

Casenote

King Solomon: Did the Supreme Court Make a Wise Decision in Upholding the Solomon Amendment in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*?

In a unanimous decision in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,¹ the United States Supreme Court upheld the constitutionality of the Solomon Amendment.² The Court ruled that under the Solomon Amendment, military recruiters must be given the same access as nonmilitary recruiters on university campuses.³ The Court's holding clarified three First Amendment⁴ tangential freedom issues: (1) what is and what is not expressive conduct; (2) what constitutes compelled speech; and (3) what is meant by expressive association.

1. 126 S. Ct. 1297, 1301 (2006) (Roberts, C.J., delivered the opinion of the Court, in which all the other Justices joined, except Alito, J., who took no part in the consideration or decision of the case).

2. *Id.* at 1313; 10 U.S.C. § 983 (2000 & Supp. III 2003).

3. *Forum for Academic & Institutional Rights*, 126 S. Ct. at 1306.

4. U.S. CONST. amend I.

I. FACTUAL BACKGROUND

In pursuit of their mission to “promote free thought and [to] inculcate principles of justice, law schools across the country have sought to create supportive, inclusive, and tolerant learning environments for their students.”⁵ To create and maintain this environment, the Association of American Law Schools (“AALS”) and its member schools believe that discrimination, in any form, cannot and should not, be tolerated.⁶ “As part of this effort to eliminate discrimination in legal education, AALS has required its members to avoid discrimination on the basis of race or color since 1951, and on the basis of sex since 1970.”⁷ In addition, starting in the 1970s, numerous law schools across the country began to prohibit discrimination on the basis of sexual orientation. Because this trend grew in the ensuing years, in 1990 the AALS amended its bylaws to require all member schools to include sexual orientation in their nondiscrimination policies.⁸ Today, all AALS members have policies that “ban discrimination on the basis of race, national origin, gender, religion, age, disability, veteran status—and sexual orientation.”⁹

Because there is no longer a draft in the United States, Congress requires the military to “conduct intensive recruiting campaigns” to encourage military enlistments.¹⁰ Today, the military recruits throughout the country at numerous colleges and universities in order to satisfy its needs—law schools included. In spite of the military’s recruiting efforts, in 1993 Congress passed the “Don’t Ask, Don’t Tell, Don’t Pursue Policy.”¹¹ Commonly referred to as “Don’t Ask, Don’t Tell,” this law provides that the military may discharge any service member who “engaged in, attempted to engage in, or solicited another to engage in a homosexual act” or “stated that he or she is a homosexual.”¹² As a consequence of the enactment of “Don’t Ask, Don’t Tell,” the military has not been able to comply with the nondiscrimination policies of AALS law schools, and as such, many law schools effectively banned military

5. Brief for AALS as Amici Curiae Supporting Respondents at 2, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (2006) (No. 04-1152).

6. *Id.*

7. *Id.*

8. *Id.* at 4.

9. Brief for American Association of University Professors as Amici Curiae Supporting Respondents at 9, *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (No. 04-1152).

10. 10 U.S.C. § 503(a)(1) (2000).

11. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a)(1), 107 Stat. 1547, 1670 (1993) (codified as amended at 10 U.S.C. § 654(b) (2000)).

12. 10 U.S.C. § 654(b) (2000).

recruiters from on-campus recruiting.¹³ In direct response to these actions, in 1994 Congress enacted the Solomon Amendment, which at the time, specified that “[n]o funds available to the Department of Defense may be provided . . . to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes . . . entry to campuses or access to students on campuses.”¹⁴ During debate on the legislation, Representative Solomon described the need for the Amendment as necessary because “[r]ecruiting is the key to our all-volunteer military forces Recruiters have been able to enlist such promising volunteers . . . by going into high schools and colleges and informing young people of the increased opportunities that a military tour or career can provide.”¹⁵

The Forum for Academic & Institutional Rights, Inc. (“FAIR”) is an association composed of various law schools and law faculties that have all adopted antidiscrimination policies that include sexual orientation.¹⁶ The organization’s mission is to “promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education.”¹⁷ In 2003 FAIR sought a preliminary injunction against the enforcement of the unamended version of the Solomon Amendment. FAIR claimed that the First Amendment rights of speech and association of its member law schools had been violated. The district court denied the preliminary injunction because FAIR had failed to establish a likelihood of success on the merits. The court’s decision was based in part on its conclusion that military recruiting is conduct, not speech.¹⁸ More specifically, the district court found that the “inclusion ‘of an unwanted periodic visitor’ did not ‘significantly affect the law schools’ ability to express their particular message or viewpoint.”¹⁹

However, in rejecting FAIR’s First Amendment claims, the district court expressed concern over the Department of Defense’s (“DOD”) assertion that the Solomon Amendment requires law schools to give military recruiters the same access that all other recruiters receive.²⁰

13. Brief for AALS, *supra* note 5, at 6-7.

14. *Id.*; Brief for Petitioner at 3, *Forum for Academic & Institutional Rights*, 126 S. Ct. 1297 (No. 04-1152) (quoting National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2776).

15. Brief for Petitioner, *supra* note 14, at 4 (quoting 142 CONG. REC. 16,860 (1996)).

16. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1302.

17. *Id.*

18. *Id.* at 1303.

19. *Id.*

20. *Id.*

In response to this concern, Congress amended the Solomon Amendment in 2004 to codify the DOD's interpretation that law schools must "provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers."²¹ The amendment now withholds "federal funds from institutions that did not afford equal access."²² This new statutory provision requires the career services offices of law schools to distribute recruiting catalogues, post job bulletins, make appointments for students, and allow military recruiters to attend job fairs.²³

Today, the Solomon Amendment provides in pertinent part:

(b) Denial of funds for preventing military recruiting on campus. No funds described in subsection (d)(2) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students . . . on campuses, for purposes of military recruiting . . . ; or

(2) access by military recruiters for purposes of military recruiting to . . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution).²⁴

FAIR appealed the decision of the district court on the grounds that the newly amended Solomon Amendment was unconstitutional for the same reasons that the previous version was unconstitutional.²⁵ The Third Circuit Court of Appeals reversed and remanded, ordering the district court to issue the preliminary injunction against the enforcement of the Solomon Amendment.²⁶ The Third Circuit held that the Solomon Amendment was unconstitutional in that it violated the unconstitutional conditions doctrine "because it forced a law school to choose between surrendering First Amendment rights and losing federal funding for its university."²⁷

21. *Id.* at 1303-04.

22. Brief for Petitioner, *supra* note 14, at 5-6.

23. Brief for Respondent at 1, *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297 (No. 04-1152).

24. 10 U.S.C. § 983(b) (2000 & Supp. III 2003).

25. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1304.

26. *Id.*

27. *Id.*

In rejecting the government's argument that the Solomon Amendment should be analyzed under intermediate scrutiny, the Third Circuit viewed the Solomon Amendment to be subject to strict scrutiny on two grounds.²⁸ First, the court concluded that the Solomon Amendment directly burdened the law schools' First Amendment rights of expressive association.²⁹ In the court's opinion, "the presence of military recruiters on campus would force law schools to send a message that they accept discrimination against homosexuals as a legitimate form of behavior."³⁰ Second, the court concluded that the Solomon Amendment "implicates the compelled speech doctrine because it forces laws schools to propagate, accommodate, and subsidize a message regarding the service of homosexuals in the military with which they disagree."³¹ The court further reasoned that "the government had failed to establish that there are no alternative means for effective recruitment of military personnel that would be less restrictive than the Solomon Amendment."³² Additionally, the court held that a denial of equal access to military recruiters was speech rather than expressive conduct, but that even "if the regulated activities were properly treated as expressive conduct rather than speech, the Solomon Amendment was also unconstitutional under *O'Brien*."³³

The United States Supreme Court granted certiorari to consider whether the Solomon Amendment violated law schools' freedoms of speech and association under the First Amendment.³⁴

II. LEGAL BACKGROUND

The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging the freedom of speech."³⁵ "The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need. . . ."³⁶ The First Amendment "embodies an overarching commitment to protect speech from government regulation through close judicial scrutiny, thereby enforcing the Constitution's constraints, but without imposing judicial formulas so rigid that they

28. *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F. 3d 219, 229-30 (3d Cir. 2004).

29. *Id.* at 230-35.

30. Brief for Petitioner, *supra* note 14, at 10.

31. *Id.*

32. *Id.*

33. *Forum for Academic & Institutional Rights, Inc.*, 126 S.Ct. at 1302.

34. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 544 U.S. 1017 (2005).

35. U.S. CONST. amend. I.

36. *Denver Area Educ. Telcomms. Consortium v. FCC*, 518 U.S. 727, 740 (1996).

become a straitjacket that disables government from responding to serious problems.³⁷ As that is the case, the Solomon Amendment has been surrounded by several First Amendment concerns. In enacting the Solomon Amendment, Congress used its Spending Clause power, which gives Congress the power to place conditions on the grant of federal funds.³⁸ However, the power of Congress to place conditions on funding is limited by the unconstitutional conditions doctrine, which is a principle fashioned by the Court that provides that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.”³⁹ “Under th[e] Court’s precedents, a funding condition violates the First Amendment when [it is] aimed at expression wholly unrelated to the purposes for which funding is given.”⁴⁰ In other words, the government cannot limit speech by placing a “condition on the recipient of a subsidy rather than on a particular program or service, thus effectively prohibiting the recipient from engaging in the protected conduct outside the scope of the federally funded program.”⁴¹ In light of this consideration, First Amendment issues of expressive conduct, compelled speech, and expressive association must be examined.

A. *Cases Involving Expressive Conduct*

Because groups and individuals often express themselves through symbols and conduct other than words, the Court has often had to determine whether certain expression was speech or conduct. In *Spence v. Washington*,⁴² the Court considered whether a defendant’s expressive conduct should be regarded as communicative.⁴³ There, the defendant had taped a large peace symbol to an American flag and displayed it outside his home. Under a Washington state law, he was convicted of affixing a symbol to the American flag.⁴⁴ The Court reversed the conviction and held that the expression was protected under the First Amendment.⁴⁵ The Court reasoned that there was “an intent to convey” a specific message and “in the surrounding circumstances” there was a great likelihood that “the message would be understood by those

37. *Id.* at 741.

38. *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1306 (2006).

39. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

40. Brief for AAUP, *supra* note 9, at 5.

41. *Id.* at 5-6 (quoting *Rust v. Sullivan*, 500 U.S. 173, 197 (1991)).

42. 418 U.S. 405 (1974).

43. *Id.* at 409-10.

44. *Id.* at 405-06.

45. *Id.* at 406.

who viewed it.”⁴⁶ These two factors continue to be used by courts in analyzing whether expressive conduct is speech under the First Amendment.⁴⁷

In *United States v. O'Brien*,⁴⁸ the Court held that not all conduct that communicates receives strict scrutiny review under the First Amendment.⁴⁹ At the time of the Vietnam War, federal law prohibited the destruction or alteration of draft cards.⁵⁰ The defendant had burned his “Selective Service registration certificates” in front of a large crowd at a courthouse and was convicted.⁵¹ On appeal, the defendant argued that his act of burning his draft card was “symbolic speech” because “the freedom of expression which the First Amendment guarantees includes all modes of ‘communication of ideas by conduct,’ and that his conduct [was] within this definition because he did it in ‘demonstration against the war and against the draft.’”⁵² The Court disagreed and held that the statute regulated conduct and that the effect on the symbolic speech was only incidental.⁵³ The Court reasoned that it could not “accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”⁵⁴ The Court stated that “when speech and nonspeech elements are combined in the same course of conduct, a sufficiently important government interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”⁵⁵ The Court articulated the standard four-part test for intermediate scrutiny, which upholds a governmental regulation if (1) it is within the “constitutional power” of the government; (2) it furthers a substantial governmental interest; (3) the governmental interest is not related to the suppression of free expression; and (4) the incidental restriction is no greater than necessary to further the interest.⁵⁶

The test articulated in *O'Brien* is the current standard for expressive conduct cases and was applied in *Texas v. Johnson*.⁵⁷ There, Texas state law prohibited the destruction of the American flag. While

46. *Id.* at 410-11.

47. *See, e.g.*, *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004).

48. 391 U.S. 367 (1968).

49. *Id.* at 376.

50. *Id.* at 370.

51. *Id.* at 369.

52. *Id.* at 376.

53. *Id.* at 376-77.

54. *Id.* at 376.

55. *Id.*

56. *Id.* at 377.

57. 491 U.S. 397, 407 (1989).

protesting at the 1984 Republican National Convention in Dallas, the defendant burned an American flag and was later convicted of flag desecration.⁵⁸ On appeal, the Court considered whether the act of flag burning was expressive conduct, which would provide the defendant First Amendment protection.⁵⁹ The Court noted that “[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the issue is] whether [a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.”⁶⁰ The Court reasoned that because the context of expression is so important, the flag burning was a protected form of expression under the First Amendment.⁶¹

B. Cases Involving Government Compelled Speech

Just as the government can infringe upon the freedom of speech by restricting speech, so too can it infringe upon freedom of speech by compelling speech. The Court has found “impermissible compelled speech in three categories of government action.”⁶² These three categories of government action are (1) government compelled speech; (2) government compelled accommodation of speech; and (3) government compelled subsidization of speech.⁶³ The doctrine of compelled speech states that the government cannot force groups or individuals to express certain ideas, messages, beliefs, or ideologies against their will.⁶⁴ In *West Virginia State Board of Education v. Barnette*,⁶⁵ the Court summed up this doctrine: “If there is any fixed star in our constitutional

58. *Id.* at 399-400.

59. *Id.* at 402-04.

60. *Id.* at 404 (quoting *Spence*, 418 U.S. at 410-11).

61. *Id.* at 420. The Court stated, “We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.” *Id.*

62. *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 235-36 (2004).

63. *Id.* at 236; *see, e.g.,* *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (propagation); *Hurley v. Irish Am. Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 581 (1995) (accommodation); *United States v. United Foods, Inc.*, 533 U.S. 405, 413 (2001) (subsidization).

64. *See United Foods, Inc.*, 533 U.S. at 410 (stating that “[j]ust as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views. . . .”); *Turner Broad. Sys. Inc. v. FCC*, 512 U.S. 622, 641 (1994) (stating that “[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”).

65. 319 U.S. 624 (1943).

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.”⁶⁶ In *Barnette* the Court held that a state law requiring schoolchildren to recite the Pledge of Allegiance and salute the flag violated the First and Fourteenth Amendments.⁶⁷ Since *Barnette*, the Court has struck down many laws compelling certain types of compelled speech. For example, in *Wooley v. Maynard*,⁶⁸ the Court struck down a state law that required “noncommercial vehicles [to] bear license plates embossed with the [New Hampshire] state motto, ‘Live Free or Die.’”⁶⁹ In *Wooley* the Court stated that “the 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.”⁷⁰

But the Court has distinguished cases such as *Barnette* and *Wooley* (which were situations where individuals were compelled to speak the government’s message) from other cases involving situations where the government forced a speaker to “host or accommodate another speaker’s message.”⁷¹ Such a situation arose in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,⁷² where the Court considered the issue of whether a state law violated a parade sponsor’s First Amendment rights by requiring the sponsor to include among the marchers an organization imparting a message that the sponsor did not wish to convey.⁷³ The Court noted that because parades were a form of expression, the “speaker ha[d] the autonomy to choose the content of his own message,” and thus, the speaker who organized the parade could exclude any message the speaker did not like.⁷⁴ The Court emphasized that a speaker “has the right to tailor the speech” and that this tailoring applies to “expressions of value, opinion, or endorsement . . . [and] to statements of fact [that] the speaker would rather avoid.”⁷⁵

This reasoning has also been applied in other contexts. In *Miami Herald Publishing Co. v. Tornillo*,⁷⁶ the Court struck down a Florida state law that granted political candidates a right to reply to criticism

66. *Id.* at 642.

67. *Id.*

68. 430 U.S. 705 (1977).

69. *Id.* at 707, 717.

70. *Id.* at 714.

71. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1309.

72. 515 U.S. 557 (1995).

73. *Id.* at 566.

74. *Id.* at 573.

75. *Id.*

76. 418 U.S. 241 (1974).

and attacks on their records by newspapers.⁷⁷ The Court recognized that under the First Amendment the government cannot tell a newspaper “what it can print and what it cannot.”⁷⁸ In particular, the Court noted that the Florida law had the effect of “taking up space that could be devoted to other material the newspaper may have preferred to print.”⁷⁹ Likewise, in *Pacific Gas & Electric Co. v. Public Utility Commission of California*,⁸⁰ the Court struck down a state agency’s order for a utility company, which regularly included a newsletter in its billing envelope, to also include a third-party newsletter.⁸¹ The Court referenced *Barnette*, *Wooley*, and *Tornillo* and concluded that the compelled inclusion of a third-party newsletter would require the utility to associate with speech that it may disagree with.⁸²

C. Cases Involving Freedom of Association

The right of expressive association is the “right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”⁸³ The Court has long recognized that the corollary to the right of freedom of association is the right of “freedom not to associate.”⁸⁴ In *Roberts v. United States Jaycees*,⁸⁵ the Court held that there is “no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”⁸⁶ At issue in *Roberts* was a challenge to a state law that prohibited private discrimination based on traits such as gender, and the Jaycees claimed they had a right to exclude women from their group.⁸⁷ Particularly significant was the Court’s assertion that the freedom of expressive association can be infringed when “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.”⁸⁸ Thus, the freedom of expressive association is not absolute.

77. *Id.* at 258.

78. *Id.* at 255-56.

79. *Id.* at 256.

80. 475 U.S. 1 (1986).

81. *Id.* at 5-7.

82. *Id.* at 9-12.

83. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984).

84. *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000).

85. 468 U.S. 609 (1984).

86. *Id.* at 623.

87. *Id.* at 612.

88. *Id.* at 623.

In fact, the Court has noted that the freedom of association protects a group's right to discriminate only if it is an intimate association or where discrimination is integral to express activity.⁸⁹ The most recent application of these principles comes from *Boy Scouts of America v. Dale*,⁹⁰ where the Court held that freedom of association allows the Boy Scouts to exclude gay scoutmasters in violation of a state's antidiscrimination statute.⁹¹ The Boy Scouts argued that their expressive message was anti-gay, and that their message was undermined by the forced inclusion of gays.⁹² In determining whether a group gets protection, the Court first must determine whether it is engaged in "expressive association," which gives rise to strict scrutiny review.⁹³ The Court ruled that the Boy Scouts were engaged in expressive association because they wanted to "instill values in young people" and they sought to do this "by having its adult leaders spend time with the youth members, instructing and engaging them in activities like camping, archery, and fishing."⁹⁴ Although there was not an anti-gay message in any Boy Scout publication or mission statement, the Court deemed this non-determinative because an organization does not need to "trumpet its views from the housetops."⁹⁵

If a group is deemed to be engaged in expressive conduct, the second consideration for the Court in determining whether a group merits protection is whether stopping the organization from discriminating would undermine its message.⁹⁶ The Court concluded that the Boy Scouts's message would be undermined, and the Court emphasized that it will give "deference to an association's view of what would impair its expression."⁹⁷ If these two considerations are met, then an association's membership decisions will not be constitutionally regulated unless the regulation of the membership decision "serve[s] compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."⁹⁸

89. See Kenneth Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); *Hurley*, 515 U.S. at 572-73.

90. 530 U.S. 640 (2000).

91. *Id.* at 661.

92. *Id.* at 647-48.

93. See *id.* at 648-49; *Forum for Academic & Institutional Rights, Inc.*, 390 F.3d at 230-31.

94. *Dale*, 530 U.S. at 649.

95. *Id.* at 656.

96. *Id.* at 648.

97. *Id.* at 653.

98. *Id.* at 648.

In summary, the Solomon Amendment implicates three significant First Amendment issues: (1) what is and is not expressive conduct; (2) what constitutes government compelled speech; and (3) what is meant by expressive association. First, before *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*,⁹⁹ in determining expressive conduct claims, the Court considered if the conduct was meant to convey a message and if there was a substantial likelihood that the message would be understood by those who saw it.¹⁰⁰ Second, as to government-compelled speech, the Court has been steadfast in its view that the government cannot compel anyone to speak the government's message.¹⁰¹ Finally, as to expressive association, the Court has given deferential treatment to groups and their decisions to exclude certain individuals.¹⁰²

III. COURT'S RATIONALE

After dealing with two preliminary issues,¹⁰³ the Court in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*¹⁰⁴ addressed the

99. 126 S.Ct. 1297 (2006).

100. See *Johnson*, 491 U.S. at 404.

101. See *Barnette*, 319 U.S. at 642.

102. See *Dale*, 530 U.S. at 653.

103. Before discussing whether the Solomon Amendment violated the law schools' First Amendment freedoms of speech and association, the Court dealt with two preliminary issues: (1) "whether institutions can comply with the Solomon Amendment by applying a general nondiscrimination policy to exclude military recruiters" and (2) whether Congress exceeded "constitutional limitations on its power in enacting [the Solomon Amendment]." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. 1297, 1305-07 (2006). As to the first issue, both parties agreed that the statute required that "[i]n order for a law school and its university to receive federal funding, the law school [had to] offer military recruiters the same access to its campus and students that it provide[d] to the nonmilitary recruiter[s] [who] receiv[ed] the most favorable access." *Id.* at 1304. The Court agreed with this interpretation and concluded that under the Solomon Amendment, it was "insufficient for a law school to treat the military as it treats all other employers who violate its nondiscrimination policy" and "military recruiters must be given the same access as recruiters who comply with the [nondiscrimination] policy." *Id.* at 1306. As to the second issue, the Court held that the Constitution explicitly gave Congress a "broad and sweeping" power to "provide for the common Defence," which included the power to "raise and support Armies" and to "provide and maintain a Navy." *Id.* (quoting U.S. CONST. art. I, § 8, cl. 1). The Court reasoned that this power included "the authority to require campus access for military recruiters." *Id.* The Court concluded that Congress's decision should enjoy deference and that Congressional power to regulate military recruiting was arguably greater under the Solomon Amendment "because universities are free to decline the federal funds." *Id.*

104. 126 S.Ct. 1297 (2006).

Third Circuit's responses to FAIR's First Amendment claims.¹⁰⁵ Chief Justice Roberts, writing for the Court, held that as a general matter, the Solomon Amendment regulated conduct and not speech, and because Congress had the authority to require law schools to provide equal access to military recruiters without violating their First Amendment rights of speech and association, the Third Circuit Court of Appeals erred in holding that the Solomon Amendment was unconstitutional.¹⁰⁶

A. *Compelled Speech*

1. Government Compelled Speech. First, the Court addressed the Third Circuit's conclusion that in supplying such services as sending e-mails and distributing flyers for military recruiters, law schools were unconstitutionally compelled to speak the government's message.¹⁰⁷ The Court quickly recognized that elements of speech were present when law schools provided the military with recruiting assistance.¹⁰⁸ The Court observed that prior precedent had established that "the principle [of] freedom of speech prohibit[ed] the government from telling people what they must say."¹⁰⁹ The Court reasoned that unlike *Barnette* and *Wooley*, the Solomon Amendment did not "dictate the content of the speech" and that any speech that was compelled was "plainly incidental to the Solomon Amendment's regulation of conduct."¹¹⁰ The Court stated that compelling a law school to send e-mails on behalf of a military recruiter was "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,'" as were the situations in *Barnette* and *Wooley*.¹¹¹ Rejecting the Third Circuit's conclusion, the Court stated that FAIR's argument trivialized these decisions and concluded that the services law schools had to provide for military recruiters was not compelled speech.¹¹²

2. Government Compelled Accommodation of Speech. Next, the Court addressed the Third Circuit's conclusion that because military recruiters were speaking while they were on campus, law schools were

105. *Id.* at 1307.

106. *Id.* at 1313.

107. *Id.* at 1309.

108. *Id.* at 1308.

109. *Id.* In support of this principle, Chief Justice Roberts cited the decisions in *Barnette* and *Wooley*. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

being unconstitutionally forced to permit, host, and accommodate their message.¹¹³ The Court started its analysis by distinguishing its line of compelled speech cases where individuals were forced to speak the government's message from those cases where the government forced individuals "to host or accommodate another speaker's message."¹¹⁴ The Court asserted that prior decisions had found compelled-speech violations where "the complaining speaker's own message was affected by the speech it was forced to accommodate."¹¹⁵ The Court reasoned that when law schools are hosting interviews and recruiting receptions, they are not speakers, but merely facilitators "to assist their students in obtaining jobs."¹¹⁶ The Court concluded that a law school's recruiting services lacked any "expressive quality."¹¹⁷ The Court held that the "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."¹¹⁸ In passing, the Court made short shrift of FAIR's argument that any similar treatment given to all recruiters "could be viewed as sending the message that they see nothing wrong with the military's policies, when they do."¹¹⁹ In rejecting this argument, the Court stated that there was nothing about recruiting on campus that would suggest "law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military's policies."¹²⁰

B. *Expressive Conduct*

After rejecting the contention that the Solomon Amendment violated the freedom of speech, the Court addressed the Third Circuit's conclusion that even if the Solomon Amendment regulated conduct, the conduct was expressive, and the regulation of it was an unconstitutional infringement on the right to engage in expressive conduct.¹²¹ First, the Court noted the decisions in *O'Brien* and *Johnson* to support its conclusion that while there were "some forms of 'symbolic speech' [that] were deserving of

113. *Id.* at 1307, 1309-10.

114. *Id.* at 1309.

115. *Id.* The Court referenced the decisions of *Hurley*, *Pacific Gas*, and *Tornillo*, which the Third Circuit had relied upon. *Id.* The Court reasoned that these decisions were distinguishable because a "law school's recruiting services lack[ed] the expressive quality of a parade, a newsletter, or the editorial page of a newspaper." *Id.* at 1310.

116. *Id.* at 1309-10.

117. *Id.* at 1310.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* at 1307, 1310-11.

First Amendment protection,” this protection would only apply to “conduct that is inherently expressive.”¹²² The Court stated that while the decision in *Johnson* held that “burning the American flag was sufficiently expressive to warrant First Amendment protection[,]” the conduct that was being regulated by the Solomon Amendment was not.¹²³ Prior to the equal-access requirement of the newly amended Solomon Amendment, the Court noted that law schools would “express” their disagreement with the military “by treating military recruiters differently from other recruiters.”¹²⁴ The Court reasoned that the expressive portion of a “law school’s actions is not created by the conduct itself but by the speech that accompanies it” and pointed out that this conduct was only expressive because the law schools needed to explain their conduct with speech.¹²⁵ Applying the *O’Brien* standard, the Court concluded that there was only an “‘incidental burden on speech’” that was no greater than needed.¹²⁶ In determining whether there was a “substantial government interest that would be achieved less effectively absent the regulation,” the Court held that there was a substantial government interest in military recruiting because “raising and supporting the Armed Forces . . . would be achieved less effectively if the military were forced to recruit on less favorable terms than other employers.”¹²⁷ The Court concluded that “even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment.”¹²⁸

C. *Expressive Association*

Finally, after concluding that there was no violation of the law schools’ freedom of speech, the Court then turned to the question of whether a violation of freedom of expressive association had occurred.¹²⁹ The Court noted that this was an important consideration because if the government were allowed to “restrict individuals’ ability to join together and speak, it could essentially silence views that the First Amendment is intended to protect.”¹³⁰ Referencing *Boy Scouts of America v.*

122. *Id.* at 1310.

123. *Id.*

124. *Id.*

125. *Id.* at 1311. The Court went on to state that “[i]f combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into ‘speech’ simply by talking about it.” *Id.*

126. *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

127. *Id.*

128. *Id.*

129. *Id.* at 1311-13.

130. *Id.* at 1312.

Dale,¹³¹ the Court concluded that military recruiters and law schools only “associate” in the context of their interaction.¹³² Furthermore, the Court emphasized that recruiters were not part of the law school, but instead were “outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school’s expressive association.”¹³³ The Court reasoned that this distinction was “critical” because students and faculty were “free to associate to voice their disapproval of the military’s message,” and because military recruiters were outsiders, the Solomon Amendment does not affect “the composition of the [law school] by making group membership less desirable.”¹³⁴ Ultimately, the Court concluded that the Solomon Amendment did not violate the law schools’ right to associate, no matter “how repugnant the law school considers the recruiter’s message.”¹³⁵

IV. IMPLICATIONS

The consequence of *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*¹³⁶ is that military recruiters must be given the same access as nonmilitary recruiters to students on university campuses. In upholding the constitutionality of the Solomon Amendment, the Court’s holding clarified three First Amendment tangential freedom issues: (1) what is and is not expressive conduct; (2) what constitutes compelled speech; and (3) what is meant by expressive association.

First, as to what is and what is not expressive conduct, the Court stated that only conduct that was “inherently expressive” was worthy of protection under the First Amendment.¹³⁷ The Court discussed *Texas v. Johnson*,¹³⁸ where the Court held that flag burning deserved protection under the First Amendment because it was “sufficiently expressive.”¹³⁹ This seems to be a different formulation of the test for expression than was stated in *Johnson*. There the Court said that “whether particular conduct possesses sufficient communicative elements” that would provide it with First Amendment protection depended on the presence of “[a]n intent to convey a particularized

131. 530 U.S. 640 (2000).

132. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1312.

133. *Id.*

134. *Id.* at 1313.

135. *Id.*

136. 126 S.Ct. 1297 (2006).

137. *Id.* at 1310.

138. 491 U.S. 397 (1989).

139. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1310 (citing *Johnson*, 491 U.S. at 406).

message, and [whether] the likelihood was great that the message would be understood by those who viewed it.”¹⁴⁰ In *Johnson* the Court cited several instances of conduct that met this test of expression, including “students[] wearing . . . black armbands to protest American military involvement in Vietnam . . . a sit-in by blacks in a ‘whites only’ area to protest segregation . . . and . . . picketing about a wide variety of causes.”¹⁴¹ The Court in *Johnson* also emphasized that it is “not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.”¹⁴² However, it does not seem that the Court in *Forum for Academic & Institutional Rights, Inc.* followed this logic, as it appears the test for expression has changed to a finding of “inherently expressive” conduct where the expression is “overwhelmingly apparent.”¹⁴³ What expressive conduct will meet this qualification is unknown and is of great consequence to the future of freedom of expression claims.

Second, as to what constitutes compelled speech, while making reference to its decisions in *Barnette* and *Wooley*, the Court stated that even if compelled speech is “plainly incidental” to a regulation of conduct, it will be upheld.¹⁴⁴ Although this reaffirms previous decisions, it also has clarified that groups who control property and resources will often not be found to be engaged in compelled speech.¹⁴⁵ However, this may be problematic, as the Court does not distinguish between public and private groups.

Finally, as to what is meant by expressive association, the Court rejected the claim that the law schools’ freedom of association allowed them to exclude military recruiters.¹⁴⁶ This seems contrary to the Court’s decision in *Dale*, where the Boy Scouts were allowed to exclude a gay scoutmaster because the government interest did not justify inclusion and “the forced inclusion . . . would significantly affect [their] expression.”¹⁴⁷ Because the Court in *Dale* gave deference to both an association’s “assertions regarding the nature of its expression,” as well

140. *Johnson*, 491 U.S. at 404 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)).

141. *Id.* (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966); *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313-14 (1968); *United States v. Grace*, 461 U.S. 171, 176 (1983)).

142. *Id.* at 406-07.

143. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1310-11.

144. *Id.* at 1308.

145. *See id.* at 1310.

146. *Id.* at 1312-13.

147. *Id.* at 1312 (quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 655-59 (2000)).

as “to an association’s view of what would impair its expression,” the Court in *Forum for Academic & Institutional Rights, Inc.* seemingly abandoned both of these considerations.¹⁴⁸ Additionally, the Court did not look for a government interest to justify inclusion as it did in *Dale*. Chief Justice Roberts stated that “judicial deference . . . is at its apogee” when Congress legislates in the area of military affairs,¹⁴⁹ but Chief Justice Roberts did not make note of any evidence that the exclusion of military recruiters was hurting military recruiting or national security. In this new age of international terrorism, this narrowing of associational expression could be problematic for dissenting groups to war and certain foreign affairs policies as the Court looks to give congressional deference to the military in spite of First Amendment associational rights.

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148. *Dale*, 530 U.S. at 653.

149. *Forum for Academic & Institutional Rights, Inc.*, 126 S. Ct. at 1306 (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).