

A Blueprint for Law School Engagement with the Military

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INTRODUCTION

In *Grutter v. Bollinger*,¹ law student amici provided significant support for the University of Michigan's use of race as a factor in law school admissions. Although *Grutter* did not specifically refer to any of the briefs submitted by law students, the Court's reliance on diversity interests echoed the students' emphasis on the educational benefits of a diverse classroom and the instrumental benefits of a diverse legal profession.² On the whole, the Court's analysis in *Grutter* broke relatively little new ground, since it closely followed Justice Powell's endorsement of diversity as a compelling interest³ in *Regents of the University of California v. Bakke*⁴ twenty-five years earlier.

Perhaps the most surprising aspect of Justice O'Connor's majority opinion was how centrally she featured the perspective of one particular association of amici who had no expertise in legal education and only an indirect connection to traditional university education. Her reasoning depended in large part on the support of former high-ranking military officers and civilian military leaders, who argued that the conscious use of race in admitting candidates to the federal military academies and university Reserve Officer Training Corps (ROTC) programs was necessary for the maintenance of national security.⁵ Although in most settings proponents of progressive causes such as affirmative action would not be expecting the military's blessing, in *Grutter* the University

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1. 539 U.S. 306 (2003).

2. See generally Danielle C. Gray & Travis LeBlanc, *Integrating Elite Law Schools and the Legal Profession: A View From the Black Law Students Associations of Harvard, Stanford, and Yale Law Schools*, 19 HARV. BLACKLETTER L.J. 43 (2003).

3. See *Grutter*, 539 U.S. at 325 ("today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions").

4. 438 U.S. 265 (1978).

5. See Consolidated Brief of Lt. Gen. Julius W. Becton, Jr. et al. as Amici Curiae in Support of Respondents, *Grutter v. Bollinger*, 539 U.S. 306 (2003) [hereinafter *Grutter* Military Brief].

of Michigan received an unexpected windfall.⁶ Citing the military's judgment concerning the necessity of affirmative action, Justice O'Connor wrote, "We agree that '[i]t requires only a small step from this [military] analysis to conclude that our country's other most selective institutions must remain both diverse and selective.'"⁷ Neither the concurring nor dissenting opinions mentioned the constitutional oddity of relying on military judgment to demonstrate that a civilian practice met the demands of the Equal Protection Clause.

Another unexpected amicus twist involving the military lies beneath the surface of *Forum for Academic and Institutional Rights, Inc. (FAIR) v. Rumsfeld*,⁸ a case pending before the United States Supreme Court that provides the Court its next occasion to evaluate the internal policies and practices of law schools. This military twist, however, is much more subtle and indirect than the military influence at work in *Grutter*. So far, it has been invisible to the parties and to the district and circuit courts that have ruled on whether the Solomon Amendment violates the First Amendment by denying federal funding to universities that bar military recruiting activities on their campuses to protest "Don't Ask, Don't Tell."⁹

One of the amicus briefs filed by law students in *FAIR v. Rumsfeld* is a "miner's canary" that should alert us to concerns much more fundamental than those presented by a challenge to the Solomon Amendment, as serious as those concerns about equality are. This brief demonstrates the deterioration of our civil-military relations and the declining strength of our civilian control of the military. It shows the complicity of courts and of law schools in that

6. See Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1441 (2005) (speculating that Justice O'Connor may have reasoned that the endorsement of military officers in a time of war would "make the Court's endorsement of affirmative action more palatable to those ambivalent about it").

7. *Grutter*, 539 U.S. at 331 (quoting *Grutter* Military Brief, *supra* note 5, at 29).

8. 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (May 2, 2005) (No. 04-1152). This litigation will be referred to as *FAIR v. Rumsfeld*.

9. See *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (plaintiffs unlikely to prevail on First Amendment challenge to Solomon Amendment), *rev'd*, 390 F.3d 219 (3d Cir. 2004) (Solomon Amendment unconstitutional on expressive association and compelled speech grounds), *cert. granted*, 125 S. Ct. 1977 (May 2, 2005) (No. 04-1152); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (Solomon Amendment unconstitutional on expressive association and compelled speech grounds). The Solomon Amendment denies federal funding to universities having a policy or practice "that either prohibits, or in effect prevents . . . access to campuses, or access to students . . . for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." 10 U.S.C.A. §983(b) (West Supp. 2005). "Don't Ask, Don't Tell," the policy that works in practice to exclude gay people from military service, is codified at 10 U.S.C. §654 (2000).

deterioration and decline. It helps explain why practices of inequality such as “Don’t Ask, Don’t Tell” are so resistant to reform. Finally, it suggests that law schools have taken exactly the wrong tack in protesting the military’s exclusionary policies.

Readers might assume that I am referring to any of a number of amicus briefs, affidavits, and declarations submitted by law students in support of law schools seeking to exclude the military from law-school-sponsored recruiting activities because it engages in employment discrimination on the basis of sexual orientation.¹⁰ It would make intuitive sense to focus on the students who argued, as their counterparts did in *Grutter*, that law schools must have discretion to shape policies designed to protect a robust educational environment equally accessible to all students. Law student briefs supporting the exclusion of military recruiters and opposing the Solomon Amendment supplemented the record by providing factual support for the contentions of law faculty concerning the effect of military recruiting activities on the educational environment. While helpful to a degree, most law student amici contributions were not particularly distinctive, and they are not the focus of this article. Their declarations and commentary were largely derivative of faculty- and administration-driven arguments against the Solomon Amendment, and they failed to provide any greater or different constitutional context for the civil-military issues at hand.

One filing by law students, however, takes an entirely different perspective that is painfully illustrative of the direction of contemporary civil-military relations. By far the most significant amicus contribution in the United States Court of Appeals for the Third Circuit in *FAIR v. Rumsfeld* is a brief filed in support of the government by three Military Law Student Associations.¹¹ This brief is significant for reasons that have not yet been considered by the courts, the parties, or even the military law student amici themselves. The Military Law Students’ Brief has, quite unintentionally, opened a window that reveals how Solomon protest has led to a failure on the part of law schools to fulfill a vital institutional obligation.

10. See, e.g., Brief of Amici Curiae American Civil Liberties Union et al. in Support of Appellants, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d. Cir. 2004) (including as amici lesbian and gay law student associations at Cardozo, Boston College, Louisville, Cornell, Harvard, New York University, Seattle, Hastings, and Michigan); Declaration of Sara Smolik, *id.* [hereinafter Smolik Declaration]; Declaration of Robert Sweeney, *id.* [hereinafter Sweeney Declaration].

11. Brief of the UCLAW Veterans Society et al. as Amici Curiae in Support of Appellees, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d. Cir. 2004) [hereinafter Military Law Students’ Brief]. The brief represented the views of Military Law Student Associations at UCLA, Washburn University, and William and Mary.

A few words of disclaimer are necessary. I am one of the relatively few law professors who are military veterans in the all-volunteer era.¹² I also take second place to no one in my belief that the *de jure* exclusion of gay people from military service reflects poor military and legislative judgment and is motivated by animus against gay people generally, not by concern for national security. I believe that “Don’t Ask, Don’t Tell” significantly impairs military effectiveness. I also believe the Solomon Amendment’s effort to coerce law school support for military recruiting reflects poor legislative judgment, even if the Supreme Court concludes that the policy is not an unconstitutional one. This article takes no position on the merits of the First Amendment arguments raised in the constitutional challenge to the Solomon Amendment because, ultimately, those arguments do not bear upon my thesis. I will argue that law schools should take the same action whether they win or lose in *FAIR v. Rumsfeld*.

Early in their brief to the Third Circuit, plaintiffs made the straightforward statement that *FAIR v. Rumsfeld* “is about the freedom of law schools to shape their own pedagogical environment and to teach, by word and deed, the values they choose, free from government intrusion.”¹³ I agree. Law schools ought to be free to choose for themselves. However, if they are freed from the coercion of the Solomon Amendment by a favorable ruling in the Supreme Court, they ought to make a different choice – not a different choice of values, but a different choice of how to pursue those values.

Law schools engage in expressive forms of protest against the military’s discriminatory policies to demonstrate their commitment to constitutional values of equality.¹⁴ Their choice of equality as a central value to be affirmed

12. Among women in law teaching, the number of veterans must be far fewer. I know of only one other female professor who has served in the active-duty military in a line capacity (other than as a Judge Advocate), Elizabeth Hillman of Rutgers-Camden. See ELIZABETH LUTES HILLMAN, *DEFENDING AMERICA: MILITARY CULTURE AND THE COLD WAR COURT-MARTIAL* (2005); Elizabeth Lutes Hillman, *Disloyalty Among “Men in Arms”: Korean War POWs at Court-Martial*, 82 N.C.L. REV. 1629 (2004); Tobias Barrington Wolff, *Compelled Affirmations, Free Speech, and the U.S. Military’s Don’t Ask, Don’t Tell Policy*, 63 BROOK. L. REV. 1141, 1154-1155, 1160-1161, 1164-1165 (1997) (recounting personal reflections from Captain Hillman’s U.S. Air Force experiences).

13. Brief for Plaintiffs-Appellants at 2, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d. Cir. 2004) (quoting 140 Cong. Rec. 11,441 (1994) (statement of Rep. Pombo)) [hereinafter Third Circuit Brief for Plaintiffs].

14. For general discussions of the Solomon controversy, see Elvia R. Arriola, *Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights*, 24 ST. LOUIS U. PUB. L. REV. 149 (2005) (drawing parallels between the Solomon Amendment and repression of dissent during the McCarthy era); Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruiting on Campus*, 13 WM. & MARY BILL RTS. J. 205 (2004) (viewing Solomon protest in

is admirable. However, it is troubling that the plaintiff law schools seem to value expression about constitutional equality more than they value the underlying constitutional principle of equality. Expressing support for equality should not be an end in itself, but rather a means toward achieving equality. Solomon protest within the law school community, unfortunately, seems to value expression about equality above all else, even when that expression cements a legal doctrine—judicial deference to military judgment—by which inequality is justified and reinforced.

Make no mistake about it, Solomon protest as practiced by law schools today has the potential to significantly delay the repeal or reform of “Don’t Ask, Don’t Tell.” Even worse, it increases the chances that military policy will be used more broadly to advance the notion that some groups of persons are less worthy than others.

Part I of this article reviews the amicus brief filed on behalf of Military Law Student Associations and explains why it is such a good example of the dysfunctional discourse that characterizes legal claims involving the military. The brief provides a warning of how far our constitutional understanding of civil-military relations has drifted off its proper course. Part II explains the recent and questionable origins of the Supreme Court’s doctrine of judicial deference to military judgment, the most significant judicial obstacle to serious scrutiny of “Don’t Ask, Don’t Tell.” These cases, all decided in the era of the all-volunteer military following the Vietnam War, depend on the dangerous assumption that the military is properly considered a separate society that is apart from, not a part of, civilian society. The perceived distance between military and civilian concerns is then used to justify the military’s immunity from effective constitutional review.

Part III takes the plaintiffs in *FAIR v. Rumsfeld* to task for a counterproductive over-reliance on expressive shunning of the military from the law school community. The use of shunning as a central feature of Solomon protest relies on the same distancing of the military from civilian society that is used to justify policies such as “Don’t Ask, Don’t Tell.” If the plaintiffs prevail in *FAIR v. Rumsfeld*, it is likely that law schools will adopt even more aggressive restrictions on the presence of military representatives within the law school community, further undermining the work of advocates who seek an end to the military’s exclusionary policies.

the context of conservative-liberal disagreement on military action in Iraq, gay rights, and affirmative action); Sylvia Law, *Civil Rights Under Attack by the Military*, 7 WASH. U. J.L. & POL’Y 117 (2001) (describing New York University Law School’s experience with Solomon protest). For a military perspective, see Eugene Y. Kim, *The Judge Advocate Recruiting Office: The Gateway to Service*, ARMY LAW., June 2004, at 33.

Part IV explains what law schools should do to demonstrate their commitment to equality. It offers a blueprint for law school engagement and research on legal matters involving the military and equal protection, focusing on constitutional analysis of the doctrine of military deference, the future of “Don’t Ask, Don’t Tell,” and the government’s impermissible use of the military as an expressive platform for statements about the place of women in society.

I. WARRIORS, VICTIMS, AND THE MILITARY LAW STUDENTS’ BRIEF:
WHAT LAW STUDENT VETERANS HAVE LEARNED
ABOUT LEGAL CONTROL OF THE MILITARY

The Military Law Students’ Brief purported to provide “a perspective on the questions presented that no other party or amicus is providing – that of law students who are serving in the military, in the military reserves, or who have previously served in the military.”¹⁵ That perspective is an important one. In public discourse concerning the military and its faithfulness to constitutional values, we tend to swing between two extremes. In some circumstances, persons who have served in the military are pointedly denied any voice; at other times, the voices of persons who have served are held conclusive and irrefutable, silencing those who are not military veterans. Very rarely do we actually consider the content of what military voices bring to the conversation and calibrate the value of the contribution accordingly.

The Military Law Students’ Brief opened with an introductory statement that was perhaps more frank than intended. Rather than stating clearly that the exclusion of military recruiters from the law school community would cause grave harm to the military and to national security, which I believe was the point the amici intended to make, they instead argued that “allowing law schools to exclude military recruiters *without facing the consequences provided for in the Solomon Amendment* would cause serious harm to the Nation.”¹⁶ Taken at face value, this statement would suggest that restriction of military recruiting activity itself is not the problem. Rather, the problem would be in allowing the restriction of military recruiting activity to go unpunished. Interestingly, this introductory statement (by amici supporting the defendants) is consistent with the plaintiffs’ characterization of congressional statements in support of the Solomon Amendment. Plaintiffs argued that because a co-sponsor of the Solomon Amendment urged its passage with a plea to “send a message over the wall of the ivory tower of higher

15. Military Law Students’ Brief, *supra* note 11, at 1.

16. *Id.* (emphasis added).

education,”¹⁷ the purpose of the legislation was “to redress a perceived insult and to command respect,”¹⁸ not to protect military recruiting. The Solomon Amendment, therefore, is seen as addressing disrespect from law schools, not the search for military lawyers.

The brief did separately allege that the military suffers a specific harm to its ability to recruit personnel when its representatives are barred from participation in law-school-sponsored placement activities. In fact, it alleged that, if plaintiffs prevail, harm to military recruitment will be “severe, immediate, and certain,”¹⁹ although it offered no evidence for such a startling prediction. Even persons who believe law school sponsored interviews make a difference in the successful recruiting of Judge Advocates ought to be highly skeptical of claims by the law student amici that, without the interviews, it would be “*next to impossible* to recruit the best military lawyers for the job.”²⁰ These statements are hyperbolic and entirely lacking in factual support. Bare assertions of this sort are no substitute for true engagement on the issue of whether, and to what extent, military recruiting is disadvantaged by exile outside the law school community.

The use of the word “certain” in all its forms is sometimes irresistible in legal argument, despite how rarely the term accurately depicts the probability that some fact is true or that some legal interpretation should prevail. The Military Law Students’ Brief not only alleged certainty of harm to military recruiting in general terms, but it also made the much more specific assertion that it “is nearly certain that military recruiters would fail to meet recruiting goals for new Judge Advocates by a wide margin.”²¹ I cannot imagine what the factual basis for this allegation would be. Of course, when allegations are not based on fact, the facts you do have often need to be adjusted to fit. For example, the brief stated that if the Solomon Amendment were invalidated, the military “would immediately lose access to 92% (166/181) of their potential applicant pool, at a time when our nation is at war and under attack.”²² The

17. Third Circuit Brief for Plaintiffs, *supra* note 13, at 9 (quoting 140 Cong. Rec. 11,441 (1994) (statement of Rep. Pombo)).

18. *Id.* at 8.

19. Military Law Students’ Brief, *supra* note 11, at 1-2.

20. *Id.* at 16 (emphasis added).

21. *Id.* at 3.

22. *Id.* The military law student amici are referring to the percentage of all accredited law schools that are member institutions of the Association of American Law Schools (AALS). AALS member institutions are bound to comply with AALS non-discrimination policies in conducting their placement activities. The Bylaws of the AALS provide:

A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual

statement, it should be noted, was not that military recruiters would have to arrange access to law students in a different way, or even in a less convenient way, but that military recruiters would simply “lose access” to them, as if law students attending AALS law schools could no longer be contacted.

Even when the facts at issue were peculiarly military facts – or perhaps especially when they were peculiarly military facts – the military law student amici adjusted them as necessary to fit the desired conclusion. In response to plaintiffs’ citation of the military’s own acknowledgment that competition among law students for Judge Advocate positions was intense²³ (mockingly referred to as plaintiffs’ “rosy picture”²⁴), the brief cited a series of newspaper articles and congressional commentary about the severe difficulty the military is now having in recruiting enlisted personnel – not lawyers, and not even officers.²⁵ The brief tied together these two completely unrelated recruiting tasks – teenagers versus law school graduates – and concluded, therefore, that “[t]he exclusion of military recruiters from law school that plaintiffs seek will have an especially egregious effect on military recruitment in the future and should therefore be denied.”²⁶

The factual distortions in the Military Law Students’ Brief are not a new development in the legal analysis of military issues. Facts have been the principal casualty of the doctrine of judicial deference to military judgment set out in decisions of the United States Supreme Court between 1974 and 1986. (In-depth discussion of this doctrine awaits in Part II of this Article.) In each of these cases the mere assertion of military necessity prevailed over an individual’s constitutional right of free speech,²⁷ gender equality,²⁸ or free exercise of religion,²⁹ and thus it is not surprising that the military law students

orientation. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school’s firm expectation that the employer will observe the principle of equal opportunity.

Bylaws of the Association of American Law Schools, art. 1, §6.3(b), *available at* <http://www.aals.org/bylaws.html>.

23. Third Circuit Brief for Plaintiffs, *supra* note 13, at 11 (“Competition for legal jobs in the military remained intense, so intense that one Army recruiter enthused in another 1998 letter that even ‘very qualified applicants will not be selected for a position.’”).

24. Military Law Students’ Brief, *supra* note 11, at 9.

25. *See id.* at 9-11.

26. *Id.* at 11.

27. *See Parker v. Levy*, 417 U.S. 733 (1974).

28. *See Rostker v. Goldberg*, 453 U.S. 57 (1981).

29. *See Goldman v. Weinberger*, 475 U.S. 503 (1986).

relied on those cases.³⁰ Judicial deference to the military is an all-purpose tool to avoid detailed scrutiny of factual and legal assertions about the military.³¹

The military law student amici took a dramatic but potentially humorous turn when they suggested that law schools must be stopped from interfering with military recruiting because Judge Advocates may soon be leading the charge into combat: “The military has a particularly strong interest in recruiting the most talented lawyers for its force, because such individuals serve as officers who may potentially be called upon to lead enlisted servicemembers in combat.”³² In support of that statement the brief cited the U.S. Army’s teaching on training and equipping soldiers,³³ which reads, in part:

American Soldiers, possessed of a fierce warrior ethos and spirit, fight in close combat, dominate key assets and terrain, decisively end conflicts, control the movement of people, protect resource flows, and maintain post-conflict stability. We must never forget that it is the Soldier – fierce, disciplined, well trained, and well equipped – who ultimately represents and enables the capabilities we as an Army provide the Joint Force and the Nation.

We must prepare all our Soldiers for the stark realities of the battlefield. No Soldier can survive in the current battlespace without constant training in weapons and fieldcraft and a continuous immersion in the Army’s Warrior Culture. There can be only one standard of training for our Soldiers, regardless of component or specialty.³⁴

It seems that the amici were relying on the guide’s reference to “all our Soldiers” and “one standard of training” to suggest that Judge Advocates are

30. See Military Law Students’ Brief, *supra* note 11, at 11-12.

31. Judicial deference is also an equal-opportunity tool, available to both ends of the political spectrum when avoidance of facts is convenient. Attorney General Janet Reno relied on the doctrine of deference to defend “Don’t Ask, Don’t Tell.” She wrote, “Because of the extraordinary deference paid by courts to military service, we are confident that the new policy proposed by the Secretary of Defense will be upheld against constitutional challenge.” *Memorandum for the President from Attorney General Janet Reno, Defensibility of the New Policy on Homosexual Conduct in the Armed Forces*, July 19, 1993.

32. Military Law Students’ Brief, *supra* note 11, at 13.

33. See *id.* at 13-14.

34. U.S. Army, *The Way Ahead: Our Army at War . . . Relevant & Ready 7*, available at http://www.army.mil/thewayahead/R&RBooklet_final.pdf.

trained for combat. The guide is not referring to military lawyers, however, and it is silly and misleading to suggest that it is.³⁵

At the same time that military law students imagined a role in combat for Judge Advocates, they painted an unconvincing picture of military veterans as academically sensitive and fragile. Amici contended that law students affiliated with the military would be inhibited from participating in the classroom and in other law school activities if their institutions excluded military recruiters:

Veterans, reservists, and active duty students would be identified as associated with an institution branded by the AALS and their own law schools as discriminatory. Students with a military affiliation would be implicitly marked by their schools' action as linked to an employer whose conduct was so reprehensible as to be undeserving to set foot on campus. This ostracism toward the military and its current and former employees may inhibit some veterans from participating in the academic marketplace of ideas that is the hallmark of the American university campus.³⁶

This loss of military voice, perspective, and experience would, they argued, diminish the "vibrancy and diversity"³⁷ of the legal academic environment that was protected as a compelling interest in *Grutter v. Bollinger*.³⁸

35. The U.S. Army Judge Advocate General's Corps recruiting Web site assures applicants they will not have to attend basic training and describes the four-week military orientation course designed for new Judge Advocates: "The military orientation course allows time for establishing personnel and finance records, purchasing uniforms, and receiving instruction in several basic areas of military life. These include the wear of military uniforms, military customs and courtesy, physical fitness training, and an overnight field training exercise." See U.S. Army Judge Advocate General's Corps Recruiting, at <http://www.jagcnet.army.mil/JARO> [follow the "Frequently Asked Questions" hyperlink].

The Military Law Students' Brief, *supra* note 11, at 14, accurately states that all Marines, regardless of specialty, receive basic combat skills training. U.S. Marine Corps Judge Advocates attend Officer Candidates School and The Basic School with non-lawyer officer candidates. See U.S. Marine Corps Officer Programs, at <http://www.marineofficer.com>.

36. Military Law Students' Brief, *supra* note 11, at 4. The military law students contend that Solomon protest may discourage military veterans from even applying to law school. See *id.* at 8 (citing "the perceived lack of welcome for veterans in the legal academy").

37. *Id.* at 26.

38. 539 U.S. 306 (2003). The military law students also characterize the law schools' action as "locking the schoolhouse doors to bar military recruiters," *id.* at 2, thus suggesting that an applicable precedent may be found in the case of the students who wore black armbands to protest the Vietnam War. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights

The law student amici were absolutely correct when they expressed concern about the exclusion of military viewpoints from law schools. However, as inviting as it may be to join the *Grutter* diversity bandwagon, it is unlikely that courts will find that military law students need to be protected from the possibility that ideas expressed by others will offend them or chill their speech. The amici's objection seems parallel to the argument, once raised in defense of constitutionally discredited speech codes on university campuses, that minority students should be protected from speech that may cause them offense and therefore discourage their participation in academic discourse.³⁹ Nonetheless, I believe that law students affiliated with the military are made of tougher stuff and are able to participate despite community disagreement with "Don't Ask, Don't Tell." For that matter, I believe that gay students are made of tougher stuff as well and do not need to be shielded from the sight of uniformed reminders that anti-gay discrimination exists outside the law school community.⁴⁰ In both instances, intense controversy exists both inside and outside the law school community, and law students must learn how to cope with it.

The Military Law Students' Brief devoted its most detailed factual discussion (contained in a twenty-four-line footnote) to the identification of a perceived factual inaccuracy in the plaintiffs' presentation.⁴¹ In a declaration filed in the district court, one of the plaintiffs' lawyers made the following statement with respect to military funding for the legal education of future Judge Advocates: "And the military can, and does, still use one recruiting device that is both extraordinarily effective and fairly unique to the military, a scholarship program that defrays some costs of law school in return for a commitment to take a position in the JAG Corps."⁴² The military law student amici went to great lengths to correct this statement, which they perceived as a significant error. They explained that the program cited in the declaration, the Funded Legal Education Program (FLEP), is open only to persons who are

of speech or expression at the schoolhouse gate.").

39. See generally Thomas C. Grey, *How to Write a Speech Code Without Really Trying: Reflections on the Stanford Experience*, 29 U.C. DAVIS L. REV. 891 (1996).

40. But see Smolik Declaration, *supra* note 10, ¶9 (containing law student's statement that military recruiting on campus made her feel "nervous and uncomfortable about being identified as a lesbian" and "isolated, singled out, and threatened"); Sweeney Declaration, *supra* note 10, ¶15 (containing law student's statement that military recruiting caused "trauma," "pain," and "suffering" in gay and lesbian law students); Third Circuit Brief for Plaintiffs, *supra* note 13, at 14 (asserting that military recruiting "has made some students feel like second-class citizens, marginalizing them and silencing them").

41. See Military Law Students' Brief, *supra* note 11, at 23 n.2.

42. Declaration of E. Joshua Rosenkranz ¶12, at 7, *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) [hereinafter Rosenkranz Declaration].

already commissioned military officers. Those chosen for FLEP are essentially detailed to attend law school as their military duty, and they continue to receive their regular military compensation while the government pays a capped amount for tuition and other expenses.⁴³ The declaration did not specifically assert that civilian law students would be eligible for FLEP, but its reference to FLEP appeared in a paragraph generally discussing the ability of the military to contact, interview, and recruit students without the assistance of law school placement offices, suggesting that FLEP is an alternative for reaching current law students, which it is not.

The controversy about FLEP is a good example of why our discourse about military subjects is so dysfunctional. There is no way to know whether plaintiffs intended to confuse the court concerning the scope and significance of FLEP, whether they did not completely understand the way FLEP works, or whether they cited FLEP only as an alternative to recruiting civilians, not as a method of recruiting civilians. The response of the military law student amici, however, seemed out of proportion to whatever offense may have been committed. The complaining footnote was reminiscent of the blogosphere's cottage industry of identifying instances in which media reports or public speakers have made factual mistakes, sometimes technical and unrelated to the substantive issue at hand, when discussing military activities or military personnel.⁴⁴ The mistakes are then cited as evidence of the civilian elite's disregard for military affairs. With respect to the Military Law Students' Brief, it does not take twenty-four lines to clarify that FLEP is not a substitute for access to civilian law students. The purpose of the footnote, however, was less to clarify the facts than to argue that civilians are not competent to discuss military matters. The footnote was designed not so much to explain the nature of the specific mistake that plaintiffs may have made in discussing Judge Advocate scholarships, but to alert the court to the danger that lies in allowing civilians to justify their arguments through reliance on military facts.

Almost all of the factual development in *FAIR v. Rumsfeld* was centered on proving or disproving facts seen from the perspective of law schools. If both plaintiffs and amici had truly engaged each other in discussion of facts from the military's perspective, the debate concerning the relevance of FLEP would have played out much differently. First, plaintiffs might have understood FLEP more fully and not portrayed it as an effective substitute for school-sponsored access to civilian law students. No one would reasonably

43. See Military Law Students' Brief, *supra* note 11, at 23 n.2.

44. Two well-known examples are *Countercolumn*, <http://iraqnow.blogspot.com>, a blog written by Jason Van Steenwyk, an infantry Captain in the Florida Army National Guard who served in Iraq, and *Rantingprofs*, <http://www.rantingprofs.com>, a blog written by Cori Dauber, an Associate Professor of Communications Studies at the University of North Carolina.

expect law firms to recruit lawyers through programs akin to FLEP. That would require firms to make a future commitment to hire an individual as a lawyer, in addition to paying for his or her legal education, before that individual had even entered law school. I doubt that many firms would see that speculative option as an advantage in recruiting. It was careless, if not disingenuous and misleading, for the FAIR plaintiffs to suggest that FLEP was a reasonable substitute for civilian recruiting. In the same vein, the military law student amici (who should have greater access to facts concerning military recruiting programs) would not have insisted so adamantly that “plaintiffs are mistaken as to the existence of a military scholarship program for law school”⁴⁵ other than FLEP. Candid, informed discussion would have required amici to disclose that the U.S. Air Force, for example, actually does have a scholarship program targeted at civilians attending law school.⁴⁶

Unfortunately, what usually takes the place of candid discussion of military affairs is sheer assertion, coupled with the insistence that a particular conclusion is correct simply because the military or Congress says so. The military law students envisioned a cascading series of disasters that would befall the nation and the military if law schools ended their sponsorship of military recruiting. The end of on-campus interviews would lead to a shortage of military lawyers, which would lead to a reduction in the training of soldiers in the law of war, which would lead to an increase in violations of the law of war and an increase in civilian casualties, which would lead to diminished moral authority of the United States abroad.⁴⁷ Looking at the predicted chain of events from an internal, domestic point of view – within the military itself – the end of interviews would lead to a shortage of military lawyers, which would lead to a practice of triage on military justice cases, which would cause the military to forego prosecutions of some military offenses, which would damage military discipline and military effectiveness,⁴⁸ causing “the very downward spiral the current military justice system was enacted to address.”⁴⁹

Those who are familiar with the strategy employed by Congress and the military to insulate “Don’t Ask, Don’t Tell” from constitutional challenge will recognize this boilerplate use of military discipline as the all-purpose, fact-free

45. Military Law Students’ Brief, *supra* note 11, at 23 n.2.

46. The U.S. Air Force’s JAG Corps Graduate Law Program (GLP) pays a tax-free stipend each month during the last two years of law school. For students attending law schools identified as Historically Black Colleges and Universities or Hispanic Serving Institutions, GLP also pays up to \$15,000 in law school tuition per year. See U.S. Air Force Judge Advocate Recruiting, at www.jagusaf.hq.af.mil/EDprgrms/glp.htm.

47. See Military Law Students’ Brief, *supra* note 11, at 15-16.

48. See *id.* at 18-19.

49. *Id.* at 19.

response.⁵⁰ The assertion that a given military decision, policy, or practice is necessary to meet the needs of military discipline can potentially be invoked in a limitless variety of circumstances. The challenger's response is automatically discounted under the assumption that an outsider to military society is not qualified to understand or to question how best to build or maintain military discipline, or what might cause discipline to deteriorate. In enacting "Don't Ask, Don't Tell," Congress included conclusory findings supposedly derived from military expertise:

The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.⁵¹

Assertions about the needs of military discipline come close to being judicially bullet-proof when they are wrapped in the armor of judicial deference in military matters. The value of studying the Military Law Students' Brief is that it shows how well future military lawyers have already assimilated the stilted and artificial form of discourse used when military affairs are addressed in legal settings. Facts do not need to be proved, or even provable. They do not need to be accurate, or even plausible. They can be ridiculous on their face, and it will be good enough if the issue at hand relates to the military. It would be easy to chalk up the defects in the Military Law Students' Brief to the excessive zeal of advocates, or perhaps just to weak brief writing. But the problem goes much deeper. The brief is the canary that reveals how law schools are failing in their role as academic stewards of legal and constitutional control of the military. The law schools' response to the Solomon Amendment is but one manifestation of a much broader problem.

50. See Diane H. Mazur, *Is "Don't Ask, Don't Tell" Unconstitutional After Lawrence? What It Will Take to Overturn the Policy*, 15 U. FLA. J.L. & PUB. POL'Y 423, 435-439 (2004) (critiquing government brief filed in opposition to constitutional challenge of the military's criminal sodomy prohibition).

51. 10 U.S.C. §654(a)(14)-(15) (2000).

The military law student amici stated that they “are deeply interested in this case because its outcome could affect the composition of the military.”⁵² They do not know how right they are. More significantly, the law schools do not know how right these students are. When law schools protest military policy by disengaging from the military and its activities, it has a significant effect on who chooses to join the military. That effect is not in the best interests of the military, of law schools, or of civilian society as a whole.⁵³ It also has a significant impact on the judiciary and makes it less likely that the courts will assume their proper role in evaluating the constitutionality of military-related decisions.

II. THE ELEPHANT IN THE ROOM: JUDICIAL DEFERENCE TO THE MILITARY AND THE INDIFFERENCE OF LAW PROFESSORS

Any discussion of constitutional questions related to the military must include the so-called doctrine of judicial deference to the military. I qualify this doctrine as “so-called” because, already thin, it is routinely distorted and exaggerated by courts, by litigants, and by academics.⁵⁴ Worse yet, distortion and exaggeration on this issue almost always go un rebutted. Judicial deference to the military is a device principally used for *ending* a conversation about matters related to the military, not for engaging in meaningful analysis. It is a device used to discourage interaction and exchange across the civil-military boundary, to limit government accountability for military policy choices, and to distance and separate civilian society from responsibility for matters concerning the military. Unfortunately, during the past thirty years the doctrine has been an unqualified success.

A. *Rostker v. Goldberg and Registration for a Military Draft*

Rostker v. Goldberg,⁵⁵ the 1981 decision upholding the congressional choice to require men, but not women, to register for a potential military draft, is the authority most commonly cited for the proposition that courts should

52. Military Law Students’ Brief, *supra* note 11, at 5.

53. See Diane H. Mazur, *Why Progressives Lost the War When They Lost the Draft*, 32 HOFSTRA L. REV. 553 (2003) (arguing that transition to an all-volunteer force weakened civil-military relations, politicized the military, and eroded rights of equality in civilian society) [hereinafter Mazur, *Why Progressives Lost the War*].

54. For a comprehensive history of the doctrine of judicial deference to military judgment, see Diane H. Mazur, *Rehnquist’s Vietnam: Constitutional Separatism and the Stealth Advance of Martial Law*, 77 IND. L.J. 701 (2002) [hereinafter Mazur, *Rehnquist’s Vietnam*].

55. 453 U.S. 57 (1981).

give great deference to decisions by the political branches on military matters. *Rostker v. Goldberg* made clear, interestingly, that judicial deference to policy judgments on military matters need not necessarily favor the military's own judgment, because at the time of *Goldberg* the military actually wanted to have women register for the draft. Military and defense department officials estimated that the military could use at least 80,000 additional women (12.3% of the total call of draftees) during the first six months of a military draft.⁵⁶ Congress, on the other hand, disregarded these facts and stated that the draft was designed to raise only combat-eligible troops, who by law and defense policy could not be women.⁵⁷ This sleight-of-hand enabled Congress to exclude women from one of the most fundamental obligations of citizenship because it was not their "place" to serve involuntarily⁵⁸ and because their limited role "enjoys wide support among our people."⁵⁹

In reviewing this facial classification on the basis of sex, Justice Rehnquist declined to follow *Craig v. Boren*,⁶⁰ which would have asked whether the exclusion of women from draft registration was substantially related to military effectiveness. Under *Craig*'s intermediate scrutiny, the government should have been required to demonstrate why it was important to exclude women from a conscripted force in order to make that force effective, and not just that it was possible to raise an effective conscripted force without women. Justice Rehnquist, however, dismissed the suggestion that heightened equal protection review applied in the context of military affairs. In its place he substituted a sub-rational-basis level of scrutiny that wholly deferred to legislative judgment in matters concerning the military.⁶¹ With respect to military affairs, he stated, "judicial deference . . . is at its apogee."⁶²

56. *Id.* at 97-102 (Marshall, J., dissenting).

57. *Id.* at 76. Exaggeration of combat activities is a common tactic for those defending military discretion. Just as the military law student amici exaggerated (in fact, created) a combat role for Judge Advocates, see Military Law Students' Brief, *supra* note 11, at 13-14, members of Congress exaggerated the need for combat-eligible troops to justify the exclusion of women from responsibility for draft registration. Senator John Warner speculated that, like General Patton at the Battle of the Bulge, the modern-day Army could pull cooks and other support personnel from their jobs and order them to join tank crews. Cooks therefore could not be women. See *Rostker*, 453 U.S. at 82 n.17.

58. See *Rostker*, 453 U.S. at 71 (noting that "Congress was fully aware . . . of the current thinking as to the place of women in the Armed Services").

59. *Id.* at 77 (quoting S. Rep. No. 96-826, at 157 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2612, 2647).

60. 429 U.S. 190 (1976).

61. See *Rostker*, 453 U.S. at 69-70 (making mildly sarcastic, quotation-mark-encased reference to levels of "scrutiny" while declining to apply any particular level of scrutiny).

62. *Id.* at 70.

This is a curious form of judicial deference. Justice Rehnquist explained that courts have a diminished role to play in military affairs, because in that realm Congress is “acting under an explicit constitutional grant of authority”⁶³ to raise and support armies, to provide and maintain a Navy, and to make rules for the government and regulation of the armed forces.⁶⁴ It is unclear why Justice Rehnquist believed congressional reliance on an affirmative constitutional grant of authority was somehow special in a constitutional structure in which Congress *always* relies on some affirmative grant of authority.⁶⁵ Nonetheless, *Rostker v. Goldberg* was built on the assumption that Congress had discretion to exercise its military powers as it saw fit without the usual measure of constitutional review:

This is not, however, merely a case involving the customary deference accorded congressional decisions. The case arises in the context of Congress’ authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference. . . .

Not only is the scope of Congress’ constitutional power in this area broad, but the lack of competence on the part of the courts is marked.⁶⁶

Nor was it apparent why the Court’s competence in military subjects is so lacking in comparison to its competence in other complex arenas of congressional regulation. The Court’s desire to distance itself from any role in measuring the constitutionality of military governance was apparently so great that its claims of ignorance came close to boasting. *Rostker v. Goldberg* padded its judicial assertions of incompetence with an inapposite citation to *Gilligan v. Morgan*,⁶⁷ the Kent State case in which it declined to install federal courts as day-to-day managers of National Guard military training, weaponry, and orders. In *Gilligan*, it was understandable that the Court found the judiciary ill-suited to “assume continuing regulatory jurisdiction”⁶⁸ and make the hands-on operational decisions necessary to reform the Ohio National

63. *Id.*

64. U.S. CONST. art. I, §8, cls. 12-14.

65. *See* U.S. CONST. art. I.

66. 453 U.S. at 64-65.

67. 413 U.S. 1 (1973).

68. *Id.* at 5.

Guard.⁶⁹ Yet the requested relief was so far detached from practicality that the Court's holding was compelled not so much by deference to military judgment as by the non-justiciable nature of the political questions presented. The *Gilligan* Court noted that “[i]t would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible – as the Judicial Branch is not – to the electoral process.”⁷⁰

Relying on a carefully crafted combination of factual distortion, departure from standard constitutional interpretation, and eager protestations of ignorance, *Rostker v. Goldberg* awarded Congress constitutional latitude to exclude women from the draft for *the very purpose of* affirming traditional notions of gender roles, a purpose that never would have been legitimate under prevailing equal protection standards. The holding of the case was never in doubt once Justice Rehnquist dismissed concerns about equal protection by placing them in fatal, mocking quotation marks: “Congress was certainly entitled . . . to focus on the question of military need rather than ‘equity.’”⁷¹

B. The Origins of Rostker v. Goldberg . . . Seven Years Earlier

The history of judicial deference to military judgment is a fascinating one. Even using the word “history,” however, paints the doctrine as much more entrenched than it actually is. At the time *Rostker v. Goldberg* was decided, the idea that general policy judgments related to military governance might not be subject to the same constitutional review as other governmental policy judgments had been in existence for only seven years, dating from *Parker v. Levy*⁷² in 1974. *Levy* was the Trojan Horse of judicial deference to the military. It should have been a fairly narrow and unremarkable decision upholding the court-martial conviction of a drafted Army doctor⁷³ who

69. The Court declared, [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Id. at 10.

70. *Id.*

71. *Rostker v. Goldberg*, 453 U.S. 57, 80 (1981).

72. 417 U.S. 733 (1974).

73. The Army Court of Military Review described Captain Levy as “a thirty-year-old man of better than average background and advantages, who agreed to serve his country for two years if he would be permitted first to obtain a medical degree, but who, when called upon to fulfill his bargain, failed miserably.” *United States v. Levy*, 39 C.M.R. 672, 675 (A.B.R. 1968)

disobeyed orders to conduct training for enlisted medical personnel and spent his time at the hospital urging black soldiers to refuse assignment to Vietnam.⁷⁴ Whether or not one would agree with Captain Levy's stance that professional medical ethics compelled his resistance to the military, the processes of military justice under the congressionally enacted Uniform Code of Military Justice (UCMJ)⁷⁵ were appropriate for deciding whether Captain Levy's statements were "unbecoming an officer and a gentleman"⁷⁶ and "to the prejudice of good order and discipline."⁷⁷ The Constitution grants Congress the authority to make rules for the government and regulation of the military, and the Article I system of courts-martial is designed to impose discipline and punishment under circumstances that may require a peculiarly *military* judgment.⁷⁸ *Parker v. Levy* held, not unreasonably, that military personnel understood the military's expectations for discipline and obedience and, therefore, the generally worded provisions under which Captain Levy was convicted were not unconstitutionally vague or overbroad.⁷⁹ The opinion could have been a short one.

Parker v. Levy was used, however, to build an edifice that would separate the all-volunteer military both from civilian society and from constitutional scrutiny. The opinion was carefully crafted on two themes that would, over the course of the next generation, fundamentally change the relationship of the military to its civilian control. The first theme was one of separatism. The military was not subject to the same judicial review as other government institutions because it was separate – physically and experientially – from

(footnote omitted).

74. *Id.* at 675-676, 677-678. For example, one specification alleged that Captain Levy told enlisted men the following: "I would refuse to go to Viet Nam if ordered to do so. I don't see why any colored soldier would go to Viet Nam; they should refuse to go to Viet Nam and if sent should refuse to fight because they are discriminated against and denied their freedom in the United States, and they are sacrificed and discriminated against in Viet Nam by being given all the hazardous duty and they are suffering the majority of casualties. If I were a colored soldier I would refuse to go to Viet Nam and if I were a colored soldier and were sent I would refuse to fight." *Parker v. Levy*, 417 U.S. at 738 n.5. See generally CHARLES C. MOSKOS & JOHN SIBLEY BUTLER, *ALL THAT WE CAN BE: BLACK LEADERSHIP AND RACIAL INTEGRATION THE ARMY WAY* 8-9 (1996) (refuting statistically the conventional wisdom that black servicemembers suffered a disproportionately high percentage of fatalities in the Vietnam War).

75. 10 U.S.C. §§801-946 (2000).

76. 10 U.S.C. §933 (2000).

77. 10 U.S.C. §934 (2000).

78. See 1 FRANCIS A. GILLIGAN & FREDRIC I. LEDERER, *COURT-MARTIAL PROCEDURE* 2-4 (2d ed. 1999) (explaining the necessity for a separate system of military criminal justice) [hereinafter *COURT-MARTIAL PROCEDURE*].

79. *Parker v. Levy*, 417 U.S. 733, 757, 760-761 (1974).

civilian society.⁸⁰ The second theme was one of moral and cultural superiority. The military was not subject to the same judicial review as other government institutions because the military's expectations for its members were considered higher than those that would otherwise apply. It would, therefore, diminish the military's moral and cultural values to measure them against the lesser standards applicable to civilians. Justice Blackmun, although he "wholly concur[red]"⁸¹ in the Court's opinion, wrote separately to emphasize the moral superiority of a military institution that "expects more of the individual in the context of a broader variety of relationships than one finds in civilian life."⁸²

In military life there is a higher code termed honor, which holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code.⁸³

Relativistic notions of right and wrong, or situation ethics, as some call it, have achieved in recent times a disturbingly high level of prominence in this country, both in the guise of law reform, and as a justification of conduct that persons would normally eschew as immoral and even illegal.⁸⁴

The more important of the two themes underlying *Parker v. Levy* is the establishment of distance or separatism between military and civilian societies. If the military as an institution is separate from and inaccessible to civilians, so goes the argument, then perhaps the military should be considered separate and inaccessible – and unaccountable – in a constitutional sense as well. However, when *Levy* was decided in 1974, there was no precedent for treating the military as a constitutionally unique entity.⁸⁵ Only by misrepresenting an off-hand, inconsequential comment from an opinion written twenty-one years earlier could the Court begin to build what would eventually become the doctrine of judicial deference to the military.

80. *See id.* at 743-749 (citing a number of pre-World War I, and in two instances pre-Civil War, decisions involving what was then a small and isolated frontier military).

81. *Id.* at 762.

82. *Id.* at 763.

83. *Id.* at 765 (quoting *Fletcher v. United States*, 26 Ct. Cl. 541, 563 (1891)).

84. *Id.* at 765.

85. The Fifth Amendment expressly exempts "cases arising in the land or naval forces . . . when in actual service in time of War or public danger" from the requirement of grand jury indictment, but the existence of this specific and narrow exception suggests that a more general immunity for the military from constitutional standards was never intended.

*Orloff v. Willoughby*⁸⁶ rejected a doctor's claim that he had been legally conscripted into the Army during the Korean War but then illegally assigned lesser medical duties that did not require a doctor's skill and education.⁸⁷ In the course of the opinion, the Court noted in passing that the Article I system of military justice employing courts-martial was separate from the civilian system of justice employing Article III federal courts: "The military constitutes a specialized community governed by a separate discipline from that of the civilian."⁸⁸ Of course the two systems of justice were separate. Military discipline was not, and is not today, carried out in civilian federal courts.⁸⁹ The statement was especially off-hand because *Orloff v. Willoughby* did not even involve the military justice system. Dr. Orloff sought habeas corpus relief from his induction into the military because he was unhappy with particular medical duties he had been assigned. The Court had no interest in stepping into the middle of an argument between the Army and one disgruntled draftee about whether he had been assigned duties that were beneath his station as a doctor. In the Court's words, "judges are not given the task of running the Army."⁹⁰

In *Parker v. Levy*, Justice Rehnquist resurrected *Orloff v. Willoughby* to support the proposition that the military is separate from civilian society in some constitutionally significant sense, but he had to rewrite the language of *Orloff* in order to get there. He took *Orloff*'s casual mention of the military's separate disciplinary system and recast it to read as a command that the military as a society should be separate from the larger civilian world it serves. In *Parker v. Levy*, Justice Rehnquist wrote that "[t]his Court has long recognized that the military is, by necessity, a specialized society separate from civilian society"⁹¹ and that "military society has been a society apart from civilian society."⁹² The jurisdictional separateness of a military justice system of courts-martial – a parallel court system that has been in existence throughout American military-legal history – was deceptively exploited to endorse a view of the entire military as an institution apart from, and not a part of, the society it protects. Justice Rehnquist's misrepresentation enabled the

86. 345 U.S. 83 (1953).

87. Dr. Orloff's commission as an officer, a prerequisite to assignment as a military doctor, was withdrawn when he refused to complete a loyalty certificate that inquired into associations with organizations designated as subversive. *See id.* at 89.

88. *Id.* at 94.

89. *See* COURT-MARTIAL PROCEDURE, *supra* note 78, at 2-4.

90. *Orloff*, 345 U.S. at 93. The Court's annoyance with Dr. Orloff's behavior was very clear. "Presumably, some doctor willing to tell whether he was a member of the Communist Party has been required to go to the Far East in his place." *Id.* at 94.

91. 417 U.S. at 743.

92. *Id.* at 744.

Court to equate deference to a decision denying an individual draftee a change in his duty assignment with deference to a policy decision denying women equal protection in military matters.

The significance of the separate-society rationale for constitutional civil-military relations cannot be overstated. It has been used consistently during the all-volunteer era to insulate and immunize the military from constitutional expectation and constitutional review. When Congress enacted a draft registration law that classified young people on the basis of sex, attaching an obligation of service to men but not to women, it was well aware it would not be held to the usual standards of equal protection. Congress knew that it would not be expected to demonstrate that the exclusion of women was substantially related to any important purpose of government. It was also well aware that relevant facts either supporting or undercutting any justifications offered for a sex-based classification were legally irrelevant, because courts would defer to legislative *conclusions* concerning military affairs without inquiring into the underlying evidence. In short, where the military was concerned, Congress was welcome to disregard the Constitution, and legislators openly stated just how much latitude they thought they had:

The Supreme Court's most recent teachings in the field of equal protection cannot be read in isolation from its opinions giving great deference to the judgment of Congress and military commanders in dealing [with] the management of military forces and the requirements of military discipline. The Court has made it unmistakably clear that even our most fundamental constitutional rights must in some circumstances be modified in the light of military needs, and that Congress' judgment as to what is necessary to preserve our national security is entitled to great deference.⁹³

During the 1980 draft debate, some members of Congress were even more candid than that about the benefits of judicial deference in matters concerning the military. Senator John Warner, for example, highlighted a letter written by distinguished law school professors stating that Congress could obligate men only, women only, or both women and men for draft registration and that “no court could challenge its decision.”⁹⁴

93. *Rostker v. Goldberg*, 453 U.S. 57, 69 n.6 (1981) (quoting S. REP. NO. 96-826, at 159-160 (1980)).

94. See 126 Cong. Rec. 13,881 (1980) (submitting a letter written to Senator Sam Nunn by Joseph W. Bishop Jr., Robert H. Bork, and Eugene V. Rostow of Yale Law School).

*Goldman v. Weinberger*⁹⁵ was the third and most recent major case, the last in the trilogy including *Parker v. Levy* and *Rostker v. Goldberg*, to endorse a broad doctrine of judicial deference in military matters.⁹⁶ *Goldman* upheld an Air Force regulation that prohibited Captain Goldman, who served as a clinical psychologist and who was also an Orthodox Jew and an ordained rabbi, from wearing a yarmulke while in uniform.⁹⁷ In 1986, the year *Goldman* was decided, strict scrutiny applied to neutral laws that burdened religious freedom.⁹⁸ Perhaps the Air Force's contention that standardized uniform dress was necessary to maintain unity and discipline would have justified upholding the regulation under that standard.

But that was not the path the Court took. Rather than expecting the Air Force to explain why it chose not to grant Captain Goldman an exemption, the Court questioned the right of judges to ask for any explanation at all, even under circumstances in which it appeared that the Air Force had enforced the regulation in retaliation for Captain Goldman's testimony in an unrelated case.⁹⁹ The opinion marshaled all the shibboleths of judicial deference to the military crafted in the twelve years beginning with *Levy*: the military was a society separate from civilian society;¹⁰⁰ the military insisted upon a "respect for duty" that civilians did not;¹⁰¹ courts were incompetent to assess the needs of military discipline;¹⁰² the Constitution assigned no express authority over

95. 475 U.S. 503 (1986).

96. The Court has relied on this singular form of judicial deference to military-related decisions in three additional cases after *Goldman v. Weinberger*. See *Loving v. United States*, 517 U.S. 748 (1996) (upholding congressional delegation of authority to the President to prescribe aggravating factors in military capital cases); *Weiss v. United States*, 510 U.S. 163 (1994) (upholding assignment of commissioned officers as military judges without a second appointment pursuant to the Appointments Clause; holding that due process does not require military judges to have fixed terms of office); *Solorio v. United States*, 483 U.S. 435 (1987) (holding that jurisdiction of courts-martial is based on the military status of the defendant and not the connection of the offense to military service, overruling *O'Callahan v. Parker*, 395 U.S. 258 (1969)); see also Earl F. Martin, *Separating United States Servicemembers from the Bill of Rights*, 54 SYRACUSE L. REV. 599 (2004) (separating judicial deference cases into categories of weak, moderate, and strong displays of deference).

97. See *Goldman*, 475 U.S. at 504-505.

98. See *Sherbert v. Verner*, 374 U.S. 398 (1963). *Employment Div. v. Smith*, 494 U.S. 872 (1990) would later hold that neutral laws of general applicability burdening religious observance did not violate the Free Exercise Clause, provided the neutral law was not intended to burden religious observance.

99. See *Goldman*, 475 U.S. at 505.

100. *Id.* at 506 (exaggerating the "separate society" rationale by claiming the Court has "repeatedly held" the military is a separate society, and misleadingly citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953), in support).

101. *Id.* at 507.

102. *Id.*

the military to the judiciary;¹⁰³ and judicial deference was “at its apogee” when military governance was at issue.¹⁰⁴ Ultimately, the Court held that “[t]he desirability of dress regulations in the military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment.”¹⁰⁵

Let us pause to consider the enormity of a statement that the military has no constitutional mandate to abandon professional judgment in the face of a prima facie constitutional violation. In the words of Justice Brennan in dissent, if the military is willing to assert that disciplinary needs require restriction of constitutional rights, “it seems the Court will accept that conclusion, no matter how absurd or unsupported it is.”¹⁰⁶ No credible explanation is necessary.¹⁰⁷ In its petition for certiorari in *FAIR v. Rumsfeld*, the government openly laid claim to an entitlement to have its judgment respected, without question or scrutiny, in circumstances involving the military. The government asserted that it did not have to explain itself to courts, to law schools, or to anyone else when military judgment was at issue:

The court of appeals’ insistence upon more proof was particularly misconceived here, because to the extent anything more than common sense is required to support the principle of equal access for military recruiters, Congress’s judgment in enacting the funding condition furnishes that support. *See, e.g., Goldman v. Weinberger*, 475 U.S. 505, 509 (1986) (holding that government is not required, in response to Free Exercise Clause claim, to offer evidentiary support to establish need for challenged military dress regulations). Article I assigns the power “[t]o raise and support Armies” to Congress, and Congress has made the judgment that equal access is necessary to “raise and

103. *Id.* at 508.

104. *Id.*

105. *Id.* at 509. Congress passed legislation in response to *Goldman v. Weinberger* that permitted servicemembers to wear “an item of religious apparel” while in uniform provided the item was “neat and conservative” and would not “interfere with the performance of the member’s military duties.” *See* 10 U.S.C. §774 (2000).

106. *Goldman*, 475 U.S. at 515 (Brennan, J., dissenting).

107. *See id.* at 516 (Brennan, J., dissenting) (“When a military service burdens the free exercise rights of its members in the name of necessity, it must provide, as an initial matter and at a minimum, a *credible* explanation of how the contested practice is likely to interfere with the proffered military interest.”); *id.* at 526 (Blackmun, J., dissenting) (“the Air Force has failed to produce even a minimally credible explanation for its refusal to allow Goldman to keep his head covered indoors”); *id.* at 528 (O’Connor, J., dissenting) (“No test for free exercise claims in the military context is even articulated, much less applied. It is entirely sufficient for the Court if the military perceives a need for uniformity.”).

support” military forces of the highest caliber. That judgment is entitled to substantial deference.¹⁰⁸

The doctrine of judicial deference to military judgment has done great damage to civil-military relations and to civilian control of the military during the all-volunteer era. This problem cannot be swept away by the assurance that, even if the judiciary has abdicated its role to evaluate the constitutionality of military decision-making, civilians in the legislative and executive branches still exercise sufficient civilian control. Civilian control requires more than just control by some civilians. Civilian control of the military requires control by the entire constitutional structure of government in all its facets, including judicial review. Civilian control of the military without the judiciary is an inadequate substitute.

The doctrine of judicial deference to the military has also done great damage to the quality of legal argument and legal decision-making in matters related to the military. We have now trained a full generation of lawyers who have been told that military issues are contested on the basis of bald assertion and exaggerated conclusion, not on the basis of evidence and facts. We have trained a generation of lawyers to believe it is unnecessary, even inappropriate, to ask the military, or Congress when acting on the military’s behalf, to explain or justify its decisions. We have trained a generation of lawyers to assume that lack of candor is an accepted form of discourse in cases involving the military when it would not be otherwise.

You might think that law professors would be intrigued by a constitutional anomaly as striking as the extreme judicial deference to the military reflected in the cases discussed above. The doctrine is a mile wide and an inch deep, inconsistent with precedent, of relatively recent vintage, and unexpectedly born during the transition from a draft military to the all-volunteer force. But you would be wrong. Almost all law professors have been indifferent to this radical form of judicial deference and the corrosive effect it has had on constitutional values of equality. With rare exceptions, law schools and legal academics have made no effort to understand or to challenge judicial deference to the military, nor have they attempted to understand military necessity, discipline, or effectiveness in the context of constitutional control of the military. They have failed to subject constitutional powers of governance over servicemembers to the same investigation applied to other constitutional powers. There is a pervasive lack of interest in the military, even though it is

108. Petition for Writ of Certiorari at 19, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (May 2, 2005) (No. 04-1152) (also relying on *Rostker v. Goldberg*, 453 U.S. 57 (1981)).

one of our most fundamental institutions. When legal academics meet judicial deference to military judgment, they roll over.

It is amusing, and at the same time distressing, to see scholars who can shred untold forests in writing endlessly and repetitively about almost any constitutional issue suddenly be struck silent and submissive where the military is concerned. In an era in which originalism is a strong current in constitutional discussion, it is amazing to read that a narrow doctrine of deference built between 1974 and 1986 through the opinions of a single justice already qualifies as a longstanding constitutional tradition,¹⁰⁹ one that is apparently no longer open to question or discussion – even by those who might otherwise be inclined to challenge it. To the extent that judicial deference to the military gets any conscious attention, and it rarely does, it is accepted blindly as the immovable foundation of military law.

III. *FAIR v. RUMSFELD*: A COUNTERPRODUCTIVE EMPHASIS ON EXPRESSION

A. *Solomon Protest and the Continuing Spiral of Shunning*

The Third Circuit's decision in *FAIR v. Rumsfeld*¹¹⁰ framed the Solomon controversy as a dueling exchange of expression between law schools and the military. Law schools were engaged in expression, according to the court, when they withheld placement assistance from employers whose

109. In scholarship of the last decade, see, for example, Erwin Chemerinsky, *The Constitution in Authoritarian Institutions*, 32 SUFFOLK U.L. REV. 441, 443-449 (1999) (presenting judicial deference to the military as settled and defensible doctrine); *id.* at 443 (“It is familiar that the Bill of Rights has little application in the military.”); William N. Eskridge Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062, 2173 (2002) (noting “the judiciary’s long tradition of near-absolute deference to military judgments”); William N. Eskridge Jr., *The Relationship Between Obligations and Rights of Citizens*, 69 FORDHAM L. REV. 1721, 1736 (2001) (“It is true that the Court defers to that [political] process on military preparedness issues, but the best reason for deference is that the Court is not competent to second-guess the judgment of military experts.”); Cass R. Sunstein, *Liberty After Lawrence*, 65 OHIO ST. L.J. 1059, 1077 (2004) (“If the policy [of “Don’t Ask, Don’t Tell”] is to be upheld, it is because courts should give great deference to military judgments, applying a form of rational basis review to them.”); *cf.* John F. O’Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000) (approving, without reservation, the practice of judicial deference to military judgment and the results achieved thereby).

Professor Chemerinsky is one of the plaintiffs in *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (May 2, 2005) (No. 04-1152).

110. 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (May 2, 2005) (No. 04-1152).

discriminatory practices were inconsistent with the law schools' core value of equality.¹¹¹ At the same time, the military was engaged in expression when it sought Judge Advocate candidates at law schools. In the court's succinct words, "Recruiting is expression."¹¹² Therefore, when law schools were compelled, under threat of the devastating penalties set by the Solomon Amendment, to "propagate, accommodate, and subsidize"¹¹³ a discriminatory recruiting message they did not share, their ability to express their own viewpoint was impaired.¹¹⁴

The court's identification of multiple components of expressive activity within the case was consistent with the way plaintiffs viewed the actions of the parties. Plaintiffs argued that law schools were expressive when they adopted anti-discrimination policies on behalf of their students:

When a law school declares it will not abet a discriminatory employer – by disseminating and posting its literature, by making appointments for it, or by providing it with a forum at which to recruit – it is engaged in quintessential expression. The law school is expressing its core values, whether couched in terms of equality, human dignity, justice, respect, or openness.¹¹⁵

Plaintiffs also characterized the military's recruitment of law students as expressive because it incorporated "persuasive advocacy about why the military is a valuable career choice for a young lawyer."¹¹⁶ Plaintiffs also highlighted another aspect of the Solomon controversy it believed to be expressive – the Solomon Amendment itself. Cosponsors of the law considered the exclusion of military recruiters to be a sign of deep disrespect for the military, and plaintiffs argued that the Solomon Amendment's principal purpose was to force law schools to adopt a more respectful attitude toward the military. The Third Circuit, however, found it unnecessary to decide whether the Solomon Amendment was enacted with a purpose to suppress the expression of ideas or whether it constituted another component of expression in the case.¹¹⁷

111. *See id.* at 231.

112. *See id.* at 236.

113. *Id.* at 239.

114. *See id.* at 231-234, 239-240.

115. Third Circuit Brief for Plaintiffs, *supra* note 13, at 20. Some, I am sure, would take issue with plaintiffs' characterization of legal education as "a delicate academic environment." *See id.* at 20-21.

116. *Id.* at 27.

117. *See FAIR v. Rumsfeld*, 390 F.3d at 245.

Despite the many forms of expression the plaintiffs and the Third Circuit dwelt upon, they missed the most important one. A finding that the military is expressive when it recruits is completely inconsequential in the larger scheme of the military's relationship to civilian society. The much more significant point is that Congress uses legislation on military matters as an opportunity to state its views about equality, and it does so frequently.¹¹⁸ It does so even when the expressive military policies adopted in no way promote military effectiveness, and even when the effort to deliver a message through legislation actually degrades military effectiveness. Conveniently (for Congress), the doctrine of judicial deference to military judgment permits Congress to use the military to make statements about equal protection on the basis of sex and sexual orientation without having to respect equal protection principles when it does so. If law schools join battle with Congress and the military over which institution can be the most effectively expressive on the subject of constitutional equality, the law schools will lose every time.

One could fully describe the dueling messages about the Solomon Amendment only by taking significantly more steps than *FAIR v. Rumsfeld* did: (1) The military excluded gay people from military service, initially unmotivated by any conscious effort to send a message about exclusion, because that exclusion was no more than a reflection of America's exclusion of gay people from public life generally. Later, however, in the era of "Don't Ask, Don't Tell," the military excluded gay people in concert with the congressional desire to make a very public statement about the inferior status of gay people in our society. (2) Law schools excluded the military from participating in their placement programs in order to communicate their commitment to constitutional values of equality. (3) Congress enacted the Solomon Amendment to make a statement about unpatriotic universities. (4) Law schools submitted to the financial coercion of Solomon and permitted military recruiting on their campuses, but they criticized the unfairness of the Solomon Amendment and expressed their continued commitment to equality by engaging in AALS-approved ameliorative activities designed to undermine "Don't Ask, Don't Tell." (5) Congress amended the Solomon Amendment to require expressly the equal treatment of military recruiters in order to make clear that it will not tolerate what it considered to be intransigent and petty behavior by law schools.

The spiral of dueling messages did not end there. U.S. District Court Judge William M. Acker announced that he would not hire Yale Law School

118. See *infra* Part IV; see also Deborah Hellman, *The Expressive Dimension of Equal Protection*, 85 MINN. L. REV. 1 (2000) (examining the expressive character of law as an independent measure of denial of equal protection).

graduates as judicial clerks,¹¹⁹ in order to make a statement of protest against Yale's lawsuit challenging the Solomon Amendment.¹²⁰ I suppose the only remaining opportunity for retaliatory expression is for Yale to exclude Judge Acker and anyone affiliated with his chambers from attending the Harvard-Yale game when it is played in New Haven. Then the spiral of shunning would be complete, because law schools would have excluded judges who excluded law clerk applicants from law schools that excluded recruiters for a military that excluded gay people.

When law schools adopted the practice of shunning military recruiters as a primary means of protesting "Don't Ask, Don't Tell" and affirming the commitment to equality that they hope to engender in their students, they became complicit in enforcing and exacerbating the same distance and separation between military and civilian society that underlies the doctrine of judicial deference to military judgment. The ability to shun or to separate others from a community is an undeniably powerful force,¹²¹ but when law schools shun the military from their collective community, they join in a larger, much more significant trend that has seen the all-volunteer force grow progressively more distant from civilian society.¹²² Law schools thus strengthen the hand of courts that assume the military is in fact a society apart from civilian society, and at the same time they fortify a doctrine of judicial deference that exempts the military from normal constitutional review on the basis that military needs and concerns cannot be understood by civilians.

119. See *U.S. Judge: No Yale Law Clerks*, NAT'L L.J., Feb. 21, 2005, at 6.

120. See *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (granting summary judgment in favor of Yale Law School faculty and finding the Solomon Amendment violated free speech and expressive association rights).

121. See Martin H. Redish & Christopher R. McFadden, *HUAC, the Hollywood Ten, and the First Amendment Right of Non-Association*, 85 MINN. L. REV. 1669 (2001) (exploring the troubling aspects of the right of non-association, or shunning, protected by the First Amendment doctrine of expressive association). Deborah Hellman also argues that shunning can be a counterproductive means of achieving change:

[S]hunning removes those shunned from contact and thus dialog with others in the community. Shunning attempts to insulate adherents of the orthodox view from interaction with non-adherents. A law that condones shunning thus violates the requirement of equal concern because it expresses that certain people are properly excluded from conversation about what is of value.

Hellman, *supra* note 118, at 61.

122. See generally Mazur, *Why Progressives Lost the War*, *supra* note 53.

B. An Expressive Rudeness

The plaintiffs in *FAIR v. Rumsfeld* would probably assert that they are not seeking to distance the military from law schools, but are only declining to assist the military in disseminating its homophobic message. Plaintiffs have bluntly described the message that the law schools intend to deliver: “We do not abet those who discriminate. We do not circulate their messages. We do not make their appointments. We do not give them platforms at our private forums. No exceptions.”¹²³ They would argue that law schools do not otherwise intend to deny or limit the military’s access to law students or to law school property.

The history of the Solomon Amendment controversy, however, viewed from the perspective of a faculty group that had great influence in shaping the response of law schools, shows that a careful distinction between the sheer *presence* of the military and the provision of *assistance* to the military may not be sustainable. In 1998, the AALS Section on Gay and Lesbian Legal Issues (“AALS Section”)¹²⁴ published two comprehensive reports for law school deans and faculties containing recommendations on how to comply most fully with AALS non-discrimination policies while avoiding financial penalty under the Solomon Amendment.¹²⁵ Before *FAIR v. Rumsfeld* changed the way Solomon protest was framed – “law schools are not limiting access by military recruiters, they are only choosing not to help them” – Solomon protest principally focused on remedying an alleged harm caused by the very presence of the military. Once the Solomon Amendment forced law schools to allow access for military recruiters, strategies of protest involved either (1) obscuring the military’s presence from the sight of law students; or (2) to the extent the military’s presence was perceptible, engaging in acts of what might be called “expressive rudeness.”

First, to reduce the visible presence of the military in law schools, the AALS Section recommended that military recruiters “be assigned a room on the law campus that is suitable for interviewing but that also is physically

123. Third Circuit Brief for Plaintiffs, *supra* note 13, at 24.

124. See Association of American Law Schools: AALS Sections, at <http://www.aals.org/sections/gl.html>. The Section on Gay and Lesbian Legal Issues is now known as the Section on Sexual Orientation and Gender Identity Issues.

125. See EXECUTIVE COMM. OF THE AALS SECTION ON GAY AND LESBIAN LEGAL ISSUES, SOLOMON II: AMELIORATION REPORT & RECOMMENDATIONS (Sept. 15, 1998) [hereinafter AMELIORATION REPORT]; EXECUTIVE COMM. OF THE AALS SECTION ON GAY AND LESBIAN LEGAL ISSUES, SOLOMON II: AMELIORATION REPORT & RECOMMENDATIONS (SUPPLEMENTAL REPORT) (Dec. 15, 1998) [hereinafter SUPPLEMENTAL AMELIORATION REPORT]. Both reports were published in Francisco Valdes, *Solomon’s Shames: Law as Might and Inequality*, 23 T. MARSHALL L. REV. 351 (1998).

distant from the ‘core’ career services facility.”¹²⁶ The purpose of this measure was to protect gay students from the sight of uniformed military personnel: “[W]hen sexual minority and other students generally avail themselves of the career services center, they should not be forcibly subjected to the immediate physical presence of military personnel actually engaging in the practice of de jure discrimination.”¹²⁷ This strategy of amelioration was unrelated to the degree or nature of the placement office’s assistance because, whether near or far, the placement office would be providing the military with a room for interviewing. The recommendation was designed instead to shield law students from observing the presence of servicemembers, who “bring[] de jure discrimination directly to the law school.”¹²⁸

The second recommended means of remedying the harm caused by the military’s presence in law schools was “tailored access”¹²⁹ (the term the AALS Section would use) – what I refer to as “expressive rudeness.” The strategy of expressive rudeness required law schools to deny military recruiters the courtesies routinely extended to employers or other law school visitors. At the time the AALS Section’s recommendations were drafted, Solomon protest focused only in part on administrative services provided by the placement office on behalf of the military’s recruiting activities. The Section also focused, or even fixated, on opportunities to shame military personnel or to make their visit to the law school physically uncomfortable or inconvenient. For example, the Section noted several times that commitment to equality required law schools to deny military personnel the food or other amenities provided to other law school visitors as a matter of courtesy.¹³⁰ In addition to withholding assistance to the military in collecting resumes and making appointments for interviews, law schools were encouraged to deny military recruiters the “courtesies” of parking, escorts, coffee, snacks, and lunch provided to other law school visitors.¹³¹ The Section believed that snatching

126. SUPPLEMENTAL AMELIORATION REPORT, *supra* note 125, at 4. The report also recommended that all branches of the military’s Judge Advocate Corps be required to interview at a particular law school on the same day, *see id.* at 37, which would limit students’ visual exposure to uniformed personnel to a single day each year.

127. *Id.* at 4 n.8.

128. *Id.* at 7.

129. *See id.* at 34.

130. *See id.* at 4, 15, 34.

131. *See* AMELIORATION REPORT, *supra* note 125, at 18. The report adds a footnote at this point, reminding law schools of the obligation of professional civility: “Of course, law schools should avoid rudeness to, or unprofessional treatment of, the military’s representatives.” *Id.* at 18 n.38. It remains unclear how law school deans, faculty members, staff members, or students were supposed to keep military recruiters away from the law school’s coffee station without being rude.

coffee and sandwiches out of the hands of servicemembers would “send a message consistent with their Solomon II disclaimers and nondiscrimination principles: discrimination and blackmail are unacceptable as social policy at the dawn of the 21st century.”¹³² Taking coffee and sandwiches away from servicemembers sends another message as well, one that is distinctively unhelpful if law schools hope to maintain any influence in legal reform related to the military.¹³³

C. The Inevitably Separatist Destination of FAIR v. Rumsfeld

The plaintiffs in *FAIR v. Rumsfeld* avoid, for the most part, any suggestion that their intent is to shun the military from the law school community or to shield law students from any visible military presence. Nonetheless, the arguments they raise lead them exactly in that direction. Law schools have framed claims grounded in expressive association and compelled speech so broadly, or perhaps so loosely, that they easily could accommodate an expressive right to shun the military in a literally physical sense, over and above any expressive right to be free of the government’s compulsion to

132. SUPPLEMENTAL AMELIORATION REPORT, *supra* note 125, at 4. Note, once again, how the spiral of expression leads law schools to “send a message” to the military.

133. I understand that the military’s discriminatory policies make people angry. They make many servicemembers and military veterans angry as well, which is why it is counterproductive to rail against servicemembers in general. I attended a program on the Solomon Amendment sponsored by the Section on Gay and Lesbian Legal Issues at the 1999 AALS Annual Meeting, at the height of contentiousness concerning military recruiting on law school campuses. I lost count of how many times officers and members of the Section derisively referred to servicemembers with phrases such as “these people,” “those people,” or, in one instance, “these immoral people.” One officer of the Section continued to refer to military recruiters in law schools as “the Gestapo” even after the guest of honor, Rep. Barney Frank of Massachusetts, asked him to stop. At no time during this program, or during two other programs concerning the Solomon Amendment conducted at the same AALS Annual Meeting, did anyone ask for the expertise or perspective of military veterans within the Section’s membership. The Urban Institute estimates that there are nearly 1,000,000 gay Americans who are military veterans. See GARY J. GATES, GAY MEN AND LESBIANS IN THE U.S. MILITARY: ESTIMATES FROM CENSUS 2000 (2004), at 6-7, available at <http://www.urban.org/url.cfm?ID=411069>.

In an effort to gain support for their recommendations, discussion leaders made factual claims that were uninformed or inaccurate. For example, they asserted that Judge Advocates were the primary instruments of “Don’t Ask, Don’t Tell” witch hunts and other investigatory abuses. See also SUPPLEMENTAL AMELIORATION REPORT, *supra* note 125, at 7 (making the same claim). The Section was unaware that, within the military criminal justice system, decisions to investigate and prosecute are not made by prosecutor-attorneys. Military commanders make these decisions, not lawyers. See COURT-MARTIAL PROCEDURE, *supra* note 78, at 89-90. Therefore, Judge Advocates are more likely to be moderating influences, not instruments of abuse.

propagate, accommodate, and subsidize the military's message. Two aspects of plaintiffs' arguments have, perhaps unintentionally, opened the door to this possibility. The first is plaintiffs' contention that the various administrative activities accompanying military recruitment at law schools are sufficiently expressive to support a First Amendment claim. The second aspect is plaintiffs' problematic reliance on what is likely the most pernicious aspect of *Boy Scouts of America v. Dale*,¹³⁴ the idea that individuals are expressive in some sense on the basis of their physical presence alone.

Law schools needed to emphasize the expressive content of the administrative support they provide to visiting employers in order to build an argument that the Solomon Amendment interferes with expressive association and compels speech. This administrative support does involve written statements, forms, documents, and messages. Plaintiffs identified in great detail the various administrative tasks necessary to arrange a series of interviews between interested, qualified law students and a visiting employer at a certain time and place. Law school placement activities involve, for example, the assignment of locations for interviews, the posting of notices, the organizing of literature, the sending of e-mails, the back-and-forth of communication between placement offices and employers, and the making of schedules and appointments.¹³⁵ Law school personnel must write and speak; they must meet and greet.

It may be that plaintiffs are correct in their contention that the administrative aspects of placement assistance are sufficiently expressive to establish expressive association and compelled speech violations. If they are correct, however, the expressive activities engaged in by law schools with respect to recruiting are entirely indistinguishable from the administrative support provided to any invited visitor to the law school. If a servicemember has been invited to the law school to speak as part of a panel of experts in military law or national security, for example, the law school might well provide a similar array of administrative courtesies. If a military appellate court has been invited to meet in session on a law school campus, the law school would undoubtedly provide extensive administrative assistance: travel arrangements for the judges, courtroom scheduling, secretarial support, postings of the schedule for arguments, and a host of other forms of assistance. In practical terms, it is impossible to distinguish the "presence" of visitors from "assistance" to them. If a servicemember is present as a guest on a law school campus, that servicemember is probably being assisted by the law

134. 530 U.S. 640 (2000).

135. See Third Circuit Brief for Plaintiffs, *supra* note 13, at 24-25, 31-32 (listing placement activities).

school in some way. At the very least, even in the complete absence of courtesies or amenities, the visitor is being afforded access to a forum within the law school community that would not be available to a member of the public at large.¹³⁶

Plaintiffs would likely distinguish such situations with the observation that they do not involve military recruiting and so do not implicate the discriminatory policies that motivate Solomon protest. However, the reliance of law schools on *Dale*¹³⁷ has made that distinction tenuous. *Dale* presumes that some individuals – in that case, gay individuals – are the source of expression in some significant way by their presence alone, even when they are silent. The *Dale* Court’s reasoning was based on the simple presence of a person, not speech, and on the message attributed to those who may be required to associate with him or her.¹³⁸ What a gay person might actually say, or not say, was irrelevant to the Court’s analysis, because the same statement would express something very different when made by a gay person instead of a straight person. The Court wrote, “The presence of an avowed homosexual and gay rights activist in an assistant scoutmaster’s uniform sends a distinctly different message from the presence of a heterosexual assistant scoutmaster who is on record as disagreeing with Boy Scouts policy.”¹³⁹ Just by being gay, being in uniform, and being present, scoutmaster James Dale forced the Boy Scouts to engage in expression concerning equality on the basis of sexual orientation. Just by standing there, gay and in uniform, he might as well have been in a parade.¹⁴⁰

It is but a short step to argue that all members of the military, when present on a law school campus in uniform and representing the government, are similarly expressive of military policies, including “Don’t Ask, Don’t Tell.” If the Boy Scouts can see a message in the mere presence of a gay person, then law students and law faculties can see expression in the mere presence of a

136. See *id.* at 26 (stating that the Solomon Amendment “is about punishing schools that decline to host a specified speaker in their own private forums”).

137. See *id.* at 22-25 (relying on *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000)).

138. The Court focused on Dale’s presence, not his speech, as the critical factor affecting the Boy Scouts’ right of expressive association. “The 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.” *Dale*, 530 U.S. at 648 (emphasis added). “*Dale’s presence* in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accept homosexual conduct as a legitimate form of behavior.” *Id.* at 653 (emphasis added).

139. *Dale*, 530 U.S. at 655-656.

140. See *id.* at 653-654 (likening Dale’s presence to the would-be parade participants in *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995)).

servicemember, even when that servicemember is not acting as a recruiter. The AALS has already taken the position that the mere presence of military recruiters is expressive, even apart from whatever expression is to be found in the administrative support that the Solomon Amendment requires law schools to provide to the military.¹⁴¹ If it seems extreme to suggest that Solomon opponents, if they prevail in the Supreme Court, would seek to exclude or shun servicemembers from the law school community when they are not engaged in military recruiting, consider that in the fall of 2002, the Chair of the AALS Section on Gay and Lesbian Legal Issues expressed outrage that a law school dean had invited a military appeals court to hold hearings on campus.¹⁴² Law schools may find themselves boxed in by the position they have taken in *FAIR v. Rumsfeld* and obligated to bar representatives of the military from the law school's community of invited guests if they wish to avoid the perception that association or engagement with the military indicates support of its policies.¹⁴³

141. See Brief of *Amicus Curiae* Association of American Law Schools in Support of Appellants at 15, *FAIR v. Rumsfeld*, 390 F.3d 219 (3d. Cir. 2004) (No. 03-4433) (citing *Dale* to support the proposition that "the presence of military recruiters on campus sends a message that the law school accepts discrimination as a legitimate form of behavior") (quotations in original omitted).

142. Message From the Section Chair, NewsL. AALS Sec. Sexual Orientation & Gender Identity Issues (Fall 2002), at 2 (formerly the Newsletter of the AALS Section on Gay and Lesbian Legal Issues), available at http://home.pacbell.net/pkykwan/AALS/documents/newsletter_fall_2002.htm. It was unclear whether the Chair's objection to the presence on campus of a "Military Court of Appeal," see *id.*, was even directed at a court with military judges. The U.S. Court of Appeals for the Armed Forces (formerly the U.S. Court of Military Appeals) is a civilian court, with civilian judges, at the apex of the military justice system. Each of the military services also has a lower Court of Criminal Appeals, a military appeals court with judges who are generally senior military lawyers but may also be civilians. See COURT-MARTIAL PROCEDURE, *supra* note 78, at xxvii-xxviii; 10 U.S.C. §866 (2000) (detailing qualifications for assignment to Court of Criminal Appeals).

143. In today's climate in which any association or engagement of law schools with the military is seen as a betrayal of the commitment to equality, it is hard to believe that we would now see a law school dean, particularly the dean of an elite northeastern law school, as the chair of a committee assigned to draft a new set of laws for the internal governance and discipline of the military. Over fifty years ago, Edmund M. Morgan, Dean of Harvard Law School, headed the committee that drafted the Uniform Code of Military Justice. See Brigadier General John S. Cooke, *Introduction: Fiftieth Anniversary of the Uniform Code of Military Justice Symposium Edition*, 165 MIL. L. REV. 1, 7-9 (2000). See generally Edmund M. Morgan, *The Background of the Uniform Code of Military Justice*, 6 VAND. L. REV. 169 (1953).

In today's climate it is rare for law professors even to participate in an informed process for the critique of military law. One recent example is the Cox Commission, named for Walter T. Cox III, the Chair of the Commission and a former Chief Judge of the U.S. Court of Appeals for the Armed Forces. The Cox Commission undertook a review of the Uniform Code of Military Justice on the occasion of its fiftieth anniversary, and two of its members were law professors, Mary Cheh of George Washington University and Elizabeth Hillman of Rutgers-

Andrew Koppelman has offered an analysis of the right of expressive association as set out in *Dale* that suggests the military will be shunned even more broadly from law school campuses should law schools prevail in *FAIR v. Rumsfeld*, although he was not contemplating the Solomon Amendment at the time he wrote it:

The Court's opinion puts its imprimatur on the idea that Dale's presence itself is a message. The Court holds that anyone who associates with him is therefore propounding a point of view. It evidently agrees with the claim in the Scouts' brief that the exclusion of openly gay people was the only way that the Scouts could avoid taking a public position on the morality of homosexual conduct.¹⁴⁴

Koppelman explained that context is essential in determining whether mere presence or association will be perceived as expressive. It depends on the nature of the default expectation. If the default expectation is that "right-thinking" people would exclude a particular person, then a decision not to exclude suddenly becomes expressive. It "says" something when decisions of inclusion or exclusion run against the grain of expectation.¹⁴⁵

In *Dale* and in society in general, according to Koppelman, there remains a default expectation that gay people can be excluded from activities of public life if the majority so chooses. Therefore, if the Boy Scouts had not exiled Dale, their choice would have "said" something about the Scouts that would not have been expressed if the default expectation had been the reverse: "Following the unspoken norm endorses nothing. Only departing from the norm sends a message."¹⁴⁶ The application of Koppelman's analysis to Solomon protest explains why law schools may eventually be pushed into establishing an even greater separation from the military than they already practice. The default expectation with respect to civil-military relations generally, with full credit to the Supreme Court and its doctrine of judicial deference, is that military and civilian societies embrace different values and therefore are properly treated as separate and apart, with different constitutional expectations. That distance is tremendously greater in the context of law schools, one of the first institutions to adopt the position that

Camden. See NAT'L INST. OF MILITARY JUSTICE, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE (2001), available at http://www.nimj.com/documents/cox_comm_Report.pdf.

144. Andrew Koppelman, *Signs of the Times, Dale v. Boy Scouts of America and the Changing Meaning of Non-Discrimination*, 23 CARDOZO L. REV. 1819, 1827-1828 (2002).

145. See *id.* at 1827-1830.

146. *Id.* at 1830.

discrimination on the basis of sexual orientation is arbitrary and morally wrong. The default expectation among many law students and law faculties is that law schools have little reason to cross paths with the military. Therefore, when they are exposed to the presence of military recruiters on campus, that presence is acutely more expressive than it otherwise would be.

Law schools have become so preoccupied with labeling any toleration of military recruiting as expression that they refrain from any actual engagement with the underlying discriminatory policies. Law schools have become content with the “out of sight, out of mind” comfort that comes with distancing the military from the law school community, thus avoiding all responsibility for the task of military legal reform. They have ignored the fact that courts use that distance to justify “Don’t Ask, Don’t Tell” and other discrimination by the military. It is not apparent why the only acceptable means of affirming values of equality in the face of “Don’t Ask, Don’t Tell” is to shield law students from viewing the unpleasant reality of military recruiting within a “delicate” law school environment, particularly when it seems that *all* law schools care to do is shield them from that unpleasant reality. Expressing opposition to inequality should not be valued more highly than promoting equality itself. An obligation to affirm values of equality and to affirm the value of each student should include a commitment to enter into a true engagement with the military and with lawmakers on matters related to the military. Engagement with the military is not agreement with the military.

I would not make the same plea with respect to a law firm that refused to comply with a law school’s non-discriminatory employment policies and was therefore barred from participating in sponsored placement activities. In that circumstance, the law school places the firm outside the law school community, but without consequences to anyone other than some inconvenience to the firm and to the students who desire to interview with it. The law school has no institutional responsibility for that firm or for the maintenance of a healthy relationship with that firm in the future. Everything changes, however, when that employer is the military. When Solomon opponents insist that the military is being treated just like any other employer, they have made the grave mistake of assuming that the military is, in fact, just another employer.

Law schools need to understand that the military is not just another employer on a placement office list. First, and most importantly, the military is an employer for which law schools have a vital constitutional responsibility. Civilian control of the military is not strong unless all institutions that have a role in legal control of the military take part, and law schools are one of those institutions. Courts have often abdicated their responsibility for civilian control of the military over the last thirty years, and now, regrettably, law

schools have been following their lead.¹⁴⁷ Second, the military is the only employer that the federal government routinely uses for the purpose of making statements about constitutional equality – statements that the Constitution would prohibit if the employer were civilian. Law schools cannot afford to wash their hands of employers with such far-reaching and enduring influence. If law schools wish to be stewards of the value of equality under law, they must give the military a seat at their community table. Law schools also have an institutional responsibility to develop an expertise in constitutional civil-military relations that will earn them a seat at the military's community table.

IV. A GUIDE FOR RESTORING ENGAGEMENT IN CIVIL-MILITARY RELATIONS: WHAT LAW SCHOOLS CAN DO

Law schools have settled into a policy of aloof disengagement in matters concerning the military. With rare exceptions, law schools and law faculties have turned their backs on issues related to legal and constitutional control of the military. They are simply not interested in legal reform when the law involves the military. Strangely, they are not even particularly interested in legal reform with respect to “Don't Ask, Don't Tell,” the policy precipitating the Solomon controversy. It seems as if disengagement itself, provided it is sufficiently loud, is the only objective.

The brief filed by the plaintiffs in the district court in *FAIR v. Rumsfeld*¹⁴⁸ revealed a great deal about the importance they assigned to actual reform of discriminatory policies. Sadly, they were willing to give away the store on “Don't Ask, Don't Tell” in order to strengthen their claim of a right to express opposition to “Don't Ask, Don't Tell” in the manner they chose. They made the extraordinary concession that a facial classification on the basis of sexual orientation should be shielded by a forgiving doctrine of judicial deference:

The deference courts traditionally have afforded Congress and the Executive in matters involving military affairs and national security is appropriate when it comes to regulation of the military's internal operations, its personnel policies, its regulation of troop behavior, and its strategic decisions on how to wage war or defend our nation. . . .

147. Seventeen years ago, Donald Zillman, a legal scholar on military subjects and a former dean of the University of Maine School of Law, noted with concern the depth of the divide between military and civilian worlds within the law school community. See Donald N. Zillman, *A Bicentennial View of Military-Civilian Relations*, 120 MIL.L. REV. 1, 18 (1988). The divide is even greater today.

148. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction, *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003).

Deference stems from such concerns as separation of powers (or other text-based commitment of authority to a realm other than the courts), institutional competence, and the absence of judicially manageable standards.¹⁴⁹

Plaintiffs were willing to concede that military personnel policies and military regulations concerning troop behavior – including, obviously, “Don’t Ask, Don’t Tell” – were not subject to meaningful judicial review. They were also willing to agree to a bizarre reading of the Constitution that removed executive or legislative action from the scope of judicial review if the subject matter of that action was specifically enumerated in Articles I or II.¹⁵⁰ Lastly, they conceded, for no apparent reason, that courts are institutionally incompetent to evaluate policies such as “Don’t Ask, Don’t Tell” and, in any event, are unable to devise manageable standards by which to evaluate them. It seems that these concessions were offered so law schools could factually distinguish Solomon protest as taking place outside the military setting: “The Solomon Amendment, however, has nothing to do with internal military operations, strategy, troop mobilization, training, discipline, or combat readiness. . . . To the contrary, the Solomon Amendment is about the military’s insistence that it has the authority to reach beyond its own sphere and compel private organizations to reorganize *themselves*”¹⁵¹ If a bright-line standard could confine the consequences of deference to matters internal to the military, then it would be much easier to characterize legislation affecting civilian law schools as outside the scope of deference.

It makes no sense for law schools to be so committed to freedom of expression that they abandon their commitment to equality. It makes no sense for law schools to criticize discriminatory policies within the military at the same time they are sabotaging the efforts of others to open the door of military service to all persons qualified to contribute. As I emphasized at the beginning of this article, law schools are right when they affirm values of equality on behalf of their faculties and their students. However, they need to evaluate whether the means they have chosen to advocate for those values – the distancing of military presence from the law school community – is appropriate. If taking a stance based on disengagement and distance from the military will ultimately feed a system in which the military is used to deny equality, then law schools should reconsider that stance. Of particular concern

149. *Id.* at 30.

150. *See supra* notes 63-65 and accompanying text.

151. Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction, *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003), at 30-31.

is the likelihood that, if the plaintiffs prevail in *FAIR v. Rumsfeld*, the separation between the military and avenues of legal reform will only increase. There is much that law schools can contribute to an understanding of the constitutional relationship between civilian society and the military – one that affirms equality, not undermines it – but law schools must be willing to engage a new agenda of research that brings the military closer rather than pushing it away.

Much legal scholarship about the military suffers from an author's attempt to write about military policy or military judgment without actually having to engage that policy or judgment in a direct manner. It is often a sniping, superficial academic exercise in which the author critiques some action or statement arising in a military context, while managing to remove it entirely from that military context. The matter under study is selectively lifted from its surrounding military circumstances and then transplanted into a parallel civilian universe in which the author feels more comfortable, generating a legal analysis that is usually heart-felt but rarely helpful or illuminating. To be clear, I am not suggesting that an author needs to have served in the military to write about it. The production of good legal scholarship on military-related issues has been limited precisely because so much of it tends to be written by the relatively small number of law professors who are veterans. That limitation is unnecessary. I believe that veterans and military-related scholarship are linked only because veterans are more willing – not necessarily more qualified – to engage the military on assertions of fact and law. It is as if law professors have come down with a bad case of deference themselves, one that deters them from thinking they have something useful to say about the military.

Most legal scholarship related to the military written in the last fifteen years, outside of the military-affiliated law reviews, has criticized the military (and often Congress) for acts of commission or omission on issues involving the treatment of women or the exclusion of gay people. The problem is not that the scholarship inevitably charges that the military has failed. The problem is, first, that the scholarship usually reflects no effort to understand military law, the military environment, military discipline, or even actual female or gay servicemembers. Academics have offered criticism that is at best off base and at worst counter-productive to the lives and careers of servicemembers.¹⁵² Second, this scholarship treats the military as the separate

152. See Diane H. Mazur, *Word Games, War Games*, 98 MICH. L. REV. 1590 (2000) (book review) (suggesting a new direction for “Don’t Ask, Don’t Tell” scholarship); Diane H. Mazur, *The Unknown Soldier: A Critique of “Gays in the Military” Scholarship and Litigation*, 29 U.C. DAVIS L. REV. 223 (1996) (same); Diane H. Mazur, *A Call to Arms*, 22 HARV. WOMEN’S L.J. 39 (1999) (suggesting a new direction for scholarship on women in the military); Diane H.

and distant institution the Court has defined it to be. Much of it rests on a perception of military culture as fixed, unchanging, and pathological, without any awareness that military culture evolves in response to how civilian society chooses to raise military forces and how the judicial system enforces, or fails to enforce, civilian supremacy. Third, when the military subject does not involve women or “Don’t Ask, Don’t Tell,” academic interest falls to almost zero. What follows in this Part is a blueprint for a new generation of legal scholarship involving the military that will begin to fulfill the institutional obligation law schools have to engage actively in the vital task of civilian control of the military.

A. *The Number One Priority: Taking Judicial Deference Seriously*

By now it should be clear why a doctrine of judicial deference to executive or legislative judgments involving military affairs cannot be ignored. The sloppy, one-size-fits-all version of deference set out in *Parker v. Levy*,¹⁵³ *Rostker v. Goldberg*,¹⁵⁴ and *Goldman v. Weinberger*¹⁵⁵ has no basis in constitutional text or in historical civil-military precedents, yet it is being applied to turn back the clock on settled understandings of equal protection. One often hears socially conservative complaints that the military is being used as a “social laboratory” for experiments in forced equality,¹⁵⁶ but the reality actually lies in the reverse. The military undoubtedly is being used as a social laboratory, but the experiment is the establishment of a judicially endorsed, separate society in which constitutional standards of equality do not necessarily apply.

Scholars in constitutional law should build on three articles by Jonathan Turley examining the constitutional relationship between the military and the civilian society it serves. *The Military Pocket Republic*¹⁵⁷ examines the

Mazur, *Women, Responsibility, and the Military*, 74 NOTRE DAME L. REV. 1 (1998) (same).

153. 417 U.S. 733 (1974).

154. 453 U.S. 57 (1981).

155. 475 U.S. 503 (1986).

156. See Kirstin S. Dodge, *Countenancing Corruption: A Civic Republican Case Against Judicial Deference to the Military*, 5 YALE J.L. & FEMINISM 1, 40 (1992) (“Traditionalists repeatedly assert that the nation cannot afford to make the military a ‘social laboratory for leading the breakdown of barriers.’”). Even former admiral John Hutson, now a proponent of dismantling “Don’t Ask, Don’t Tell,” felt obligated to explain why the service of gay people would not implicate the troublesome “social laboratory” scenario. See Deb Price, *Admiral Steers Support for Gays in Military*, DETROIT NEWS, Feb. 28, 2005, at 9.

157. Jonathan Turley, *The Military Pocket Republic*, 97 NW. U.L. REV. 1 (2002); see also Mazur, *Rehnquist’s Vietnam*, *supra* note 54 (examining U.S. Supreme Court decisions involving civil-military relations from the Civil War to the present, focusing on the development of the

historical development of military governance as a semi-autonomous system. Turley argues that our contemporary military “is strikingly different from the model the Framers intended when they established the first standing army.”¹⁵⁸ In keeping with the theme of this article, he laments the lack of academic interest in constitutional civil-military relations, speculating that it may reflect “a certain academic distance from (or even disdain of) the military culture and its functions within government.”¹⁵⁹ Turley’s second and third articles in the series, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*¹⁶⁰ and *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*,¹⁶¹ explore the criminal and civil aspects of the military justice system, respectively. Each article in the series treats the military as an institution that is as worthy of intellectual critique and commendation as any other function of government and, in some circumstances, even more worthy.

One of the consequences of disengagement from the military is the risk that significant developments will go unrecognized. The military has changed dramatically in the last generation following the transition to an all-volunteer force.¹⁶² It has become less politically representative of American society at large and more politically partisan, conditions never contemplated by the Constitution.¹⁶³ The military has also been changing more recently as a result

doctrine of judicial deference to military judgment).

158. Turley, *supra* note 157, at 6.

159. *Id.* at 11.

160. Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEO. WASH. L. REV. 649 (2002). Part III of *Tribunals and Tribulations*, *id.* at 682-708, reviews what Turley calls the Supreme Court’s “willfully uninformed or strikingly disingenuous” development of a separate system of military governance. *Id.* at 682. “The military cases decided by the Supreme Court are remarkable in their overbroad treatment of military uniqueness in allowing such differences to exist despite their negative impact on the rights of servicemembers.” *Id.*

161. Jonathan Turley, *Pax Militaris: The Feres Doctrine and the Retention of Sovereign Immunity in the Military System of Governance*, 71 GEO. WASH. L. REV. 1 (2003).

162. See Mazur, *Why Progressives Lost the War*, *supra* note 53. The Triangle Institute for Security Studies, a consortium of faculty members specializing in national and international security, conducted a survey to measure the political, ideological, and cultural gap between the military and civilian society in the era of the all-volunteer force. Twelve studies based on the Gap Project’s data were published in *SOLDIERS AND CIVILIANS: THE CIVIL-MILITARY GAP AND AMERICAN NATIONAL SECURITY* (Peter D. Feaver & Richard H. Kohn eds., 2001).

163. See *Greer v. Spock*, 424 U.S. 828, 839 (1976) (holding that the military had a constitutional responsibility to avoid “both the reality and the appearance of acting as a handmaiden for partisan political causes,” a responsibility that was “wholly consistent with the American constitutional tradition of a politically neutral military establishment under civilian control”).

of the ongoing conflict in Iraq. For example, operational strains on American military forces have led to a massive increase in the “privatization” or “civilianization” of the conduct of war, but there has been very little study of the consequences of outsourcing war. A notable exception is Jon Michaels’s *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems With Privatizing War*.¹⁶⁴ Privatization, moreover, leads potentially to a new array of equal protection concerns that have so far gone unexamined. As non-combat functions are increasingly outsourced to civilian contractors and a larger percentage of duty positions within the military are combat-identified and therefore closed to women, will the role of women within the military be diminished? Will a force of civilian contractors fulfilling what was once a military function be even less politically representative than the military is now?

It is telling that the Constitution mentions the militia – today’s National Guard – in three places (in Article I,¹⁶⁵ in Article II,¹⁶⁶ and in the Second Amendment¹⁶⁷), but legal scholarship focuses on only one of those provisions. The militia is the subject of endless study relating to the scope of the Second Amendment and the history of the right to bear arms, but today’s actual militia and its members seem to be of little interest. Does the Constitution contemplate, for example, indefinite reliance on the militia of the states as a force of projection and occupation overseas in Iraq?¹⁶⁸ There needs to be an institutional commitment on the part of law schools to become knowledgeable

164. Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001 (2004).

165. U.S. CONST. art. I, §8, cls. 15-16 (stating that Congress shall have power to “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions” and to “provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress”).

166. U.S. CONST. art. II, §2, cl. 1 (stating that the President “shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”).

167. U.S. CONST. amend. II (stating that “[a] well regulated Militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed”).

168. See Dan Balz, *Guard Deployments Weigh on Governors; Length, Frequency of Tours Worry States*, WASH. POST, July 19, 2005, at A3 (reporting the observation of Idaho’s Governor Dirk Kempthorne that “not since the Civil War has there been such state identification with the military”); Pam Belluck, *Vermonters Vote on Study of National Guard’s Role*, N.Y. TIMES, Mar. 2, 2005, at A12 (noting the deployment of 42% of Vermont’s National Guard); Eric Schmitt & Davis S. Cloud, *Part-Time Forces on Active Duty Decline Steeply*, N.Y. TIMES, July 11, 2005, at A1 (noting reduced availability of National Guard for state missions involving fire protection and other emergencies).

participants in a discussion about legal control of the military. The principal limitation on this research agenda, however, may be an unspoken assumption that any engagement with military issues expresses agreement with the military, and that any interaction with military personnel is inconsistent with a commitment to equality.

B. At the Tipping Point of “Don’t Ask, Don’t Tell”

I believe we have reached the ironic point at which the military is far less interested in maintaining the “Don’t Ask, Don’t Tell” regime than is Congress. The policy of “Don’t Ask, Don’t Tell” has become so deeply enmeshed in our national debate about the place of gay people in society that its original connection to the needs of the military has almost vanished. This is why it is essential for law schools and legal scholars to become engaged with the military issues underlying the exclusionary policy without becoming distracted by the escalating rhetoric about the policy.

Defenders of both “Don’t Ask, Don’t Tell” and the Solomon Amendment often raise the disingenuous argument that the military should not be the target of complaint with respect to a statutory exclusion of gay servicemembers. If congressional action codified the policy and congressional action is necessary to change it, they ask, why do law schools single out the military as the personification of a discriminatory statute? To a certain extent, this argument raises a fair point. Law schools have never, for example, sought to withhold judicial clerkship assistance from judges who have upheld “Don’t Ask, Don’t Tell” or its predecessors. Law schools have never attempted to distance themselves from government agencies employing lawyers who defend the policy in court. I assume that law schools would not seek to withhold placement assistance if members of Congress who voted for “Don’t Ask, Don’t Tell” sought to hire law students as members of their staffs. The singular focus of law schools on the military as the target of their expressive disagreement may well be misdirected or incomplete.

At the same time, defenders of “Don’t Ask, Don’t Tell” and the Solomon Amendment are embarrassingly disingenuous when they contend that congressional control of the policy makes the military an unfair target for criticism. Earlier this year, Charles Moskos, professor emeritus at Northwestern University and the dean of military sociologists, wrote a letter

to *The New York Times* objecting to the newspaper's editorial criticism¹⁶⁹ of the military's enforcement of the ban on gay servicemembers:

Whatever the pros and cons of "don't ask, don't tell" (full disclosure: I am a principal architect of the policy), your editorial is wrong in accusing the Pentagon of "hiding from reality." In fact, the gay ban is authorized by a 1993 Congressional law signed by the president. Any change of the status of homosexuals in the military requires Congressional action. Your editorial implies that the military should disobey the law. Who is hiding from reality?¹⁷⁰

It is true that "Don't Ask, Don't Tell" will remain in force unless amended, repealed, or invalidated by a court as unconstitutional. However, it is also true that "Don't Ask, Don't Tell" would not exist if the military had not insisted in congressional hearings that it was necessary for military effectiveness.¹⁷¹ When the military attempts to justify the policy with nonchalant suggestions that gay servicemembers might be killed by their colleagues and excuses for why the military could do nothing about it, the military's moral blame for existence of the policy is at least equal to that of Congress.¹⁷² Second, enforcement of the military's ban on gay servicemembers, statutory or administrative, has always involved the exercise of discretion on the part of individual military commanders.¹⁷³

But there is also cause for optimism to be found in Moskos' letter. I do not believe it is accidental that Moskos pointedly put the ball in Congress's court with respect to changing the policy. I suspect the letter is a subtle indication of his recognition that the military is no longer the driving force

169. Editorial, *The Price of Homophobia*, N.Y. TIMES, Jan. 20, 2005, at A22 (criticizing the military's discharge of Arabic-speaking linguists because they were gay).

170. Charles Moskos, Letter to the Editor, *Pentagon's Gay Policy*, N.Y. TIMES, Jan. 27, 2005, at A24.

171. See, e.g., *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong. (1993) [hereinafter *Senate Armed Servs. Hearings*]; *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Servs.*, 103d Cong. (1993) [hereinafter *House Armed Servs. Hearings*].

172. See *Senate Armed Servs. Hearings*, *supra* note 171, at 602, 615; *House Armed Servs. Hearings*, *supra* note 171, at 171.

173. See generally RANDY SHILTS, CONDUCT UNBECOMING: GAYS AND LESBIANS IN THE U.S. MILITARY (1993) (chronicling the history of gays and lesbians in U.S. military service and demonstrating that, prior to 1993, when the "Don't Ask, Don't Tell" debate cemented a broad institutional commitment to enforce the ban on gay servicemembers, the policy was enforced sporadically and arbitrarily, often on the basis of the personal predilection of the commander involved).

behind the continuation of “Don’t Ask, Don’t Tell.” There are other indications that the military’s commitment to the policy is ebbing. Retired flag-level military officers (generals and admirals), both gay and straight,¹⁷⁴ endorsed the Military Readiness Enhancement Act,¹⁷⁵ a bill that would repeal “Don’t Ask, Don’t Tell” and allow openly gay individuals to serve in the military. A former Judge Advocate General of the Navy (the Navy’s top lawyer), once a supporter of the policy, reversed course and now believes it “fosters divisiveness” and “demeans the military.”¹⁷⁶ An active-duty professor at the U.S. Military Academy at West Point published an article in *Army Times* recommending that Congress repeal “Don’t Ask, Don’t Tell.”¹⁷⁷ Even more significantly, the disapproval and shunning he feared from colleagues at West Point never materialized.¹⁷⁸ The Army’s premier scholarly publication, *Parameters*, featured a study demonstrating that the detriment to unit cohesion and military effectiveness the military always claimed would accompany the service of gay individuals actually never occurs.¹⁷⁹ The Government Accountability Office released a report calculating that “Don’t Ask, Don’t Tell” has cost the combined military services \$190 million over ten years to recruit and train replacements for discharged gay servicemembers.¹⁸⁰ My

174. See Press Release, *Servicemembers Legal Defense Network, Generals and Admirals Call for Repeal of “Don’t Ask, Don’t Tell,”* Mar. 2, 2005, available at <http://www.sldn.org/templates/press/record.html?section=2&record=1937>.

175. Military Readiness Enhancement Act of 2005, H.R. 1059, 109th Cong. (2005).

176. John D. Hutson, *Retire a Bad Military Policy*, NAT’L L.J., Aug. 11, 2003, at 30. John Hutson is presently the Dean and President of Franklin Pierce Law Center. He retired as Judge Advocate General of the Navy in 2000.

177. See Allen B. Bishop, *Gays in the Military: It’s a Question of Liberty*, ARMY TIMES, Mar. 14, 2005.

178. See John Caldwell, *West Point Ally*, THE ADVOCATE, Apr. 26, 2005, at 20 (interviewing Lt. Col. Allen Bishop). Colonel Bishop was inspired to write his editorial after participating in a conference at Hofstra University School of Law commemorating the tenth anniversary of “Don’t Ask, Don’t Tell.” See *id.* The *Hofstra Labor and Employment Law Journal* published a symposium issue on the conference. See Symposium, *Don’t Ask, Don’t Tell: 10 Years Later*, 21 HOFSTRA LAB. & EMP. L.J. 325 (2004).

179. Aaron Belkin, *Don’t Ask, Don’t Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS, Summer 2003, available at <http://carlisle-www.army.mil/usawc/Parameters/03summer/belkin.htm> (finding that when Australia, Britain, Canada, and Israel lifted their bans on gay servicemembers, in each instance the change in policy was a non-event).

180. See GOV’T ACCOUNTABILITY OFFICE, *MILITARY PERSONNEL: FINANCIAL COSTS AND LOSS OF CRITICAL SKILLS DUE TO DOD’S HOMOSEXUAL CONDUCT POLICY CANNOT BE COMPLETELY ESTIMATED 2* (2005), available at <http://www.gao.gov/htext/d05299.html>. The GAO conceded it could not measure the cost of investigating and discharging gay servicemembers, which would be above and beyond the cost of recruiting and training replacements. The Center for the Study of Sexual Minorities in the Military at the University of California, Santa Barbara, has commissioned a study to quantify all costs incurred as a result

sense is that the military is becoming less and less interested in pulling the oar for Congress on a discriminatory policy that, to the military, may no longer be worth the trouble. If that is true, the effort to preserve “Don’t Ask, Don’t Tell” will increasingly come from civilian quarters.

The military justice system’s regulation of sexual conduct is in flux as a result of *Lawrence v. Texas*,¹⁸¹ which overruled *Bowers v. Hardwick*.¹⁸² The Department of Defense is currently considering whether, and to what extent, *Lawrence* requires revision of the military’s criminal sodomy provision.¹⁸³ Article 125 of the Uniform Code of Military Justice (UCMJ) is an across-the-board prohibition of “unnatural carnal copulation” that applies even when there is mutual consent and regardless of the sex or marital status of the parties involved.¹⁸⁴ *Lawrence*, of course, does not directly reach “Don’t Ask, Don’t Tell,” a policy governing eligibility for military service. But just as *Bowers v. Hardwick*, which upheld a criminal statute, was used to justify a panoply of other burdens on gay citizens, the criminal regulation of sodomy is clearly related to the justifications given for the exclusion of gay servicemembers. The latitude granted to the military in criminalizing sodomy after *Lawrence* will be predictive of the decision’s impact on “Don’t Ask, Don’t Tell,” because both issues present the same question: to what extent do the distinctive character of the military environment and the necessity for good order and discipline justify the prohibition of sexual intimacy between persons of the same sex?

Courts within the military’s criminal justice system have already begun to draw lines separating constitutionally protected sexual conduct from the constitutionally unprotected, which is a significant development in a system accustomed to having complete discretion to define sexual misconduct. In *United States v. Marcum*,¹⁸⁵ the United States Court of Appeals for the Armed Forces held *Lawrence* applicable in a military context, rejecting the government’s contention that the court should continue to defer to congressional judgment concerning the military even when the governing constitutional principles have changed.¹⁸⁶ However, *Marcum* declined to

of “Don’t Ask, Don’t Tell.” See Press Release, Center for the Study of Sexual Minorities in the Military, *New Blue Ribbon Commission to Estimate Cost of “Don’t Ask, Don’t Tell,”* Mar. 23, 2005, available at http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2005_0323.htm.

181. 539 U.S. 558 (2003).

182. 478 U.S. 186 (1986).

183. See John Files, *Pentagon Considers Changing the Legal Definition of Sodomy*, N.Y. TIMES, Apr. 21, 2005, at A18.

184. See 10 U.S.C. §925 (2000).

185. 60 M.J. 198 (C.A.A.F. 2004).

186. See *id.* at 206 (demonstrating a lack of familiarity with or understanding of *Lawrence* by equating homosexuality with sodomy).

invalidate Article 125 on its face and instead adopted a case-by-case approach to the application of *Lawrence* in the military context.¹⁸⁷ The court upheld the defendant's conviction for consensual sodomy with a subordinate, reasoning that the circumstances did not fall within the liberty interest protected by *Lawrence*, because the persons involved were "situated in relationships where consent might not easily be refused."¹⁸⁸ The Army Court of Criminal Appeals, on the other hand, reversed a sodomy conviction for consensual sexual intimacy between a soldier and a civilian that took place in the soldier's barracks room, finding that the conduct did fall within the scope of *Lawrence*.¹⁸⁹ To many people, this was a surprising decision. The court could have taken the position that any conduct within a military facility, even if it is a soldier's home, sufficiently affects military discipline to warrant military regulation. "Don't Ask, Don't Tell" relies on the assumption that anything a servicemember does, twenty-four hours a day, seven days a week, is subject to regulation.¹⁹⁰ If the military justice system's response to *Lawrence* is to carve out a zone of personal intimacy that the Constitution protects for all servicemembers, then it becomes tremendously more difficult for Congress to justify "Don't Ask, Don't Tell."

It is possible, perhaps probable, that the Defense Department will recommend that Article 125 be amended to prohibit sodomy only under circumstances in which the conduct is specifically proven to be "to the prejudice of good order and discipline" or "of a nature to bring discredit upon

187. *See id.* at 207-208.

188. *Id.* at 208 (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003)). *Marcum* held that the nature and reach of the *Lawrence* liberty interest could be affected by factors relevant in a military environment. *See id.* at 207; *United States v. Stirewalt*, 60 M.J. 297 (C.A.A.F. 2004) (finding superior-subordinate relationship outside the scope of *Lawrence*); *United States v. Bart*, 61 M.J. 578 (N-M. Ct. Crim. App. 2005) (finding adulterous relationship between married co-workers that was carried on in military family housing and precipitated the murder of one of their spouses outside the scope of *Lawrence*); *United States v. Christian*, 61 M.J. 560 (N-M. Ct. Crim. App. 2005) (finding relationship between military recruiter and the friend of one of his enlistees outside the scope of *Lawrence*); *United States v. Gamez*, ACM 35576, 2005 CCA Lexis 109 (A.F. Ct. Crim. App. Mar. 30, 2005) (finding superior-subordinate relationship outside the scope of *Lawrence*).

189. *United States v. Bullock*, ARMY 20030534 (A. Ct. Crim. App. Nov. 30, 2004); *see also* *United States v. Barber*, ARMY 20000413 (A. Ct. Crim. App. Oct. 7, 2004) (applying *Lawrence* to overturn a sodomy conviction based on two episodes, each of which involved conduct in the barracks between the accused and another servicemember of equivalent rank with no duty connection).

190. "The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces." 10 U.S.C. §654(a)(9) (2000).

the armed forces” under Article 134 of the UCMJ.¹⁹¹ Under this “General Article,” the military has the discretion to prosecute a wide range of offenses not otherwise specifically enumerated within the UCMJ. Conviction requires proof of two separate elements: 1) “the accused did or failed to do certain acts,” as listed in Article 134 and ranging alphabetically from “abusing public animal” to “wearing unauthorized insignia, decoration, badge, ribbon, device, or lapel button”; and 2) “under the circumstances” the acts of commission or omission either prejudiced good order and discipline or were service discrediting.¹⁹² If the sodomy prohibition were incorporated within Article 134, sodomy in and of itself would no longer constitute an offense. Sodomy would be punishable only if it could be shown to cause specific harm to the military.

One could view this possible change in two ways. Pessimistically, it could be viewed as heel-digging resistance to *Lawrence* and a search for a means to continue to criminalize sodomy. Optimistically, the change could represent an intermediate step in which the military is forced to articulate – as it was forced to articulate with respect to the Article 134 offense of adultery¹⁹³ – the specific circumstances under which disfavored sexual conduct actually affects military discipline and why. This intermediate step represents progress for those seeking to expose the weakness of the justifications for “Don’t Ask, Don’t Tell.” The conversation that is taking place today about the criminal regulation of sodomy, heterosexual or homosexual, and its relationship to military discipline is critically important because it will, one day, open the door to a dialogue about “Don’t Ask, Don’t Tell” based more on facts than on mere assertions.

That day may not be far in the future. *Cook v. Rumsfeld*,¹⁹⁴ a lawsuit filed on behalf of twelve former servicemembers involuntarily discharged under “Don’t Ask, Don’t Tell,” is pending in the United States District Court for the District of Massachusetts. *Cook* directly raises the question whether *Lawrence* requires servicemembers to be treated with the same dignity as civilians in their personal relationships, absent some justification based in military

191. 10 U.S.C. §934 (2000).

192. MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. IV, ¶¶60-113 (2002).

193. *Id.* ¶62. The Manual for Courts-Martial provides very detailed guidance concerning the circumstances under which the commission of adultery should be considered prejudicial to good order and discipline or service discrediting. Some of the relevant factors are: the marital status and rank of the accused, the marital status and military status of the co-actor, the military status of the accused or co-actor’s spouse, misuse of government resources to facilitate the adultery, whether the conduct persisted despite warning or counseling, the degree of notoriety of the affair, and whether the affair is ongoing or remote in time. *See id.*

194. *Cook v. Rumsfeld*, No. 04-12546 GAO (D. Mass. filed Dec. 6, 2004).

effectiveness that indicates they should not. It should come as no surprise that the government has moved to dismiss the suit on the basis that the doctrine of judicial deference prevents the court from evaluating the constitutionality of “Don’t Ask, Don’t Tell.” The briefing and oral argument on that motion featured some of the most sophisticated and thoughtful argument available on the meaning of judicial deference in the context of a constitutional challenge to “Don’t Ask, Don’t Tell.”¹⁹⁵ It is a shame that law schools are not involved in that argument.

C. Equal Protection on the Basis of Sex: Revisiting Rostker v. Goldberg and Government Expression on the Role of Women

Twenty-five years after *Rostker v. Goldberg*¹⁹⁶ accepted the exemption of women from an obligation to register for the draft because it was not their “place” to serve in combat, the military and Congress still struggle to preserve an expressive role for military policy, even as the factual underpinnings of *Goldberg* crumble around them.¹⁹⁷ The story behind the development of the U.S. Army’s new Combat Action Badge provides a very recent example of how the persistent habit of using military policy to make a statement about the proper societal role of women can interfere with mission effectiveness.

In recognition of the new battlefield reality in Iraq that respected neither an identifiable “front line” nor a zone of safety “in the rear,” the Army announced a new combat honor, the Close Combat Badge.¹⁹⁸ The Army’s original guidelines for award of the Close Combat Badge stated: “The CCB will be presented only to eligible Soldiers who are personally present and under fire while engaged in active ground combat, to close with and destroy the enemy with direct fires.”¹⁹⁹ The wrinkle was in the term “eligible.” The definition of an “eligible” soldier was written to track the Department of Defense’s definition of duties from which women must be excluded.²⁰⁰

195. The pleadings in the case and a transcript of the oral argument are available at the website of the Servicemembers Legal Defense Network, <http://www/sldn.org>.

196. 453 U.S. 57 (1981).

197. See Ann Scott Tyson, *For Female GIs, Combat Is a Fact; Many Duties in Iraq Put Women at Risk Despite Restrictive Policy*, WASH. POST, May 13, 2005, at A1.

198. See News Release, U.S. Army Public Affairs, *Army Announces Close Combat Badge*, Feb. 11, 2005, at http://www4.army.mil/ocpa/read.php?story_id_key=6853.

199. *Id.*

200. “The Army will award the CCB to Armor, Cavalry, Combat Engineer, and Field Artillery Soldiers in Military Occupational Specialties or corresponding officer branch/specialties recognized as having a high probability to routinely engage in direct combat, and they must be assigned or attached to an Army unit of brigade or below that is purposefully organized to routinely conduct close combat operations and engage in direct combat in accordance with

Women, therefore, were automatically ineligible for the Close Combat Badge, regardless of the degree to which they were “personally present and under fire while engaged in active ground combat.” Excluded from the honor along with women were a far greater number of men serving in occupational specialties open to women, such as military police, that were routinely used in Iraq to perform duties on an interchangeable basis with combat infantry soldiers. It was apparently more important to deny the honor to some men than to give the honor to any women.

At a military town hall meeting in Afghanistan, a female enlisted soldier asked Secretary of Defense Donald Rumsfeld why the qualifications for the Close Combat Badge were designed to exclude soldiers on the basis of their occupational specialty alone, regardless of combat performance. She inquired: “I’m wondering why our MPs [military police] aren’t considered for the close-combat patch [read badge]?”²⁰¹ Secretary Rumsfeld turned to a three-star general for an explanation but, even after some prompting, was unable to extract an explanation from him. The transcript reflects a lot of laughter. Rumsfeld then brusquely moved onto another soldier without further response: “Last question. Make it an easy one. I’ve had a long day.”²⁰² Apparently others did not find it as funny. The Army soon reversed course and withdrew the Close Combat Badge. It authorized another new combat honor to take its place, the Combat Action Badge, which would be awarded without regard to occupational specialty – and without regard to sex – to soldiers “personally present and actively engaging or being engaged by the enemy.”²⁰³

This skirmish is typical of the tension that lies just beneath the surface of military personnel policies. The military must judge how far it is willing to go in expressing opposition to equality when that expression interferes with the military mission. The U.S. Army recently came down on the side of expression when it chose to open Army Ranger training to men in combat-support positions, but left the training door closed to women who perform exactly the same duties. In its personnel message announcing the change, the

existing rules and policy.” *Id.*; cf. GEN. ACCOUNTING OFFICE, GENDER ISSUES: INFORMATION ON DOD’S ASSIGNMENT POLICY AND DIRECT GROUND COMBAT DEFINITION 3 (1998) (noting that Department of Defense policy “excludes women from assignments to units below the brigade level whose primary mission is direct ground combat”).

201. News Transcript, U.S. Department of Defense, *Secretary Rumsfeld Townhall Meeting in Kandahar, Afghanistan*, Apr. 13, 2005, at <http://www.defenselink.mil/transcripts/2005/tr20050413-secdef2502.html>.

202. *Id.*

203. See U.S. Army Combat Badges, at <http://www.army.mil/symbols/combatbadges>. Members of the infantry and medical personnel assigned to the infantry are awarded distinctive badges for engagement in active ground combat, the Combat Infantryman Badge and the Combat Medical Badge, respectively. See *id.*

Army noted:

The Global War on Terrorism (GWOT) created many new challenges for our Army. Traditional branch roles on the battlefield are no longer the norm for our forces and the threat facing us today requires that we ensure additional select leaders of CS [combat support] and CSS [combat service support] units receive the unique skills taught at Ranger School.²⁰⁴

Those unique skills, however, are denied to women: “Attendance at Ranger school will remain limited to Soldiers for whom the combat exclusion policy does not apply.”²⁰⁵ In contrast, the military came down on the side of mission effectiveness when it rebuffed a congressional attempt to restrict the duties of military women so severely that women might no longer be eligible for assignment to current war zones.²⁰⁶ Expression apparently has its limits. If it would be impossible to maintain an adequate military force in Iraq without women, the military will not support a policy restricting the assignment of military women to combat support duties. Members of Congress, however, may still choose to give greater weight to the enforcement of societal notions of the proper place of women – a choice, unfortunately and unconstitutionally, that the doctrine of judicial deference has so far permitted them to take. The task for legal academics is to evaluate the limits of *Rostker v. Goldberg* in the course of a war that has obliterated every assumption on which the decision was based.

CONCLUSION

Valuing speech supporting equality is not the same thing as valuing equality, particularly when misdirected expression has the effect of reinforcing inequality. This is why law schools have taken the wrong tack by objecting to the presence of military recruiters on law school campuses. Their mistake stems from the misperception that the military is just another employer on a long list of employers with which a university interacts. But the military has never been just another employer. It is an institution of constitutional

204. MILPER Message No. 05-067, *Expansion of Ranger School Attendance to Combat Support (CS) and Combat Service Support (CSS) Branches*, Mar. 9, 2005, at <http://perscomnd04.army.mil/milpermsgs.nsf/0/d0d1785c5acd5885256fbf00704232?OpenDocument>.

205. *Id.*

206. See Thom Shanker, *Military Bill Backtracks On Women*, N.Y. TIMES, May 26, 2005, at A24; Thom Shanker, *House Bill Would Preserve, and Limit, the Role of Women in Combat Zones*, N.Y. TIMES, May 20, 2005, at A20.

magnitude, and when law schools choose whether to engage in or withdraw from active participation in civilian control of the military, their decision affects whether the military will “stay in its lane” in the constitutional system.

When law schools take the position that the only way to demonstrate support for equality is to separate the military and its practice of inequality from the law school community, they accept exactly the same dysfunctional separatism that allows the military to have discriminatory policies in the first place. Our constitutional civil-military relations today are weak because the judicial system has enforced a legal distance between the military and civilian society, and it does not help when law schools conduct themselves as if they believe that distance is appropriate or even necessary. There is no doubt a great deal of psychic satisfaction to be derived from a dramatic display by which law schools turn their backs on the military, but the legal academy cannot afford to walk away from an institution so vital to the nation’s well-being, and one for which they share responsibility.

Expression is a double-edged sword. Over the last generation courts have permitted the government to use military policy for expressive purposes on matters of equality, and these policies should be of much greater concern to law schools than the *de minimis* expressions of inequality that may accompany the presence of a uniformed servicemember on a law school campus. The Solomon plaintiffs have argued it is not enough for law schools to express their objection to “Don’t Ask, Don’t Tell” through means of ameliorative education or academic discussion. Words are meaningless, they contend, without the action of excluding military recruiters. I suggest that law schools are half right. The action they take, however, needs to bring the military closer, not push it further away.

