsfeld v. FAIR*. I am enormously proud to have been in this role. As a law school faculty member, I believe that law schools should refuse to allow any employer that discriminates based on race, gender, religion, or sexual orientation from using its career service facilities. All of my students should have equal access to all who interview on campus, and any employer who discriminates based on invidious characteristics should not be able to have the advantages of using law school facilities. A law firm that refuses to hire African-American or Jewish or women students should be unwelcome, as should any employer that refuses to hire gays or lesbians. In part, this is about ensuring fairness to all of our students. But also, because law schools are in the business of training future lawyers, we should be teaching a lesson of equality and non-discrimination. The example law schools set can be a powerful message that discrimination is wrong and unacceptable.

That it is the federal government, through a federal statute, excluding gays and lesbians from the military, makes it all the more important that law schools refuse to be a party to the discrimination. The federal law is based on the premise that there is something

wrong with gays and lesbians and that discrimination based on sexual orientation is acceptable.¹⁰ Law schools must, in every way possible, say that this is unconscionable and that they will not be a part of facilitating the federal government's continued unacceptable discrimination based on sexual orientation.

I

THE SOLOMON AMENDMENT AND THE CHALLENGE TO IT

Beginning in the 1970s, law schools began to adopt policies to exclude from school facilities employers who discriminate on the basis of race, gender, or religion. In 1990, the American Association of Law Schools, the governing and accrediting body for law schools, voted unanimously to include sexual orientation among the types of prohibited discrimination.¹¹

As a result of such policies, many law schools barred the military from using their placement facilities because a federal statute excludes gays and lesbians from service in the military.¹² Schools varied in the extent of their exclusion, but most law schools restricted the ability of military recruiters to use law school career services offices because of the military's express policy of discrimination based on sexual orientation.¹³ The military could interview students

10. See 10 U.S.C. § 654 (2000) (outlining reasons for the military's policy against homosexuality).

11. See American Academy of Law Schools, Executive Committee Regulations 6-3.2(a) (2004), available at <http://www.aals.org/ecr> (stating that "a member school . . . shall require employers . . . to provide an assurance of the employer's willingness to observe the principals of equal opportunity stated in Bylaw 6-3(b)").

12. 10 U.S.C. § 654 (2000).

13. See *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*, 291 F.Supp.2d 269, 282 (D. N.J. 2003) ("Law schools are loathe to endorse or assist in recruiting efforts of the United States military because of its policy against homosexual activity.").

off-campus, or at campus ROTC offices, but not within law school facilities.

In response to the law schools' exclusion of the military, in 1994 New York Congressman Gerald Solomon proposed an amendment to the annual defense appropriations bill that would withhold Department of Defense funding from any educational institution that excluded the military from using school facilities for recruiting purposes.¹⁴ This proposal was adopted by both the House and Senate and signed into law.¹⁵

In 2001, following the events of September 11, under the more conservative Bush administration, the Department of Defense informed law schools of their requirement to allow military recruiters access equal to all other employers or their universities would face the loss of all federal funds.¹⁶ In the summer of 2004, Congress codified this policy in a statute which provides that law schools and their universities face loss of federal funds, unless military recruiters are given access "in a manner that is at least equal in quality and scope to the [degree of] access to campuses and to students that is provided to any other employer."¹⁷

14. National Defense Authorization Act for Fiscal Year 1994, H.R. 2401, 103rd Cong. § 571 (1993) (enacted).

15. *Id.*

16. See *FAIR*, 291 F.Supp.2d at 282 (citing record evidence).

17. Ronald Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 198-375, § 552, 118 Stat. 1811, 1911 (2004), *codified at* 10 U.S.C. § 983(b) (Supp. 2005). As the Supreme Court explained:

The federal funds covered by the Solomon Amendment are specified at 10 U.S.C. § 983(d)(1) (Supp. 2005) and include funding from the Departments of Defense, Homeland Security, Transportation, Labor, Health and Human Services, and Education, and the Central Intelligence Agency and the National Nuclear Security Administration of the Department of Energy. Funds provided for student financial assistance are not covered. § 983(d)(2). The loss of funding applies not only to the particular school denying access but university wide. § 983(b).

A lawsuit challenging the Solomon Amendment was brought by an association of law schools and law faculty, the Forum for Academic and Institutional Rights. Plaintiffs also included two law professors, Sylvia Law, of New York University, and myself, then of the University of Southern California. Three law students were also named as plaintiffs in the lawsuit.¹⁸

The United States District Court for the District of New Jersey denied the petitioner's motion for preliminary injunction and denied the government's motion to dismiss.¹⁹ In November 2004, the United States Court of Appeals for the Third Circuit reversed the decision to deny the petitioner's preliminary injunction motion.²⁰ The Third Circuit premised its decision on the principle that the government "may not deny a benefit to a person on a basis that infringes his constitutional protected interests—especially, his interest in freedom of speech."²¹ This doctrine, often called "the unconstitutional conditions doctrine," is firmly established.²² Surely, the government could not condition welfare benefits on a requirement that recipients refrain from criticizing the government.

Rumsfeld v. Forum for Academic and Institutional Rights (FAIR), 126 S. Ct. 1297, 1304 n.3 (2006).

18. The Supreme Court found that FAIR had standing and thus concluded that it did not need to consider the standing of the other plaintiffs. *Id.* at 1303 n.2.

19. *FAIR*, 291 F. Supp. 2d at 269.

20. *Forum for Academic and Institutional Rights (FAIR) v. Rumsfeld*, 390 F.3d 219, 246 (3rd Cir. 2004).

21. *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

22. *See, e.g., FCC v. League of Women Voters*, 468 U.S. 364, 402 (1984) (holding that the specific interests sought to be advanced by a ban on editorializing were either not sufficiently substantial or not served in a sufficiently limited manner to justify the abridgment of journalistic freedoms which the First Amendment protects); *Speiser v. Randall*, 357 U.S. 513, 529 (1958) (holding that when the constitutional right to speak is sought to be deterred by a State's general taxing program, the State must come forward with sufficient proof to justify its inhibition, or a compelling interest at stake as to justify a procedure which results in suppressing protected speech).

Nor, the Third Circuit concluded, should the government be able to condition federal funds on a requirement that law schools forego their First Amendment rights.²³

The Third Circuit found that the Solomon Amendment violates the First Amendment rights of law schools in two major ways.²⁴ First, law schools are being compelled to express a message with which they strongly disagree. The Supreme Court long has recognized that in addition to preventing suppression of speech, “the First Amendment may prevent the government from . . . compelling individuals to express certain views.”²⁵ The Solomon Amendment does exactly that. It forces law schools to express a message about the presence of the military and its recruiters. Law schools must announce the military’s recruitment via e-mails, flyers, and posters. Additionally, law schools must include the military in recruitment forums and programs.

The Third Circuit found a second, separate constitutional violation: the Solomon Amendment violates law schools’ freedom of association.²⁶ The Supreme Court long has held that groups that have an expressive message may exclude in furtherance of it.²⁷ Law schools have an expressive message that is against discrimination, and in furtherance of that message, they have the right to refuse to associate with those who discriminate based on sexual orientation and other invidious characteristics.

23. *FAIR*, 390 F.3d at 246.

24. *Id.* at 230.

25. *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (citing, *inter alia*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634, 639–43 (1943)).

26. *FAIR*, 390 F.3d at 235.

27. *See, e.g.*, *Boy Scouts of America v. Dale*, 530 U.S. 640, 647–48 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)) (noting that protection of the right to expressive association “is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority”).

II

WHY THE SUPREME COURT WAS WRONG

In a unanimous opinion, written by Chief Justice John Roberts, the Court reversed the Third Circuit and upheld the Solomon Amendment.²⁸ The Court concluded that neither of the First Amendment grounds found by the Third Circuit had any merit.²⁹

Interestingly, the Court said that there was no need for it to consider whether there was an unconstitutional condition because Congress would have the authority to directly compel universities to allow the military to recruit on campuses.³⁰ Chief Justice Roberts wrote:

The Constitution grants Congress the power to “provide for the common Defence,” “[t]o raise and support Armies,” and “[t]o provide and maintain a Navy.” Congress’ power in this area “is broad and sweeping,” and there is no dispute in this case that it includes the authority to require campus access for military recruiters. That is, of course, unless Congress exceeds constitutional limitations on its power in enacting such legislation.³¹

The Court said, though, that “[u]nder this principle, known as the unconstitutional conditions doctrine, the Solomon Amendment would be unconstitutional if Congress could not directly require universities to provide military recruiters equal access to their students.”³² In other words, the Court reaffirmed the unconstitutional conditions doctrine and said that the issue was whether the requirement of military access violated the First

28. *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, 126 S. Ct. 1297, 1301, 1313 (2006).

29. *Id.* at 1313.

30. *Id.* at 1306.

31. *Id.*

32. *Id.* at 1307.

Amendment. Subsequently, the Court proceeded to reject each of the First Amendment claims that had been accepted by the Third Circuit.³³

A. Compelled Speech

First, the Court rejected that there was any compelled speech.³⁴ Chief Justice Roberts explained that “[t]he Solomon Amendment does not require any . . . expression by law schools There is nothing in this case approaching a Government-mandated pledge or motto that the school must endorse.”³⁵ The Court explained that students surely could understand that schools were not endorsing the military or its exclusion of gays and lesbians.³⁶ Chief Justice Roberts wrote: “We have held that high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy. Surely students have not lost that ability by the time they get to law school.”³⁷

The Court stressed that law schools were still free to express their own views, even though they had to allow the military on campus to use career service facilities. Chief Justice Roberts explained: “The Solomon Amendment neither limits what law schools may say nor requires them to say anything. Law schools remain free under the statute to express whatever views they may have on the military’s

33. *Id.* at 1313.

34. *Id.* at 1308.

35. *Id.*

36. *Id.*

37. *Id.* at 1307.

congressionally mandated employment policy, all the while retaining eligibility for federal funds.”³⁸

There are two flaws in the Court’s reasoning here, one factual and one legal. The factual error is in concluding that law schools are not required by the Solomon Amendment to engage in expression. Law schools are required to disseminate literature in student mailboxes; post job announcements on bulletin boards; maintain leaflets in binders for reference by students; publish précis in printed catalogs; e-mail students about interview possibilities; arrange appointments for students; supply private meeting rooms for discussion with candidates; reserve spots at private forums; and potentially post “JAG Corps” banners.³⁹ All of this is speech activity that is compelled by the Solomon Amendment.⁴⁰

The Court’s legal error is even more serious. Never before has the Supreme Court said that compelled speech is permissible so long as the speaker is allowed to disavow the forced message and engage in other speech. The classic case concerning compelled speech was *West Virginia State Board of Education v. Barnette*, which declared unconstitutional a state law that required that children salute the flag.⁴¹ Justice Robert Jackson, writing for the Court, eloquently said:

The compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. . . . 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,

38. *Id.* at 1308.

39. This non-inclusive list is based on the author’s experience with employer recruiting at law schools.

40. 10 U.S.C. § 983(b)(1).

41. 319 U.S. 624, 642 (1943).

religion or other matters of opinion or force citizens to confess by word or act their faith therein.⁴²

The Court followed this principle in other cases, such as in *Wooley v. Maynard*, where it ruled that an individual could not be punished for blocking out the portion of his automobile license plate that contained the New Hampshire state motto, “Live Free or Die.”⁴³ The Court said that:

[T]he right of freedom of thought protected by the First Amendment includes both the right to speak freely and the right to refrain from speaking at all. The right to speak and the right to refrain from speaking are complementary components of the broader concept of “individual freedom of mind.”⁴⁴

Similarly, in *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court declared unconstitutional a utility commission regulation that required that a private utility company include in its billing envelopes materials prepared by a public interest group.⁴⁵ The utility commission sought to provide a more balanced presentation of views on energy issues;⁴⁶ the public interest group’s statements were to be a counterpoint to the statements by the utility companies.⁴⁷ But the Court found that such compelled access violated the First Amendment. Justice Powell, writing for the Court, said that “[c]ompelled access like that ordered in this case both penalizes the expression of particular points of view

42. *Id.* at 633, 642.

43. 430 U.S. 705, 717 (1977).

44. *Id.* at 714 (citations omitted).

45. 475 U.S. 1, 20–21 (1986).

46. *Id.* at 5–7.

47. *Id.* at 9.

and forces speakers to alter their speech to conform with an agenda they do not set.”⁴⁸

Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston also involved an issue of forced expression.⁴⁹ Every St. Patrick’s Day, the Veterans Council, a private group, organizes a parade in Boston.⁵⁰ The Veterans Council refused to allow the Irish-American Gay, Lesbian, and Bisexual Group of Boston to participate in its parade.⁵¹ The Irish-American Gay, Lesbian, and Bisexual Group sued in Massachusetts state court based on the state’s public accommodations law that prohibited discrimination by business establishments on the basis on sexual orientation.⁵² The Massachusetts Supreme Judicial Court sided with the Irish-American Gay, Lesbian, and Bisexual Group.⁵³

The United States Supreme Court unanimously reversed. The Court, in an opinion by Justice Souter, said that organizing a parade is inherently expressive activity and that it violated the First Amendment to force the organizers to include messages that they find inimical.⁵⁴ Justice Souter explained that compelling the Veterans Council to include the Irish-American Gay, Lesbian, and Bisexual Group “violates the fundamental rule . . . under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”⁵⁵

48. *Id.*

49. 515 U.S. 557, 573 (1995).

50. *Id.* at 560–61.

51. *Id.* at 561.

52. *Id.*

53. *Id.* at 563–64.

54. *Id.* at 573.

55. *Id.* at 572.

The Court expressly invoked the principle discussed above that there is a First Amendment right not to speak. Justice Souter wrote that “the Council clearly decided to exclude a message it did not like from the communication it chose to make, and that is enough to invoke its right as a private speaker to shape its expression by speaking on one subject while remaining silent on another.”⁵⁶

It is impossible to reconcile the Supreme Court’s decision in *Rumsfeld v. FAIR* with these decisions. In none of them did the Court say, as it did in *Rumsfeld v. FAIR*, that the ability of the speaker to engage in other speech allowed the government to compel expression. Nor did the Court say, as it did in *Rumsfeld v. FAIR*, that the ability of the audience to recognize that it was compelled speech made it permissible.

In *West Virginia Board of Education v. Barnette*, the Court did not say that compelled flag salutes were permissible simply because the students were able to present alternative viewpoints.⁵⁷ Nor in *Wooley v. Maynard* was the required phrase on the license plate allowed just because the driver could put a bumper sticker on his car protesting the compelled message or just because those seeing the license plate would know that the slogan was there because of the state’s compelled speech.⁵⁸ In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, the Court held that a state agency cannot require a utility company to include a third-party newsletter in its billing envelope, even though the utility company could express its own message of disagreement with the compelled speech.⁵⁹ In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,

56. *Id.* at 575.

57. 319 U.S. 624 (1943).

58. 430 U.S. 705 (1977).

59. 475 U.S. 1, 20–21 (1986).

the compelled speech was not excused because the parade organizers could have spoken out against the Gay, Lesbian, and Bisexual group.⁶⁰

Rumsfeld v. FAIR, if followed, would eliminate the principle that compelled speech violates the First Amendment. Instead, it would substitute the view that the government can compel speech so long as the speaker than can disagree with the forced message. This is not only a radical departure from precedent, but also highly undesirable. As the Supreme Court has held for decades, the First Amendment's protection of freedom of speech also includes a right to not speak.⁶¹ Allowing the government to compel speech, under the assumption that the speaker can then disagree with its message, dissolves one's right to not speak. That right is precious under an Amendment that guarantees freedom of conscience.

Chief Justice Roberts' majority opinion also attempted to distinguish the cases by stating:

The compelled speech violation in each of our prior cases, however, resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate. . . . In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruiting receptions.⁶²

But this is just wrong. Under the Solomon Amendment, law schools are required to disseminate literature in student mailboxes

60. 515 U.S. 557 (1995).

61. *Pacific Gas & Elec. Co.*, 475 U.S. at 9 (noting that "the essential thrust of the First Amendment is to prohibit improper restraints on the *voluntary* public expression of ideas. . . . There is necessarily . . . a concomitant freedom *not* to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect" (citations omitted)).

62. *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, 126 S. Ct. 1297, 1309 (2006).

that they would not have to put there otherwise. They must post job announcements on bulletin boards that otherwise would not be there. They must e-mail students about interview possibilities and arrange appointments for students. They must allow the military to participate in employment forums held by them, and they must allow the military to display its banners.

The irony the Court never acknowledges is that in all of the prior cases the Supreme Court rejected the government's power to require equal access. In *Hurley*, for example, the Court said that the government could not require that the parade organizers allow the gay and lesbian group to march in the same way as other groups.⁶³ But in *Rumsfeld v. FAIR*, the Court said that the government can force law schools to give the military preferred access.⁶⁴ Any other employer who discriminates based on sexual orientation can be excluded, but not the military.

B. Freedom of Association

Second, the Court rejected the claim that the Solomon Amendment interfered with law schools' freedom of association.⁶⁵ The Court said that its earlier decisions concerning freedom of association involved the ability of a group to exclude certain people from membership, but the Solomon Amendment had nothing to do with membership.⁶⁶ Chief Justice Roberts wrote: "Unlike the public accommodations law in *Dale*, the Solomon Amendment does not force a law school 'to accept members it does not desire.'"⁶⁷ The

63. *Hurley*, 515 U.S. at 559.

64. *FAIR*, 126 S. Ct. at 1313.

65. *Id.*

66. *Id.* at 1312.

67. *Id.* (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

Court again emphasized that there is not a violation of the First Amendment because “[s]tudents and faculty are free to associate to voice their disapproval of the military’s message.”⁶⁸

But on careful consideration, the Court’s distinctions to *Dale* should not make a difference. As the Court recognized, *Boy Scouts of America v. Dale* is the key case here.⁶⁹ In *Dale*, in a 5 to 4 decision, the Court held that freedom of association protects the Boy Scouts’ right to exclude gays in violation of a state’s antidiscrimination statute.⁷⁰ Dale was a lifelong Scout who had reached the rank of Eagle Scout and had become an assistant scoutmaster.⁷¹ While in college he became involved in gay rights activities. Dale was quoted in a newspaper article after attending a seminar on the psychological needs of gay and lesbian teenagers and was identified in the article as the co-president of the Gay/Lesbian Alliance at Rutgers University.⁷² A scout official saw this article and then sent Dale a letter, excluding him from further participation in the Scouts.⁷³

Dale sued under the New Jersey law that prohibits discrimination by places of public accommodation.⁷⁴ The New Jersey Supreme Court found that the Boy Scouts are a “public accommodation” within the meaning of the law and rejected the Boy Scouts’ claim that freedom of association protected their right to discriminate based on sexual orientation.⁷⁵

68. *Id.* at 1313.

69. 530 U.S. 640 (2000).

70. *Id.* at 659.

71. *Id.* at 641.

72. *Id.* at 645.

73. *Id.* at 643.

74. N.J. Stat Ann. §§ 10:5-4, 10:5-5 (West Supp. 2000).

75. *Dale v. Boy Scouts of Am.*, 734 A.2d 1196, 1230 (N.J. 1999).

The issue before the Supreme Court was whether the Boy Scouts' desire to exclude gays fits within either of the exceptions recognized in *Roberts v. United States Jaycees*.⁷⁶ Since the Boy Scouts are a large national organization, they could not realistically claim to be an "intimate association." Instead, they argued that they had an expressive message that was anti-gay and that forcing them to include homosexuals undermined this communicative goal.⁷⁷

Chief Justice Rehnquist's majority opinion acknowledged that "[o]bviously, the Scout Oath and Law do not expressly mention sexuality or sexual orientation."⁷⁸ But Chief Justice Rehnquist was willing to find such a goal based on the Boy Scouts' interpretation of its own words, such as its command that scouts be "morally straight," and from the position it had taken during litigation.⁷⁹

In other words, the Court in *Boy Scouts of America v. Dale* essentially held that a group could define its own expressive message during litigation.⁸⁰ Chief Justice Rehnquist said that the failure to clearly state such a communicative goal in advance is not determinative: "The fact that the organization does not trumpet its views from the housetops, or that it tolerates dissent within its ranks, does not mean that its views receive no First Amendment protection."⁸¹

76. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656–59. See also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622–23 (1984) (noting that the government may seek to impose limitations on a group's freedom of association by imposing penalties or withholding benefits because of their membership in a disfavored group; it may attempt to require disclosure of the fact of membership in a group seeking anonymity; or, it may try to interfere with the internal organization or affairs of the group) (internal citations omitted).

77. Reply Brief for Petitioners at 4, *Dale*, 530 U.S. 640 (No. 99-699).

78. 530 U.S. at 650.

79. *Id.* at 650–51.

80. *Id.* at 656.

81. *Id.*

The analogy to *Rumsfeld v. FAIR* is powerful. Forced association that interferes with an organization's expressive message was found to violate the First Amendment.⁸² The fact that the Boy Scouts could find other ways to express their anti-gay message was not enough to allow forced association.⁸³ Nor should it matter whether the forced association was in the form of membership or other means. It is the compelled association, and not its specific form, that is objectionable under the First Amendment.

If followed, *Rumsfeld v. FAIR* would dramatically change the law. It would limit protection of freedom of association to the membership context. Moreover, it would mean that the government could compel association, so long as the individual or institution could express its disagreement with the mandate.

Simply put, in *Boy Scouts of America v. Dale*, the Court held that the government could not compel association in a manner that is inconsistent with a group's expressive message.⁸⁴ But the Solomon Amendment does just this. No one disputes the fact that law schools have an expressive message of disapproving discrimination.

III

WHY AND WHAT NOW?

My primary focus thus far has been in demonstrating that *Rumsfeld v. FAIR* was a significant departure from well-established First Amendment principles. I believe that understanding the decision requires seeing it as part of the Court's historical deference

82. *Id.* at 659.

83. *Id.* at 656-59.

84. *Rumsfeld v. Forum for Academic and Institutional Rights (FAIR)*, 126 S. Ct. 1297, 1312 (2006).

to the military, especially in time of war. In fact, at the outset of the majority opinion, Chief Justice Roberts said just this:

But 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 v. Goldberg*,⁸⁵ “judicial deference . . . is at its apogee” when Congress legislates under its authority to raise and support armies.⁸⁶

But what the Court ignores is that such deference has almost always in hindsight been regarded as a mistake. For example, few Supreme Court decisions are regarded as more in error than *Korematsu v. United States*, which upheld the constitutionality of the government’s evacuation of Japanese-Americans from the west coast during World War II.⁸⁷ Moreover, as the Third Circuit pointed out, there is no need for such deference to the military with regard to the Solomon Amendment.⁸⁸ Never during the litigation did the government offer a shred of evidence that law schools’ exclusion of military recruiters had the slightest adverse effect on military recruitment.

What now? Law schools, and their faculty and students, must protest the military’s presence on campus and the military’s policy of excluding gays and lesbians. The Court in *Rumsfeld v. FAIR* emphasized that law schools are free to express their own messages of protest and disagreement with the military.⁸⁹ Chief Justice Roberts wrote: “Law schools remain free under the statute to express

85. 453 U.S. 57, 70 (1981).

86. *FAIR*, 126 S. Ct. at 1306 (quoting 453 U.S. at 70).

87. 323 U.S. 214, 224–25 (1944).

88. See *FAIR*, 126 S. Ct. at 1309 (“[T]he Third Circuit concluded that the Solomon Amendment unconstitutionally compels law schools to accommodate the military’s message.”).

89. *Id.* at 1307.

whatever views they may have on the military's congressionally mandated employment policy, all the while retaining eligibility for federal funds."⁹⁰ The Court added:

[The] Solicitor General acknowledg[ed] that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests" . . . [The Solomon Amendment] affects what law schools must *do*—afford equal access to military recruiters not what they may or may not *say*.⁹¹

Thus, law schools, and their faculty and students, are allowed to protest the military's presence on campus in any way they choose, so long as they do not exclude the military. They need to do so and to express their strong disagreement with the exclusion of gays and lesbians from the military.

That, of course, is what all of this is about: a federal statute, based on prejudice and stereotypes, that discriminates on the basis of sexual orientation. Efforts must concentrate on eliminating that law and the exclusion of gays and lesbians from the military.

I have heard many say that FAIR and the other plaintiffs in the suit were anti-military. In fact, the lawsuit is based on just the opposite: the desire to allow more people to serve in the armed forces. The lawsuit was brought by those who believe that their schools should not facilitate discrimination. Rather, they should adhere to long-standing policies that employers who discriminate are not welcome in law schools. It is sad that the Court was so insensitive to this interest and abandoned well-established First Amendment principles out of its desire to defer to the military.

90. *Id.*

91. *Id.* (quoting Transcript of Oral Argument at 25).