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I. INTRODUCTION

Since World War II, higher education has emerged as perhaps the single most successful industry in the United States, and government funding has helped fuel that success.1 Thanks to the Spending Clause in Article I, Section 8 of the United States Constitution, which empowers Congress "to authorize expenditure of public moneys for public purposes [which power] is not limited by the direct grants of legislative power found in the Constitution,"2 Congress has been more than willing to provide federal funding to support higher education.3 By using its Spending Clause power, however, Congress has also been able to attach various conditions on the receipt of federal funds that it might not otherwise have been able to do pursuant to the Constitution.4 From ensuring gender equality in high-school sports under Title IX, to requiring standardized testing mandates through the No Child Left Behind Act, Congress has been more than willing to attach various conditions on a school's receipt of federal educational funding.5

This note examines the forces in play leading up to the United States Supreme Court's decision in Rumsfeld v. Forum for Academic & Institutional Rights, Inc.,6 a case in which the Court upheld a federal law conditioning the receipt of federal funding by law schools (and other institutions of higher learning) on those schools granting United States Military recruiters equal access to students, despite First Amendment claims brought by

3. Lazerson, supra note 1, at 67.
4. Dole, 483 U.S. at 207.
those schools. This note first explores the facts leading to the controversy that culminated in an appeal to the Supreme Court. Next, this note explores the background of the issues presented by Rumsfeld, including the United States military’s historic treatment of homosexuals, the law schools’ disagreement with military recruiters, and the background of the First Amendment arguments invoked by the law schools in an attempt to avoid being forced to accommodate military recruiters. Finally, this note explains the Court’s reasoning in Rumsfeld and concludes with a discussion of the significance of the Rumsfeld decision. The significance section further illustrates how this decision—the first major decision of the Court since the death of Chief Justice Rehnquist and the retirement of Justice O’Connor—may foreshadow the direction of the Court’s future decisions relating to military affairs and political matters.

II. FACTS

Since the 1970s, many law schools have included sexual orientation in their anti-discrimination policies, and as a result of the United States military’s historical discrimination against homosexual soldiers and recruits, many schools have been less than enthusiastic about granting military recruiters access to law students. In an attempt to remedy law school discrimination against military recruiters, Congress passed the Solomon Amendment in 1994, which conditioned the receipt of federal funding on a school’s granting military recruiters access to students. In order to preserve the law schools’ (and their respective universities’) federal funding, most law schools grudgingly began to allow military recruiters access to students. Many schools, however, still refused to provide military recruiters the same administrative services or perks provided to other recruiters.
Shortly after the September 11 attacks, the Department of Defense (DoD) began to push aggressively for access to students on the same terms as those enjoyed by private employers, threatening to jeopardize the federal funding provided to noncomplying schools. Unhappy with the DoD's enforcement of the Solomon Amendment, law schools and law professors from around the country formed the Forum for Academic and Institutional Rights (FAIR) in 2003 with the express purpose of opposing the Solomon Amendment's "violation of the schools' First Amendment rights."

On September 19, 2003, the Forum for Academic and Institutional Rights, Inc.; the Society of American Law Teachers, Inc.; the Coalition for Equality; Rutgers Gay and Lesbian Caucus; law professors Erwin Chemerinsky and Sylvia Law; and law students Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild (collectively referred to as FAIR) filed suit in the United States District Court for the District of New Jersey against Secretary of Defense Donald Rumsfeld, the DoD, and others, seeking a temporary restraining order and preliminary injunction enjoining enforcement of the Solomon Amendment. FAIR contended before the District Court that the Solomon Amendment was unconstitutional because it (1) conditioned receipt of federal funding on law schools surrendering their First Amendment rights of academic freedom, freedom of speech, and freedom of expressive association, (2) discriminated against law schools on the basis of viewpoint by promoting a pro-military recruiting message at the expense of punishing schools who disagree with the military's policy concerning homosexuals, and (3) violated the void-for-vagueness doctrine for lack of clear guidelines and for conferring unbridled discretion on the DoD to determine what institutions were in compliance with the Solomon Amendment, and thus, entitled to federal funding. FAIR then moved for a preliminary injunction, which the DoD opposed on the grounds that the Solomon Amendment was a valid exercise of Congress's Spending Clause power that conditioned federal funding on conduct unrelated to speech.

The district court denied FAIR's motion for preliminary injunction on the grounds that FAIR had failed to establish a likelihood of success on the merits, a necessary element justifying the grant of a preliminary injunction. The district court was careful to point out that its finding for the DoD was

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17. Totenberg, supra note 13; see also Healy, supra note 13, at A1.
18. Kent Greenfield, Imposing Inequality on Law Schools, WASHINGTON POST, Nov. 10, 2003, at A25. Kent Greenfield is a law professor at Boston College and is the president of FAIR. Id.
20. Id. at 274–75.
21. Id. at 275.
22. Id.
based solely on the district court’s belief that “the Solomon Amendment, as an exercise of Congress’s spending power and its power and obligation to raise military forces, on balance, is not violative of the First Amendment.”

The district court further prefaced its ruling with the disclaimer that “as with all constitutional challenges to legislation, the question is not whether the Court believes that the legislation is wise or unwise, or even fair or unfair.”

FAIR then appealed the district court’s denial of the motion for preliminary injunction.

On appeal, the United States Court of Appeals for the Third Circuit reversed the district court’s denial of FAIR’s motion for preliminary injunction. The court of appeals examined each of FAIR’s constitutional claims and concluded that FAIR had established a likelihood of success on the merits of each of the constitutional claims. The court of appeals explained that “the Solomon Amendment requires law schools to express a message that is incompatible with their educational objectives, and no compelling governmental interest has been shown to deny this freedom.”

The court also concluded that the DoD had failed to provide any evidence that the Solomon Amendment’s “restrictions on speech are no more than [what is] required to further its interest in attracting good legal counsel.”

The court of appeals then reversed the district court and ordered the district court to enter a preliminary injunction enjoining enforcement of the Solomon Amendment. The DoD immediately appealed the Third Circuit’s decision to the Supreme Court, which granted certiorari.

### III. BACKGROUND

With issues including gay rights, national defense, and the First Amendment rights of schools, Rumsfeld is a case that is as much about politics and current events as it is about case law and constitutional issues. Therefore, in order to assist the reader with a full understanding of the complex issues surrounding Rumsfeld, this section first explores the origin of the United States Military’s stance on homosexuals, beginning with its founding.
during the American Revolution.\textsuperscript{32} Next, this section traces the policies and events of the early 1990s that led to the formation and evolution of the now infamous "Don’t Ask, Don’t Tell" policy.\textsuperscript{33} This section will then examine the current events of the late 1990s and early 2000s that led to the formation of FAIR and the controversy culminating in the Court’s decision in \textit{Rumsfeld}.\textsuperscript{34} Finally, this section will examine the contemporary state of First Amendment jurisprudence relevant to the issues presented in \textit{Rumsfeld}.\textsuperscript{35}

A. The Origins of the United States Military’s Stance on Homosexuals\textsuperscript{36}

On March 14, 1778, General George Washington entered the following general order while camped with the Continental Army at Valley Forge:

At a General Court Martial whereof Colo. Tupper was President (10th March 1778) Lieutt. Enslin of Colo. Malcom’s Regiment tried for attempting to commit sodomy, with John Monhort a soldier; Secondly, For Perjury in swearing to false Accounts, found guilty of the charges exhibited against him, being breaches of 5th. Article 18th. Section of the Articles of War and do sentence him to be dismiss’d the service with Infamy. His Excellency the Commander in Chief approves the sentence and with Abhorrence and Detestation of such Infamous Crimes orders Lieutt. Enslin to be drummed out of Camp tomorrow morning by all the Drummers and Fifers in the Army never to return; The Drummers and Fifers to attend on the Grand Parade at Guard mounting for that Purpose.\textsuperscript{37}

Pursuant to the order, Lieutenant Gotthold Frederick Enslin was dismissed from the Continental Army and became the first reported "gay discharge" from the United States Military.\textsuperscript{38}

\begin{itemize}
\item \textsuperscript{32} See infra Part III.A.
\item \textsuperscript{33} See infra Part III.B.
\item \textsuperscript{34} See infra Part III.C.
\item \textsuperscript{35} See infra Part III.D.
\item \textsuperscript{36} This section refers to sodomy and homosexuality interchangeably; however, this is a misnomer as sodomy is a sexual act that can be committed by both homosexual and heterosexual couples. Because "homosexuals have been restricted through either personnel regulations or the application of the sodomy provisions of military law," NAT’L DEF. RESEARCH INST., MR-323-OSD, \textit{SEXUAL ORIENTATION AND UNITED STATES MILITARY PERSONNEL POLICY: options and assessment} 3 (1993) [hereinafter \textit{RESEARCH INST.}], this subsection will discuss the military prohibition of sodomy as if it applied only to homosexual soldiers and as if sodomy were analogous to homosexuality.
\item \textsuperscript{37} George Washington, General Orders at Valley Forge on March 14, 1778 (1778), \textit{reprinted in THE WRITINGS of GEORGE WASHINGTON} 83–84 (John C. Fitzpatrick ed., United States Gov’t Printing Office 1934).
\item \textsuperscript{38} Sharon E. Debbage, Symposium, \textit{A Ban by Any Other Name: Ten Years of “Don’t Ask, Don’t Tell,”} 21 \textit{HOFSTRA LAB. \& EMP. L.J.} 403, 405 (2004). It should be noted that Enslin was drummed out of the Continental Army, not for being homosexual per se, but for
\end{itemize}
Though general military law has criminalized sodomy "since time immemorial," American military law did not specifically criminalize sodomy until 1920.\(^9\) In 1775, the Continental Congress adopted its first Articles of War governing the newly formed Continental Army, which articles were largely based on the British Articles of War of 1765.\(^4\) Like the British Articles of War then in effect, the American Articles of War did not explicitly prohibit sodomy or homosexual soldiers from serving in the military.\(^4\) Rather, soldiers engaging in sodomitic activities were punished based on their violations of applicable civilian or common law.\(^4\)

After the adoption of the Articles of War of 1916, the military prosecuted "sodomy and other unnatural crimes" under the catch-all provisions of Article of War 96.\(^4\) Then, in 1920, Congress amended the 1916 Articles to specifically include sodomy as a punishable offense, and for the first time, sodomy became an explicitly punishable crime in the United States Military.\(^4\)

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\(^4\) Captain Erik C. Coyne, *Note, Check Your Privacy Rights at the Front Gate: Consensual Sodomy Regulation in Today's Military Following United States v. Marcum*, 35 U. Balt. L. Rev. 239, 244 (2005). The British Articles of War of 1749 did include an express prohibition against sodomy; however, this reference to sodomy was not included in the British Articles of War of 1765. *Id.* at 244. The failure to explicitly criminalize sodomy in the 1765 Articles and the American Articles is understandable given that noted commentator Lord William Blackstone described sodomy in his *Commentaries on the Laws of England* as that "infamous crime against nature . . . not fit to be named; 'peccatum illud horribile, inter christianos non nominandum [that horrible sin not to be mentioned among Christians].'" *William Blackstone, 4 Commentaries 215 (1769)* (emphasis supplied).

\(^4\) Debbage, *supra* note 38, at 405. Debbage states that the first prohibition against sodomy in United States Military law appeared in the 1916 Articles; however, the prohibition against sodomy as a separate offense did not appear in the Articles of War until its amendment in 1920. *Id.* at 405 n.15.

\(^4\) United States v. Harris, 8 M.J. 52, 53 (C.M.A. 1979). Article 96 of the Articles of War of 1916 provided the following:

Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial according to the nature and degree of the offense, and punished at the discretion of such court.


\(^4\) Harris, 8 M.J. at 53. In 1920, Congress amended Article of War 93, which listed the "various crimes" punishable by court-martial, to include sodomy for the first time. *Id.* at 56.
Between World War I and World War II, the military "attempted to screen and exclude homosexuals from service by utilizing contemporary, biological theories about the causes and manifestations of homosexuality." For example, Army Regulation 40-105, instituted in 1921, defined its "stigma of degeneration" to include characteristics such as an "overly feminine appearance, with sloping shoulders, broad hips, and absence of secondary sex characteristics[,] including facial and body hair." Additionally, included in the exclusion criteria was "sexual psychopathy, which included sexual relations between men." As a result of these policies, the military often administratively discharged homosexual soldiers under a "Section VIII" discharge.

During World War II, the United States military re-examined its policies regarding homosexuals; in fact, the United States Army revised its own policies regarding homosexual soldiers more than twenty-four times during the war. Freudian-inspired psychologists developed theories that homosexuality and military service were incompatible due to homosexuals' "inaptitude for combat and lack of trustworthiness." As a result, homosexuals were banned from serving in the military solely because of their sexual orientation and regardless of whether they had engaged in sodomy. Under the new policies, homosexuals were barred from joining the military and were discharged upon discovery.

The Article listed only sodomy and was silent as to whether both heterosexual and homosexual sodomy or just homosexual sodomy was punishable. Army Reorganization Act, Pub. L. No. 66-242, 41 Stat. 759, 805 (1920). Additionally, many sources, including the Rand Report of 1993, erroneously state that Article 93 of the 1916 Articles mentioned sodomy; however, this revision did not appear until 1920. See Debbage, supra note 38, at 405 n.15.

45. RESEARCH INST., supra note 36, at 4.
46. Id.
47. Id. (citing Army Regulation 40-105 (1921) (internal quotations omitted)).
48. Id. A "Section VIII" discharge was used to separate insane and otherwise psychologically unfit soldiers from the military, and it had been popularized in the media thanks to fictional characters such as Corporal Klinger of M*A*S*H and Captain Yossarian of Catch 22. Major Susan L. Turley, Book Note, 170 MIL. L. REV. 197, 199 (2001) (reviewing BEN SHEPARD, A WAR OF NERVES: SOLDIERS AND PSYCHIATRISTS IN THE TWENTIETH CENTURY (2001)).
49. RESEARCH INST., supra note 36, at 5.
50. Debbage, supra note 38, at 406.
51. Id. at 406; RESEARCH INST., supra note 36, at 6.
52. RESEARCH INST., supra note 36, at 6.
B. The Evolution of the “Don’t Ask, Don’t Tell” Policy and the United States Military’s Current Stance Towards Homosexuals

In 1992, then-Governor Bill Clinton campaigned in part on a pledge to end homosexual discrimination in the military if elected president. Shortly after taking office in January 1993, Clinton attempted to fulfill his campaign promise to end discrimination against homosexuals by instituting a review of the United States military’s policies concerning homosexuals. Clinton, however, faced opposition, not only from Congress but also from the Joint Chiefs of Staff over his plan to end sexual-orientation discrimination in the military. As a result, Clinton was forced to abandon his plan to end homosexual discrimination in the military outright, and instead, he implemented a compromise intended to be “practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion.”

Pursuant to the President’s instructions, Secretary of Defense Les Aspin formed a Military Working Group to analyze the DoD’s homosexual policies and to suggest revisions consistent with the President’s instructions. The Military Working Group’s conclusion included the following:

Homosexuality is incompatible with military service. The presence in the military of individuals identified as homosexuals would have a significantly adverse effect on both unit cohesion and the readiness of the force—the key ingredients of combat effectiveness. If identified homosexuals are allowed to serve, they will compromise the high standards of combat effectiveness which must be maintained, impacting on the ability of the Armed Forces to perform its mission.

Further, the Military Working Group concluded that even homosexuals who were unknown to the military or who otherwise kept their sexual orientation a secret still posed a threat to the military. The Military Working Group determined that “closeted” homosexuals would “undermine combat effectiveness through, for example, high risk behavior and the formation of a ‘sub-culture’ outside the chain of command,” or they would eventually be found out and discharged.

53. Id. at 9.
54. Id. at 1.
57. SUMMARY REPORT, supra note 56, at 1.
58. Id. at 12.
59. Id. at 7.
60. Id.
Despite the military’s continued resistance, Secretary Aspin issued a memorandum dated July 19, 1993, in which the military instituted the “Don’t Ask, Don’t Tell” policy.\footnote{See Memorandum from Les Aspin, Sec’y of Def. to the Sec’y of the Army et al., (July 19, 1993) (on file with author) [hereinafter Memo].} Under this revision, the military still held that homosexuality was incompatible with military service, but noted that many homosexuals had served the United States with distinction.\footnote{Id. at 1.} Under the new policy, homosexual conduct was still grounds for discharge, but sexual orientation was “considered a personal and private matter.”\footnote{Id.} Thus, homosexual orientation was “not a bar to service entry or continued service unless manifested by homosexual conduct.”\footnote{Id.} Further, the policy forbade commanders from asking servicemembers about their sexual orientation and forbade commanders from investigating a servicemember’s sexual orientation.\footnote{Id. at 2.} These restrictions, however, were lifted when a commander had “credible information” that a basis for discharge existed.\footnote{Id.; see also Abrams, \textit{supra} note 55, at 221.} Credible information constituting a basis for discharge under the policy included statements or actions by a servicemember, such as holding hands with a member of the same sex, which would tend to indicate that the servicemember was homosexual.\footnote{Memo, \textit{supra} note 61, at 2; see also Abrams, \textit{supra} note 55, at 221.} In November 1993, Congress followed President Clinton’s lead and passed Public Law 103-160, which codified the provisions of the “Don’t Ask, Don’t Tell” policy into United States law.\footnote{See 10 U.S.C. § 654 (1993).}

C. Current Events Leading to \textit{Rumsfeld}

Since the 1970s, many law schools across the country have required that all recruiters seeking to use the schools’ career services facilities sign an agreement stating that they do not discriminate on the basis of race, sex, religion, or sexual orientation.\footnote{Totenberg, \textit{supra} note 13.} In 1990, the Association of American Law Schools (AALS) formally adopted this practice and required all member institutions to obtain non-discrimination statements from recruiters.\footnote{Michael J. Collins, \textit{Current Event}, Fair v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004), 13 AM. U.J. GENDER SOC. POL’Y & L. 717, 718 (2005).} As a result of the United States military’s long and continued history of discrimination against homosexuals, and as a result of military recruiters’ inability to comply with the AALS anti-discriminatory mandate, many law school cam-

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  \item 61. \textit{See} Memorandum from Les Aspin, Sec’y of Def. to the Sec’y of the Army et al., (July 19, 1993) (on file with author) [hereinafter Memo].
  \item 62. \textit{Id.} at 1.
  \item 63. \textit{Id.}
  \item 64. \textit{Id.}
  \item 65. \textit{Id.} at 2.
  \item 66. \textit{Id.; see also} Abrams, \textit{supra} note 55, at 221.
  \item 67. Memo, \textit{supra} note 61, at 2; \textit{see also} Abrams, \textit{supra} note 55, at 221.
  \item 69. Totenberg, \textit{supra} note 13.
\end{itemize}
puses simply banned military recruiters from campus. This ban continued at many member institutions even after the enactment of the "Don't Ask, Don't Tell" policy.

In 1994, Congress responded to the ban of military recruiters in law schools and other institutes of higher education by passing the Solomon Amendment. The law was inspired in part by the AALS position on sexual orientation discrimination in law schools. The amendment forbade any university from restricting military recruitment on campus at the risk of losing federal DoD dollars. In 1997, Congress amended the Solomon Amendment to jeopardize a university's receipt of not only DoD funds, but also funds administered by other federal agencies, including the Depart-

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71. Id. at 718–19; see also Totenberg, supra note 13.

72. Collins, supra note 70, at 719; Totenberg, supra note 13. Despite the recent ruling in Rumsfeld, the AALS continues to maintain that member institutions must require employers to not discriminate on the basis of sexual orientation. See, e.g., ASS'N OF AM. LAW SCHOOLS, INC., BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, INC. § 6.3 (Amended Jan. 2004), available at http://www.aals.org.cnchost.com/about_handbook_requirements.php (last visited Mar. 27, 2007) [hereinafter BYLAWS] (setting forth the requirement that member institutions cannot discriminate on the basis of sexual orientation); ASS'N OF AM. LAW SCHOOLS, INC., EXECUTIVE COMMITTEE REGULATIONS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS 6-3.2 (Amended Jan. 2006), available at http://www.aals.org.cnchost.com/about_handbook_regulations.php#6 (last visited Mar. 27, 2007) [hereinafter REGULATIONS] (setting forth the requirement that member institutions must inform employers of the school's anti-sexual-orientation discrimination policy and obtain written agreements from employers). The University of Arkansas at Little Rock William H. Bowen School of Law is a member of the AALS.

73. 10 U.S.C. § 983 (1994); Paul Horwitz, Grutter's First Amendment, 46 B.C. L. REV. 461, 516 (2005). During the congressional debate on the Solomon Amendment, Congressman Richard Pombo spoke in favor of the Solomon Amendment and offered the following remarks:

[...]Institutions of higher education in this country need to be put on notice that their policies of ambivalence or hostility towards our Nation's armed services do not go unnoticed . . . . A growing, and misguided, sense of moral superiority is creeping into the policies of colleges and universities in this country when it comes to such things as military recruiting or ROTC activities on campus . . . . These colleges and universities need to know that their starry-eyed idealism comes with a price. If they are too good—or too righteous—to treat our Nation's military with the respect it deserves . . . . or to afford our military the same recruiting opportunities offered to private corporations—then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America. . . . I urge my colleagues to support the Solomon amendment, and send a message over the wall of the ivory tower of higher education.


75. 10 U.S.C. § 983 (1994); Horwitz, supra note 73, at 516–17.
The Solomon Amendment was again amended in 1999 to clarify which federal funds would be withheld from which institution. The 1999 amendment "penaliz[es] an offending 'subelement' of a college or university (i.e., a law school) that prohibits or effectively prevents military recruiting with the loss of federal funding from all of the federal agencies identified in the statute, while withholding from the offending subelement's parent institution only D[o]D funds." The loss of federal funding due to non-compliance with the Solomon Amendment was no idle threat to universities. For example, non-compliance could have meant a loss of nearly $1 billion in federal funding to Columbia, Harvard, and Yale combined in 2003.

As a direct result of the Solomon Amendment, law schools across the country were forced to suspend their non-discrimination policies with regard to military recruiters. Schools grudgingly permitted military recruiters to come onto campus; however, schools continued to protest the military's discrimination against homosexuals by refusing to provide military recruiters with equal access to administrative services that the career services departments provided to other recruiters. For example, many schools allowed military recruiters to recruit on campus but refused to (1) send e-mails to the student body informing students of the recruiters' presence, (2) post flyers regarding recruitment, and (3) otherwise provide military recruiters with the same "perks" provided to other recruiters.

Shortly after the change in administration and the September 11 attacks, the DoD began to push for military recruiters' access to students, as guaranteed by the Solomon Amendment. The DoD also began to push aggressively for access to students on the same terms granted to other employ-

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77. Id.
78. Id. (citing 32 C.F.R. § 216.3(b)(1)); see also 10 U.S.C. § 983 (1999); Horwitz, supra note 72, at 517.
80. Id.
81. Horwitz, supra note 72, at 517.
82. Totenberg, supra note 13.
83. Id. The Loyola University School of Law in Chicago went so far as to deny military recruiters the free lunch provided to other recruiters on campus. Frank James and Jodi S. Cohen, Court Sides with Military: Colleges Accepting Federal Money Must Not Bar Recruiters, CHI. TRIBUNE, Mar. 7, 2006, at C1.
84. See Totenberg, supra note 13; see also Healy, supra note 13, at A1.
ers—for example, access to the same administrative services and perks provided to other employers.\textsuperscript{85}

Unhappy with the DoD's enforcement of the Solomon Amendment, law schools from around the country formed the Forum for Academic and Institutional Rights (FAIR) in 2003 with the express purpose of opposing "the violation of the schools' First Amendment rights."\textsuperscript{86} On September 19, 2003, FAIR filed suit against the DoD seeking to prohibit enforcement of the Solomon Amendment.\textsuperscript{87} At that time, FAIR declined to disclose which law schools formed the organization out of fear of retribution from the DoD, although four member schools were willing to be publicly associated with FAIR: New York University, Golden Gate University School of Law, Whittier Law School, and Chicago-Kent College of Law.\textsuperscript{88}

D. The Solomon Amendment and Relevant First Amendment Jurisprudence

In holding that the Solomon Amendment was an unconstitutional infringement on the First Amendment rights of FAIR's member institutions, the United States Court of Appeals for the Third Circuit relied on a variety of First Amendment grounds.\textsuperscript{89} These grounds included the following: (1) the Solomon Amendment's requirements concerning the required admission of military recruiters to law schools' campuses is tantamount to compelled, expressive speech; (2) the law schools affected by the Solomon Amendment have a First Amendment right of association (and its converse, to be free of compelled association); and (3) the Solomon Amendment's federal funding conditions amount to an unconstitutional condition on the receipt of those funds.\textsuperscript{90} Likewise, on appeal to the Supreme Court, FAIR again presented these First Amendment arguments as grounds for overturning the Solomon

\textsuperscript{85} Forum for Academic & Institutional Rights v. Rumsfeld ("FAIR II"), 390 F.3d 219, 227 (3d Cir. 2004); Seth Stern, Law Schools Revolt over Pentagon Recruitment on Campus, CHRISTIAN SCIENCE MONITOR, Nov. 6, 2003, at 2. The "equal treatment" pushed for by the DoD was at first an informal policy as the Solomon Amendment only required that schools provide military recruiters with "access." FAIR II, 390 F.3d at 228. However, in 2005, an equal treatment provision was added to the Solomon Amendment, which required law schools to provide military recruiters 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." \textit{Id.} (internal quotations omitted).

\textsuperscript{86} Greenfield, supra note 18, at A25.

\textsuperscript{87} Sam Dillon, Law Schools Seek to Regain Ability to Bar Military Recruiters, N.Y. TIMES, Sept. 20, 2003, at A14.

\textsuperscript{88} \textit{Id.}; Stern, supra note 85, at 2.

\textsuperscript{89} See generally FAIR II, 390 F.3d at 229–46.

\textsuperscript{90} \textit{Id.}
Amendment. However, despite the presentment of these First Amendment issues and the fact that the Court could have seized on any one of these First Amendment issues as the germ of a decision ultimately overturning the Solomon Amendment, the Court quickly dismissed the First Amendment arguments and upheld the Solomon Amendment.

Because each of these First Amendment issues played a large role in Rumsfeld's appellate history and because each of these First Amendment issues were placed before the Court—although its decision arguably sidestepped them—this subsection will briefly address the status of the Court's jurisprudence concerning the First Amendment arguments raised by FAIR via a quick analysis of the seminal cases concerning those First Amendment issues and the jurisprudence of these issues as presented to the Rumsfeld Court. Accordingly, the following subsections address compelled speech, freedom of association and expressive association, and the unconstitutional conditions doctrine.

1. Compelled Speech

Before the Court, FAIR argued, in part, that the Solomon Amendment was an unconstitutional attempt by Congress to compel the speech of FAIR's member institutions by requiring those institutions to provide recruiting assistance to military recruiters. Accordingly, this subsection will briefly address the evolution of the Court's compelled speech jurisprudence and the status of that jurisprudence as presented to the Court in rendering the Rumsfeld decision.

The Supreme Court first held that compelled speech was a violation of the First Amendment in the 1943 case of West Virginia State Board of Education v. Barnette. In that case, the West Virginia Board of Education passed a resolution requiring all schoolchildren within the state to salute the American flag and recite the pledge of allegiance daily. Failure to comply with the resolution would be considered an "act of insubordination" and

92. See id. at 1308–13.
93. See infra Part III.D.1.
94. See infra Part III.D.2.
95. See infra Part III.D.3.
96. See infra Part III.D.3.
97. See 319 U.S. 624, 642 (1943). It is interesting to note that Rumsfeld was decided during the current era of heightened patriotism and public support for the military due to the ongoing war on terrorism while Barnette was decided during the heightened patriotism of World War II.
98. Id. at 626.
would be "dealt with accordingly." Children of Jehovah's Witnesses, however, refused to salute the flag and were expelled from school. Parents brought suit seeking to enjoin the flag salute requirement, and the school board appealed to the Supreme Court.

On appeal, the Court held that the flag salute requirement violated the First Amendment because it required students to engage in compelled speech. The Court noted that while the law was intended to foster "[n]ational unity[,] . . . which officials may foster by persuasion and example," the case presented the question of "whether under our Constitution[,] compulsion as here employed is a permissible means for its achievement." The Court concluded that compelled speech was not a permissible means to achieve this goal. The Court stated that a "compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind," and that "[i]f 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 therein." The Court further warned that "[t]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters," and "[c]ompulsory unification of opinion achieves only the unanimity of the graveyard."

Thirty years after Barnette, the Court again struck down a law compelling speech on First Amendment grounds in Miami Herald Publishing Co. v. Tornillo. In that case, the Court struck down a "right of reply" law in Florida that compelled newspaper editors to publish political candidates' rebuttals to critical articles free of charge. In Tornillo, a candidate for the Florida House of Representatives sought to publish a rebuttal to a negative edi-

99. Id. (internal quotations omitted).
100. Id. at 629. The Court explained the following:
   The [Jehovah's] Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

101. Id. at 629–30.
102. Id. at 642.
104. Id. at 641.
105. Id. at 633, 642.
106. Id. at 641.
108. Id. at 243–44.
torial against him that ran in a Florida newspaper. After the newspaper editor refused, the candidate brought suit under the 1913 law. In holding that the right-of-reply law was unconstitutional, the Court rejected the argument that the right-of-reply statute was not a restriction on the newspaper’s First Amendment rights because it did not prevent the publisher or editor from printing anything he or she wished. Instead, the Court held that a governmental restraint on speech need not fall into a familiar or traditional pattern. Rather, the Court determined that the Florida right-of-reply statute “exact[ed] a penalty on the basis of the content of a newspaper” because it penalized editors and publishers “in terms of the cost in printing and composing time and materials and in taking up space that could be devoted to other material the newspaper may have preferred to print.” Furthermore, the Court held that the right-of-reply statute failed First Amendment scrutiny because the law intruded on the function of editors in deciding what to print.

The Court reached a similar decision regarding compelled speech in the 1977 case of Wooley v. Maynard. In Wooley, a Jehovah’s Witness couple obscured the New Hampshire state motto, “Live Free or Die,” on their state-issued license plates in violation of state law on the grounds that the motto was repugnant to their religious, moral, and political beliefs. After repeated citations and prosecutions for violating the state law, the couple brought an action for declaratory and injunctive relief against enforcement of the New Hampshire law.

The Court observed that it had to decide whether the state could require an individual to help the state disseminate an ideological message by requiring the individual to display the message on his or her private property, that is, a license plate. The Court concluded that the state could not. The Court noted that “[t]he First Amendment protects the right of individuals to hold a point of view different from the majority and to refuse to foster, in

109. Id.
110. Id.
111. Id. at 256.
112. Id.
113. Miami Herald, 418 U.S. at 256.
114. Id. at 258.
115. 430 U.S. 705 (1977); see also Edward J. Schoen, Margaret M. Hogan & Joseph S. Falchek, United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech—Now You See It, Now You Don’t, 39 AM. BUS. L.J. 467, 471 (Spring 2002).
117. Id. at 711.
118. Id. at 713.
119. Id.
the way New Hampshire commands, an idea they find morally objectionable."

Next, the Court examined whether the state’s reasons for compelling the display of the motto—identification of passenger vehicles and promoting appreciation of history, individualism, and pride—were compelling enough to justify requiring the display of the motto on all citizens’ license plates. The Court, however, concluded that those reasons were inadequate as well. The Court held that even though New Hampshire had a legitimate and substantial reason for requiring the motto to be displayed, vehicle identification “cannot be pursued by means that broadly stifle fundamental[,] personal liberties when the end can be more narrowly achieved.” With regard to New Hampshire’s second reason for requiring the state motto on license plates, the Court again rejected the State’s proffered reason on the grounds that, no matter how acceptable the message might be to most citizens, that fact could not outweigh an individual’s First Amendment right to avoid becoming the courier for the message.

The Court again overturned the first dissemination of a message in Pacific Gas & Electric Co. v. Public Utilities Commission. In that case, the Court held that the forced dissemination by a private utility of a third-party’s message in its billing materials was an impermissible violation of the First Amendment. For over sixty years, Pacific Gas had included a monthly newsletter consisting of general information, energy conservation tips, and editorials inside its billing envelopes. However, the California Public Utilities Commission (CPUC) ruled that the weight and space left over within a billing envelope constituted “extra space,” which was the property of ratepayers. The CPUC then required that this extra space be made available to third parties who disagreed with Pacific Gas so that they could disseminate their messages directly to ratepayers. Toward Utility Rate Normalization (TURN), a ratemaking group with whom Pacific Gas disagreed, sought an order from the CPUC requiring Pacific Gas to include its materials in billing envelopes. The CPUC ruled that Pacific Gas must send out TURN mate-

120. *Id.* at 715.
121. *Id.* at 716.
123. *Id.* at 716 (quoting Shelton v. Tucker, 364 U.S. 479 (1960)).
124. *Id.* at 717.
125. 475 U.S. 1 (1986).
126. *Id.* at 17–21.
127. *Id.* at 5.
128. *Id.* at 5–6.
129. *Id.* The “extra space” was defined as both the physical room left over in a billing envelope after the bill and required legal notices had been enclosed and the weight left over before the billing envelope was charged at the next higher postage rate. *Id.*
130. *Id.* at 6–7.
rials four times yearly for two years.\textsuperscript{131} Pacific Gas appealed the CPUC’s decision, arguing that under \textit{Wooley}, it could not be forced to help spread a message with which it disagreed.\textsuperscript{132}

The Court held that the CPUC’s requirement unconstitutionally burdened Pacific Gas’s speech and reversed the CPUC decision.\textsuperscript{133} The Court stated that “[c]ompelled access[,] like that ordered in this case[,] both penalizes the expression of particular points of view and forces speakers to alter their speech to conform with an agenda they do not set,”\textsuperscript{134} and it noted that “[s]uch one-sidedness impermissibly burdens [the] appellant’s own expression.”\textsuperscript{135} Despite the CPUC’s attempt to classify the extra space in the billing envelopes as belonging to the ratepayer, this classification did not change the fact that Pacific Gas’s message was being altered.\textsuperscript{136} The Court explained that Pacific Gas still owned the billing envelopes themselves and that CPUC’s order required Pacific Gas to use its own property to distribute the messages of other parties.\textsuperscript{137} Furthermore, the Court observed that because the billing envelopes contained Pacific Gas’s return address, CPUC’s order forced Pacific Gas to not only disseminate TURN’s speech, but to associate itself with TURN’s speech.\textsuperscript{138} This forced association, in turn, burdened Pacific Gas’s expression of differing views and risked forcing Pacific Gas to speak when it may have preferred to remain silent.\textsuperscript{139} The Court opined that “the choice to speak includes within it the choice of what not to say.”\textsuperscript{140}

The Court finally noted that the access granted in this case was “a content-based grant of access to private property,” which in turn could not be imposed by the government absent a compelling interest.\textsuperscript{141} However, the Court held that the state’s compelling interest—fair and effective ratemaking—could be met through less intrusive means.\textsuperscript{142}

In \textit{Riley v. National Federation of the Blind of North Carolina, Inc.},\textsuperscript{143} the Court held that a North Carolina law requiring professional, charitable

\textsuperscript{131} \textit{Pac. Gas & Elec. Co.}, 475 U.S. at 6.
\textsuperscript{132} \textit{Id.} at 7.
\textsuperscript{133} \textit{Id.} at 20–21.
\textsuperscript{134} \textit{Id.} at 9.
\textsuperscript{135} \textit{Id.} at 13.
\textsuperscript{136} \textit{Id.} at 9.
\textsuperscript{137} \textit{Pac. Gas & Elec. Co.}, 475 U.S. at 17–18.
\textsuperscript{138} \textit{Id.} at 18.
\textsuperscript{139} \textit{Id.}
\textsuperscript{140} \textit{Id.} at 16.
\textsuperscript{141} \textit{Id.} at 16–17.
\textsuperscript{142} \textit{Id.} at 19.
\textsuperscript{143} 487 U.S. 781 (1988). In 1985, North Carolina amended its Charitable Solicitations Act in response to a study that disclosed that certain professional fundraisers had retained upwards of fifty percent of gross charitable donations as fees and costs. \textit{Id.} at 784.
fundraisers to disclose certain information to potential donors upfront—including what percentage of each donated dollar was retained by the fundraisers as costs and fees—violated the First Amendment as unconstitutional compelled speech. In reaching its decision, the Court determined that the charitable solicitations made by professional fundraisers were protected speech. Next, the Court decided that “[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech.” The Court concluded that because the North Carolina law was a content-based regulation, it was subject to “exacting First Amendment scrutiny.” The Court considered unavailing the arguments that the compelled speech involved statements of simple fact, rather than opinion, and reasoned that compelled statements, whether fact or opinion, were still a burdened, protected speech.

The Court then decided that North Carolina’s interest in protecting charitable contributors from fraud by professional fundraisers was “not as weighty as the State assert[ed], and that the means chosen to accomplish it [were] unduly burdensome and not narrowly tailored” and held the law to be an unconstitutional compelling of speech. The Court further noted that there were other, less intrusive means for citizens to be made aware of the information that the North Carolina law compelled to be provided—for example, citizens could simply obtain the information from the state itself, as the fundraisers were already required to report this information to the state.

In 1995, the Supreme Court held in Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston that a private entity that organized an annual St. Patrick’s day parade could not be forced to allow homosexual and bisexual marchers to take part in the parade. In Hurley, the Irish-American Gay, Lesbian and Bisexual Group of Boston (GLIB), an organization of homosexual and bisexual marchers, filed suit against parade organizers seeking enforcement of a Massachusetts public accommodation law that prohibited discrimination on the basis of sexual orientation. A Massachusetts state court ordered the parade organizers to allow the GLIB marchers

144. Id.
145. Id. at 789.
146. Id. at 795.
147. Id. at 798.
148. Id. at 797–98.
149. Riley, 487 U.S. at 798.
150. Id. at 800–01.
152. Id. at 566.
153. Id. at 570–71.
to participate, and the parade organizers later appealed to the Supreme Court.\footnote{154}

In deciding the case, the Court observed that "we use the word 'parade' to indicate marchers who are making some sort of collective point, not just to each other[,] but to bystanders along the way" and that parades "are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches."\footnote{155} As long as parades are "peaceful and orderly," the Court concluded, they remain expressive conduct that is protected by the First Amendment.\footnote{156}

After determining that a parade was expressive conduct protected by the First Amendment, the Court determined that, like newspaper editors who enjoy the right to pick and choose what material should appear on an editorial page, the private organizers of the parade enjoyed just as much right to determine what groups and messages should appear in the parade.\footnote{157} The Court noted that the manner in which the statute was applied had the net result of altering the expressive content of the parade.\footnote{158} The Court further concluded that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised," and the court held that GLIB could be denied permission to participate in the private parade, just as GLIB could be denied admission to a private club.\footnote{159}

Although the cases discussed above do not provide a cohesive, black-letter analysis of the Court's compelled speech jurisprudence, the cases "combine to provide a significant level of First Amendment protection[,] not only to express and tailor views and opinions, but, equally important, to avoid being identified with expressions of others."\footnote{160} Woven among these cases are common themes that were also presented to the Court in \textit{Rumsfeld}, including the idea that (1) a governmentally required message, even when it is as innocuous as a license plate motto or a leaflet included in a billing statement, can still be an intolerable infringement on the First Amendment rights of the affected individual or organization, and (2) expressive conduct is just as worthy of First Amendment protections from compulsion as speech.\footnote{161} Combined together, these cases stand for the proposition that "no government official can proscribe orthodoxy in thought or opinion, or compel an individual by word or act to express, participate, or concur in the dis-

\begin{footnotes}
\footnote{154}{Id. at 563–66.}
\footnote{155}{Id. at 568.}
\footnote{156}{Id. (internal quotations omitted).}
\footnote{157}{Hurley, 515 U.S. at 569–70.}
\footnote{158}{Id. at 572–73.}
\footnote{159}{Id. at 576, 580–81.}
\footnote{160}{Schoen, Hogan & Falchek, supra note 115, at 475.}
\footnote{161}{Id.}
\end{footnotes}
s.emination of the ideas or messages of others," and demonstrate that the Solomon Amendment's compelled, military recruiter accommodation is both arguably expressive and possibly prohibited by the First Amendment.

2. Freedom of Association and Expressive Association

In addition to compelled speech issues, Rumsfeld also presented the Court with issues surrounding whether or not the Solomon Amendment's requirements of equal access to military recruiters violated schools' freedoms of association. The First Amendment to the United States Constitution provides that "Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." Although the First Amendment does not explicitly protect a freedom of association per se, the Court has long recognized "as implicit in the right to engage in activities protected by the First Amendment[,] a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." Accordingly, this subsection will briefly address those cases leading to the clarification of this right of association.

The freedom of association was first recognized in NAACP v. Alabama ex rel. Patterson. In that case, the Alabama Attorney General attempted to compel the NAACP to disclose the names and addresses of all of its Alabama members. The NAACP refused, however, and was held in contempt of court. On appeal, the Supreme Court held that "[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' ... [of] freedom of speech." Then, the Court noted that compelling the NAACP to disclose its membership could have effected a restraint on the NAACP and its members' freedom of association and held that the NAACP should not be compelled to disclose its membership to the State of Alabama. The Court then reversed the contempt citation.

162. Id.
164. UNITED STATES CONST. amend. I
167. Id. at 451-52.
168. Id.
169. Id. at 460.
170. Id. at 462, 466.
171. Id. at 466.
A quarter-century later, the Supreme Court limited an organization's freedom of association in *Roberts v. United States Jaycees.* In *Roberts,* two Minnesota chapters of the Jaycees began allowing women to join in contravention of the Jaycee's national bylaws. When the national organization threatened to cut off the two Minnesota chapters, the chapters brought suit alleging that the Jaycees' exclusion of women from full membership violated the Minnesota Human Rights Act.

In its opinion, the Court stated from the outset that this case required the Court to "address a conflict between a State's efforts to eliminate gender-based discrimination against its citizens and the constitutional freedom of association asserted by members of a private organization." The Court also noted that the right of expressive association is not absolute and that "[i]nfringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." Then, the Court held that the state's compelling interest in eradicating gender discrimination justified the statute's impact on the Jaycees' associational freedoms. The Court observed that the Minnesota law did not "aim at the suppression of speech, [and] does not distinguish between prohibited and permitted activity on the basis of viewpoint." The Court further supported its decision by characterizing membership in the Jaycees as more like a public accommodation than as "expressive association."

In *Board of Directors of Rotary International v. Rotary Club of Duarte* and *New York State Club Ass'n v. City of New York,* the Supreme Court upheld *Roberts's* reasoning. In both of these cases, the Court upheld laws requiring organizations to admit women and minorities on the grounds that (1) the compelling state interest in equality outweighed the organizations' restrictions and (2) the laws did not require the organizations to "abandon or alter" any of their activities.

In *Boy Scouts of America v. Dale,* the Supreme Court revisited its expressive association case law. In that case, the Boy Scouts dismissed
Dale, one of their adult members, from the organization after learning of his homosexuality.\textsuperscript{185} Dale filed suit against the Boy Scouts, and the New Jersey Superior Court Appellate Division and New Jersey Supreme Court held for Dale, in part on the grounds that under \textit{Rotary Club}, requiring the Boy Scouts to admit Dale did not affect the Boy Scout’s activities, and thus, did not infringe on its expressive association.\textsuperscript{186} The Supreme Court, however, reversed the New Jersey Supreme Court.\textsuperscript{187} The Court noted that “[t]he forced inclusion of an unwanted person in a group infringes the group’s freedom of expressive association if the presence of that person affects in a significant way the group’s ability to advocate public or private viewpoints.”\textsuperscript{188} But, the Court also cautioned, “the freedom of expressive association, like many freedoms, is not absolute. We have held that the freedom could be overridden by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.”\textsuperscript{189}

After determining that the Boy Scouts engaged in expressive association, the Court addressed the question of whether the inclusion of Dale in the organization would “significantly affect” its ability to express its viewpoints.\textsuperscript{190} The Court concluded the following:

As the presence of GLIB in Boston’s St. Patrick’s Day parade would have interfered with the parade organizers’ choice not to propound a particular point of view, the presence of Dale as an assistant scoutmaster would just as surely interfere with the Boy Scout’s choice not to propound a point of view contrary to its beliefs.\textsuperscript{191}

3. \textit{Unconstitutional Conditions Doctrine}

The unconstitutional conditions doctrine was the final First Amendment issue presented to the \textit{Rumsfeld} Court.\textsuperscript{192} The unconstitutional conditions doctrine evolved from \textit{Perry v. Sindermann}\textsuperscript{193} and other cases involv-
ing governmental employment.\textsuperscript{194} The doctrine holds that "the government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech[,] even if he has no entitlement to that benefit."\textsuperscript{195}

In a seminal case concerning the unconstitutional conditions doctrine, \textit{Grove City College v. Bell},\textsuperscript{196} the United States Supreme Court faced the question of whether the government could constitutionally withhold federal financial aid assistance to a college that refused to comply with Title IX.\textsuperscript{197} In that case, Grove City College, a small, private liberal arts college, consistently refused governmental assistance in order to maintain its institutional autonomy.\textsuperscript{198} Despite Grove City's desire to remain autonomous, several students of Grove City received governmental grants to finance their education under a Department of Education program, and, as a result, the Department of Education determined that Grove City was an eligible institution receiving federal money under Title IX.\textsuperscript{199} The Department of Education then requested Grove City College to provide certification of compliance with Title IX as required by the statute, but the college refused.\textsuperscript{200} Therefore, the college became ineligible for federal assistance, and its students could no longer receive such educational grants.\textsuperscript{201}

Grove City College and four students then brought suit against the Department of Education\textsuperscript{202} and argued on appeal to the Supreme Court that the requirement of compliance with Title IX constituted an infringement on their First Amendment rights.\textsuperscript{203} The Court, however, dismissed this argument and explained that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."\textsuperscript{204} The Supreme Court noted that Grove City was free to refuse federal funds under the program and that its students were free to take their grant dollars to some other institution.\textsuperscript{205} Thus, the Court

\begin{footnotes}
\item[194] Bd. of County Comm’rs v. Umbehr, 518 U.S. 668, 674 (1996). The Court noted in Umbehr that the unconstitutional conditions doctrine rejects “Justice Holmes’ famous dictum, that a policeman may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” \textit{Id.} (internal quotations omitted).
\item[195] \textit{Id.} (internal quotations omitted).
\item[197] \textit{See id.} at 558–59. Title IX prohibits gender discrimination in educational programs or activities receiving federal funding and provides that such funding will terminate in cases of non-compliance. \textit{Id.}
\item[198] \textit{Id.} at 559.
\item[199] \textit{Id.} at 559–60.
\item[200] \textit{Id.} at 560–61.
\item[201] \textit{Id.} at 561.
\item[202] Grove City Coll., 465 U.S. at 561.
\item[203] \textit{Id.} at 575.
\item[204] \textit{Id.}
\item[205] \textit{Id.}
\end{footnotes}
concluded that requiring Grove City to comply with the terms of Title IX as a condition of receiving federal funds did not infringe the First Amendment rights of either Grove City or its students.206

On the flip side of the Grove City "reasonable and unambiguous conditions" of federal assistance standard is the Court's jurisprudence regarding the unconstitutional conditions doctrine as set forth in cases like Perry v. Sinderman.207 In that case, an untenured college professor was not re-hired by the college after he made public comments critical of, and in opposition to, the college's board of regents.208 The professor brought suit against the college on the grounds that the college's refusal to re-hire him was a violation of his First Amendment freedom of speech.209

In deciding the case, the Court first answered the question of whether the fact that the professor had no contractual or tenure rights to re-employment precluded his First Amendment claims.210 The Court observed that it had "made clear that even though a person has no 'right' to a valuable, governmental benefit, and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely."211 Furthermore, the Court observed that the government may not deny a governmental benefit in a way that "infringes [on a person's] constitutionally protected interests[,] especially [the person's] interest in freedom of speech."212 The Court concluded as follows:

For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result [that it] could not command directly.' Such interference with constitutional rights is impermissible.213

The Court noted that this principle has been applied in cases involving denial of tax exemptions, unemployment benefits, welfare payments, and public employment.214 The Court held that, despite the professor's lack of a "guaranteed" governmental benefit (for example, no right to being automatically re-employed by the college), the professor could nonetheless state a

206. Id. at 575–76.
207. 408 U.S. 593 (1972).
208. Id. at 594–95.
209. Id. at 595.
210. Id. at 596.
211. Id. at 597.
212. Id.
213. Perry, 408 U.S. at 597 (internal quotations omitted).
214. Id.
cause of action alleging that a governmental benefit had been denied to him in a manner that violated his First Amendment rights.

Although the above discussion is not an exhaustive analysis of the Court's jurisprudence regarding compelled speech, freedom of association, and unconstitutional conditions doctrine, the brief survey of key cases in these areas demonstrates the depth of the First Amendment issues presented to the Court by *Rumsfeld*, each of which were used with success by FAIR in its prior victory before the Third Circuit. However, as the Reasoning section demonstrates, the Court made relatively short work of FAIR's First Amendment claims in delivering its opinion upholding the Solomon Amendment.

IV. REASONING

In *Rumsfeld*, the United States Supreme Court unanimously held that the Solomon Amendment's conditioning of federal funding on institutions of higher education providing equal access to military recruiters did not violate those institutions' freedoms of speech and association under the First Amendment. The Court rejected FAIR's arguments that the Solomon Amendment placed unconstitutional conditions on law schools' receipt of federal funding and determined that pursuant to its Spending Clause power and its power to raise and support armies, Congress could impose the Solomon Amendment's conditions directly. The Court also rejected FAIR's other constitutional arguments and held that the Solomon Amendment (1) compelled only conduct by the law schools, and not speech, (2) did not force law schools to accommodate the military's message, and (3) did not otherwise violate the law schools' right of expressive association.

A. The Solomon Amendment Does Not Impose an Unconstitutional Condition

In its opinion, the Court immediately addressed the merits of FAIR's arguments that the Solomon Amendment created an unconstitutional condi-

215. *Id.* at 596–98.
218. *Id.* at 1304–13. The Court also addressed an argument by FAIR concerning the Solomon Amendment's interpretation. *Id.* at 1304–06. However, FAIR's arguments regarding interpretation were brought up for the first time during the Supreme Court appeal and were quickly dismissed by the Court. *Id.* at 1305–06. Therefore, those arguments are not discussed in this note.
tion on the law schools’ federal funding.\textsuperscript{219} The Court explained that under the unconstitutional conditions doctrine, a condition placed on funding is not unconstitutional if the funding condition could be imposed directly (and constitutionally) by Congress.\textsuperscript{220} Thus, the Court observed that FAIR’s unconstitutional conditions argument turned on whether Congress could directly impose the Solomon Amendment’s conditions on law schools through some other power.\textsuperscript{221} The Court then concluded that Congress could directly impose the Solomon Amendment’s conditions on law schools using its power to raise and support armies under Article I, Section 8 of the Constitution.\textsuperscript{222} The Court held that Congress’s power to raise armies was broad enough to include the authority to open law school campuses to military recruitment.\textsuperscript{223}

In further support of its conclusion, the Court noted that “‘judicial deference . . . is at its apogee’ when Congress legislates under its authority to raise and support armies.”\textsuperscript{224} The Court also held that, although Congress had chosen to pursue its objective—allowing military recruiters equal access to campuses—indirectly through its Spending Clause power and not directly through its power to raise and support armies, the courts should give Congress wide deference in this area of military affairs.\textsuperscript{225}

B. The Solomon Amendment Did Not Otherwise Violate the First Amendment Rights of Speech and Association of the Law Schools

Despite the Court’s conclusion that Congress could directly impose the Solomon Amendment’s conditions on law schools, the Court was careful to caution that this power, though broad, was still limited by the First Amendment.

Accordingly, the Court examined and quickly disposed of each First Amendment claim brought by FAIR.\textsuperscript{226}

1. \textit{The Solomon Amendment Regulates Conduct, Not Speech}

First, the Court explained that precedents such as \textit{Barnette} and \textit{Woolsey} had long established that the government had no power to “tell[] people what they must say.”\textsuperscript{228} The Court then distinguished the Solomon Amend-

\begin{itemize}
\item \textsuperscript{219} Id. at 1307.
\item \textsuperscript{220} Id.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id. at 1306.
\item \textsuperscript{223} \textit{Rumsfeld}, 126 S. Ct. at 1306.
\item \textsuperscript{224} Id. (quoting \textit{Rostker v. Goldberg}, 453 U.S. 57 (1981)).
\item \textsuperscript{225} Id.
\item \textsuperscript{226} Id.
\item \textsuperscript{227} Id. at 1308.
\item \textsuperscript{228} Id.
\end{itemize}
ment from the mandatory flag-salute and license-plate-motto laws at issue in *Barnette* and *Wooley*. The Solomon Amendment, the Court held, required only compelled statements of fact—for example, that a military recruiter would be on campus from 1:00 to 5:00—and not compelled statements of opinion. Although the Court conceded that statements of fact are still protected by the First Amendment, it noted that the instant statements were easily distinguished from those in other compelled speech cases because they were merely incidental to the conduct that was being compelled by the Solomon Amendment. The Court refuted FAIR's arguments that posting flyers and sending e-mails constituted protected speech by noting that, although speech may be incidental to some compelled conduct, the fact that someone happened to use speech in completing an otherwise non-expressive compelled conduct was not enough by itself to classify the conduct as protected speech. In holding that the Solomon Amendment compelled conduct and not speech, the Court was careful to further distinguish this case from *Barnette* and *Wooley* with the following parting shot:

Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto "Live Free or Die," and it trivializes the freedom protected in *Barnette* and *Wooley* to suggest that it is.

2. The Solomon Amendment Did Not Force Law Schools to Accommodate the Military's Message

Next, the Court held that the Solomon Amendment did not impermissibly attempt to force law schools to host or accommodate the military's message. The Court noted that under cases such as *Pacific Gas*, *Tornillo*, and *Hurley*, the forced accommodation of speakers violated the First Amendment. However, the Court pointed out that in each of these cases, the First Amendment violation resulted from the fact that the speaker's message was affected by the speech it was forced to accommodate—for example, in *Hurley*, the parade organizers' anti-homosexual speech and beliefs were affected by being forced to accommodate homosexual parade marchers. In this case, however, the Court held that a forced accommodation of the military's

230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.* at 1309.
236. *Id.*
speech did not violate the First Amendment rights of the law schools because their decisions to allow recruiters on campus were not inherently expressive. The Court concluded that, unlike a parade, newspaper, or other expressive medium, the Solomon Amendment’s mandate that law schools accommodate military recruiters did not sufficiently interfere with the schools’ messages. The Court dismissed FAIR’s concern that law students might misinterpret the schools’ accommodation of military recruiters as an endorsement of the military’s speech with the quip that “[w]e 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.”

3. The Solomon Amendment Did Not Violate the Law Schools’ Rights of Expressive Association

Finally, the Court rejected FAIR’s arguments that the Solomon Amendment violated the law schools’ right of expressive association by requiring the law schools to associate with a group with which they did not agree—the military. FAIR argued that, by requiring law schools to accommodate military recruiters, the Solomon Amendment had significantly affected the law schools’ ability to express the idea that sexual-orientation discrimination is wrong.

The Court, however, held that while under Dale the forced inclusion of a gay scoutmaster would alter the Boy Scouts’ message, the Solomon Amendment did not similarly affect the law schools’ associational rights. The Court zeroed in on the fact that the Solomon Amendment required law schools to temporarily invite military recruiters on campus and briefly interact with recruiters but did not require military recruiters to otherwise associate with the law school. Thus, the Court reasoned, unlike Dale, the Solomon Amendment did not force the law schools to accept members that they otherwise would decline. Rather, military recruiters at all times maintained their identity as “outsiders who [came] onto campus for the limited

237. Id. at 1309–10.
238. Id. at 1310.
239. Id. (parenthetical omitted).
240. Id. at 1312.
241. Rumsfeld, 126 S. Ct. at 1312.
242. Id.
243. Id.
244. Id.
purpose of trying to hire students—not to become members of the school’s expressive association.”

C. The Court’s Conclusion

The United States Supreme Court held that FAIR had attempted to “stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect.” The Court concluded that FAIR’s attempts to portray itself as the “the schoolchildren in Barnette, the parade organizers in Hurley, and the Boy Scouts in Dale” exaggerated the expressive nature of the law schools’ position regarding military recruiters, overstated the impact of the Solomon Amendment on the law schools’ anti-sexual-discrimination ideals, and exaggerated the reach of the Court’s previous First Amendment precedents. The Court then held that, because Congress did have the power to require law schools to provide equal access to military recruiters without violating the law schools’ First Amendment freedoms of speech and association, the Solomon Amendment did not violate the First Amendment.

V. SIGNIFICANCE

The United States Supreme Court’s decision in Rumsfeld is significant in three respects. First, the Court’s willingness to rely on Congress’s power to raise and maintain armies as justification for denying FAIR’s First Amendment claims with little further analysis seems to suggest that the current Court may be more willing to defer to Congress’s power in military affairs in the future. Second, the Court’s quick dismissal of FAIR’s First Amendment claims, when coupled with its rebuke and admonition of FAIR for arguing that the Solomon Amendment was analogous to the various laws that had been overturned in other significant First Amendment precedent, suggests that the current Court may be less-than-friendly to academics and schools who choose to accept federal money and then decry the conditions

245. Id.
246. Id. at 1313 (emphasis omitted).
247. Rumsfeld, 126 S. Ct. at 1313.
248. Id.
249. See infra Part V.A. It is interesting to note that less than four months after issuing its ruling in Rumsfeld, the Supreme Court took a seemingly anti-war-on-terror and anti-military approach when it held in Hamdan v. Rumsfeld that enemy combatants held by the United States military at Guantanamo Bay, Cuba, were entitled to Geneva Convention protections. See generally 126 S. Ct. 2749 (2006). However, the Hamdan case is easily distinguished from Rumsfeld because Hamdan involved actions taken by the President in prosecuting the war on terror and not actions taken by Congress pursuant to its constitutional power to raise and maintain armies.
placed on that money. And third, as the first major opinion authored by Chief Justice Roberts, the opinion delivered in Rumsfeld may foreshadow the tone of the current Court’s future opinions. This section will address each of these concerns in turn.

A. Is the Current Court More Willing to Defer to Congress on Military Matters?

Rumsfeld is significant in that the case may show that the Roberts Court is more than willing to defer to Congress’s power to raise and support armies. In its opinion, the Court not only agreed with the DoD that the Solomon Amendment did not violate the First Amendment rights of law schools, but also adopted the DoD’s argument that equal access to law students was a vital part of Congress’s power to raise and support armies. Rather than back up this conclusion with further reasoning or justification, the Court simply concluded that “there is no dispute in this case that [Congress’s power to raise and support armies] includes the authority to require campus access for military recruiters.” The Rumsfeld decision both fails to provide further justification for how obtaining equal access to law students implicates Congress’s power to raise and support armies, and it fails to seize on any of a variety of First Amendment arguments presented for overturning the Solomon Amendment. This inaction suggests that the current Court is more willing to defer to actions taken by Congress that are related to supporting the United States Military, rather than carefully analyzing those decisions to determine if they are truly vital to raising or supporting armies.

Perhaps, however, what is most interesting about the Rumsfeld decision is what remained unsaid by the Court. As prime-time television and an increasing number of “out” celebrities indicate, American popular culture has grown increasingly aware and accepting of homosexuals. Further, as recent gains by proponents of gay rights in areas such as gay marriage demonstrate, gay rights seem to be gaining widespread approval and acceptance in American society.

Although Rumsfeld directly presented only issues concerning the Solomon Amendment and the First Amendment to the Court and not issues concerning the military’s discrimination against homosexuals, those background issues concerning homosexual discrimination were still indirectly presented to the Court by the facts of the case. Thus, with Rumsfeld, the Court was presented with the opportunity to make a statement (or even state
a position) concerning homosexual discrimination with its decisions in much the same way that the Court had "set the curve" with regard to civil rights with its then-controversial decisions of the 1950s and 1960s concerning subjects such as segregation and racial discrimination. However, rather than use *Rumsfeld* as an opportunity to invalidate the Solomon Amendment and take a stance on gay rights (or, if the majority was unwilling to do so, establish a dissenting opinion on the subject for posterity), the Court instead chose to let this opportunity to at least speak out concerning the underlying issue of gay rights pass it by without comment.

B. Is the Current Court More Hardened to the First Amendment Claims of Academics and Institutions of Higher Learning?

In *Rumsfeld*, the Court dismissed FAIR's arguments that the Solomon Amendment violated law schools' various First Amendment rights with little discussion—in fact, for an opinion dealing with so many First Amendment issues, the Court's slip opinion consisted of only twenty-one pages. Additionally, in dismissing FAIR's constitutional claims, the Court made several jabs at FAIR's expense, including commenting that "by the time they get to law school," students can surely appreciate the difference between school-sponsored speech and speech a school is legally required to permit. Further, the Court essentially scolded FAIR for arguing that the Solomon Amendment's prohibitions were analogous to the laws struck down by the Court in famous cases, such as *Wooley* and *Barnette*, by commenting that FAIR's reliance on those cases "trivializes the freedom protected in *Barnette* and *Wooley.*" When the relative lack of attention that was paid by the Court to FAIR's constitutional claims is read in light of these verbal spars against FAIR, the Court's opinion in *Rumsfeld* suggests that the current Court—like Representative Pombo who contended that academics live in an "ivory tower" and have alienated themselves from society—may view academics with some disdain and may in fact be somewhat hardened to the First Amendment claims of academics and schools in general.

C. Does the Case Set the Tone of the Roberts Court?

Finally, the decision reached by the United States Supreme Court in *Rumsfeld* is important in that it represents the first major constitutional opi-
nion delivered by Chief Justice Roberts since his appointment to the Court, and it may indicate the future tone of the Court’s decisions. In this case, the Court delivered a relatively short opinion that was directly limited to the issues raised by the parties, and the court included little dicta or other extraneous material. Further, despite the multitude of First Amendment issues raised by this case—any one of which the Court could have (and has in the past with other social issues) seized upon as grounds for overturning the Solomon Amendment—the Court failed to invoke any of these First Amendment issues as grounds for overturning the Solomon Amendment. Additionally, the opinion relies largely on precedent for each question raised, and it overturned no existing precedent. Given that the Court (1) largely deferred to Congress’s constitutional power to raise and maintain armies, (2) refused to take the opportunity to address the multitude of First Amendment claims presented by the case, and (3) issued a short opinion that relied largely on precedent, the opinion in Rumsfeld may indicate that the Roberts Court may take a more conservative tone in its future decisions, may rely heavily on precedent, and otherwise refuse to “think outside the box.”

The fact that the Court delivered a unanimous opinion in Rumsfeld may also be significant in itself. The facts and issues presented by this case—sexual orientation discrimination by the military and various First Amendment issues concerning governmentally compelled speech—presented more than ample opportunity for members of the Court to split along ideological lines and render lengthy opinions supporting or refuting the Solomon Amendment and its wider implications on American society, as the Court has so often done in the past. However, rather than issue a split ruling, the seven other members of the Court who participated in the decision instead joined in Chief Justice Roberts’s opinion. Thus, Rumsfeld may signal that the justices comprising the current Court may be more likely to avoid splitting on ideological lines in the future and may, instead, work towards delivering unanimous, or near unanimous, opinions on important constitutional or decisive issues.

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258. The fact that the Court rendered a unanimous opinion in Rumsfeld and did not split along ideological lines is particularly interesting considering that the case involved several First Amendment issues, and that one of the Court’s “liberal” Justices who joined in the Court’s dismissal of these claims—Ruth Bader Ginsburg—was the former chief legal counsel for the American Civil Liberties Union. Robert J. Caldwell, Judging Alito: A Republican Majority Ensures Confirmation, but Many Democrats Are Balkling, SAN DIEGO UNION-TRIB., Jan. 15, 2006, at G6.

259. Id.
VI. CONCLUSION

Thanks to its Spending Clause power, Congress exercises the power to condition federal funding on compliance with regulations that Congress is otherwise without power to impose under the Constitution. Cases such as *Dole* and *Perry*, however, have established that the Spending Clause does not give Congress unlimited power to legislate indirectly through spending—for example, the Court has held that Congress may not parcel out governmental benefits in a way that infringes on an individual’s constitutional rights, even though that individual may have no right or obligation to receive the governmental benefit. Accordingly, when *Rumsfeld* came before the Court, the Court’s own prior precedent (and in fact *Rumsfeld*'s own prior appellate history) established that (1) association (and the right to be free from mandatory association) is considered to be speech protected by the First Amendment, and (2) Congress cannot establish unconstitutional conditions on this speech through the selective use of its Spending Clause powers.

However, instead of using the First Amendment to overturn the Solomon Amendment, the *Rumsfeld* Court rejected the unconstitutional conditions doctrine as it applies to the First Amendment rights of institutions of higher education in the case of the Solomon Amendment. Rather than follow precedent, such as *Perry*, and hold that the Solomon Amendment infringed on institutions’ First Amendment rights, the Court instead concluded that the schools’ First Amendment claims were not infringed by the Solomon Amendment or were so minimally infringed that the institutions were not entitled to First Amendment safeguards. As a result, the Court upheld the Solomon Amendment’s prohibition on the expressive speech of institutes of higher education.

In *Rumsfeld*, three distinct ways of thinking collided: (1) the law schools’ long commitment to anti-sexual-orientation-discrimination policies, (2) the military’s longtime discrimination against homosexuals, and (3) Congress’s desire that academics should either grant military recruiters equal access to students or else forego federal funding. As this note demonstrates, ultimately the will of the military and Congress won out. With the decision, law schools and other institutions of higher learning now have three choices: (1) either compromise or change non-sexual-orientation policies and allow military recruiters equal access to students, (2) ban all recruiters whatsoever from campus, or (3) hold to anti-sexual-discrimination policies and forego federal funding. Under *Rumsfeld*, it appears that institutions of higher learning may no longer continue to accept federal money.

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while at the same time decrying the conditions Congress places on the receipt of that money.

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