

NOTE

SOLOMON'S MINES: THE EXPLOSION OVER ON-CAMPUS MILITARY RECRUITING AND WHY THE SOLOMON AMENDMENT TRUMPS LAW SCHOOL NON- DISCRIMINATION POLICIES

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*Yale Law School . . . believes that, under the U.S. Constitution,
no one may be required, as a condition of federal funding, to
promote a message of employment discrimination*

*. . . The School looks forward to the day when all members of its
community have an equal opportunity to serve in the nation's
Armed Forces.¹*

*Effective recruitment is essential to sustain an all-volunteer
military, particularly in a time of war The Solomon
Amendment reflects Congress's judgment that a crucial
component of an effective military recruitment program is equal
access to college and university campuses.²*

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¹ Yale Law School, *Current Issues: Military Recruitment at Yale Law School*, @YLS—NEWS, May 4, 2005, http://www.law.yale.edu/outside/html/Public_Affairs/576/yls_article.htm.

² Charles Lane, *Court to Review Military Recruiting at Colleges; Law Schools Challenge Rule Requiring Universities to Give Equal Access or Risk Losing Funding*, WASH. POST, May 3, 2005, at A02 (quoting brief from Acting Solicitor General Paul D. Clement).

INTRODUCTION

The on-campus recruiting season can be one of the most difficult components of the already trying task of preparing to become a lawyer. Each fall, many legal employers arrange meetings with second and third-year law students that will eventually “determine [the students’] initial career assignments.”³ Adding to the tension inherent in this process is a recent controversy between legal recruiters for the armed services and law schools that feel the military, as an employer, violates the non-discrimination policies adopted by the Association of American Law Schools.⁴

The ability of the United States Congress to “raise and support” an effective military is a clearly enumerated Constitutional power.⁵ The Supreme Court has determined this power to be plenary in a variety of circumstances that recognize the wide scope of Congress’ authority to build and govern the

³ Tom Ginsburg & Jeffrey A. Wolf, *The Market for Elite Law Firm Associates*, 31 FLA. ST. U. L. REV. 909, 910 (2004). The authors describe the on-campus recruiting process as a “war . . . [that] results in stiff competition.” *Id.* at 911.

⁴ See *Forum for Academic & Institutional Rights v. Rumsfeld (FAIR II)*, 390 F.3d 219, 224–28 (3d Cir. 2004) (concerning a law school’s desire to rely on non-discrimination policy to bar military recruiting due to the military’s policy on homosexuals), *cert. granted*, 125 S. Ct. 1977 (2005); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 159 (D. Conn. 2005) (same); *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, at *4–6 (E.D. Pa. Aug. 19, 2004) (same); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 390–92 (D. Conn. 2004) (same). See generally Clay Calvert & Robert D. Richards, *Challenging the Wisdom of Solomon: The First Amendment and Military Recruitment on Campus*, 13 WM. & MARY BILL RTS. J. 205 (2004); Sylvia Law, *Civil Rights Under Attack By the Military*, 7 WASH. U. J.L. & POL’Y 117 (2001); Francisco Valdes, *Solomon’s Shames: Law As Might and Inequality*, 23 T. MARSHALL L. REV. 351 (1998); Robin Ingle, Essay, *Gays in the Military: A Policy Analysis of “Don’t Ask, Don’t Tell” and the Solomon Amendment*, 20 HAMLINE J. PUB. L. & POL’Y 89 (1998); Amy Kapczynski, Comment, *Queer Brinkmanship: Citizenship and the Solomon Wars*, 112 YALE L.J. 673 (2002); Sean Roaney, Note, *Discrimination Under Law: The Solomon Amendment*, 6 HUM. RTS. BRIEF 21 (1999); Richard Schaen, Comment, *Challenging “Don’t Ask, Don’t Tell”: The Future of Military Recruitment on Public Law School Campuses*, 65 U. CIN. L. REV. 1359 (1997); LAW SCH. ADMISSION COUNCIL, INFORMATION FOR LESBIAN, GAY, BISEXUAL & TRANSGENDERED APPLICANTS (2004), <http://www.lsac.org/LSAC/LGBT/LGBT2005web.pdf>; Memorandum from Carl C. Monk, Executive Vice President and Executive Director of the Association of American Law Schools, to Deans of Member and Fee-Paid Schools (Feb. 9, 2000), <http://www.aals.org/00-6.html> [hereinafter Memorandum from Carl C. Monk to Deans].

⁵ See U.S. CONST. art. I, § 8, cl. 12 (granting Congress the authority to “raise and support Armies”); *id.* § 8, cl. 13 (authorizing Congress to “provide and maintain a Navy”); *id.* § 8, cl. 14 (delineating the power of Congress to “make Rules for the Government and Regulation of the land and naval Forces”).

military.⁶ One of the chief ways the U.S. military seeks to accomplish this mandate is through the recruitment of well-qualified officers to lead the various branches of the Armed Forces.⁷ Among the vast array of officers employed throughout the military is a group of practicing attorneys commissioned for service in the Judge Advocate General's Corps ("JAG").⁸ Though each branch of the military utilizes its own methods for the selection of Judge Advocates, each relies on the on-campus interviewing and recruiting process typical of employers within the legal profession.⁹ The United States Army, for instance, sends an officer to conduct screenings at nearly every accredited law school in the country.¹⁰

The Association of American Law Schools ("AALS" or the "Association")¹¹ enjoys an authority among its member law schools similar in practical effect to the plenary powers of the federal Congress. A principle criterion for membership in the AALS is compliance by members of the Association with the by-laws set forth by the organization as a whole.¹² According to the

⁶ See *United States v. O'Brien*, 391 U.S. 367, 377 (1968) ("The constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping."). Though it may have varying connotations, the term "military" will be used throughout this Note to refer to the United States Armed Forces, including the Army, Navy, Air Force, Marines, and Coast Guard, as well as the Reserve and National Guard components of each branch.

⁷ See 10 U.S.C. § 503(a) (2000) (requiring the armed forces to "conduct intensive recruiting campaigns to obtain enlistments").

⁸ See generally Army JAG Corps, Overview, <http://www.goarmy.com/jag/index.jsp> (last visited Sept. 16, 2005); Navy Judge Advocate General's Corps, Careers, <http://www.jag.navy.mil/Careers/Careers3.htm> (last visited Sept. 16, 2005); Staff Judge Advocate to the Commandant of the Marine Corps, Mission, <http://sja.hqmc.usmc.mil/SJAOrg.htm> (last visited Sept. 16, 2005); U.S. Air Force Judge Advocate Recruiting, How Can I Become an Air Force Judge Advocate?, <http://www.jagusaf.hq.af.mil/EDprgrms/howtobecome.htm> (last visited Sept. 16, 2005).

⁹ See *supra* note 8.

¹⁰ Eugene Y. Kim, *The Judge Advocate Recruiting Office: The Gateway to Service*, 2004 ARMY LAW. 33, 34 (2004).

¹¹ The AALS states that "[t]he purpose of the association is 'the improvement of the legal profession through legal education.' It serves as the learned society for law teachers and is legal education's principal representative to the federal government and to other national higher education organizations and learned societies." American Association of Law Schools, What is the AALS?, <http://www.aals.org/about.html> (last visited Sept. 16, 2005).

¹² Membership in the AALS is determined by a "four or five person team [that] visits the applicant school to determine its compliance with the Association's Bylaws." *Id.*

Association's core values, as laid out in its by-laws, opposing discrimination is a chief goal of the AALS.¹³ To that effect, the AALS opposes discrimination on the basis of several factors and in several contexts and encourages its members to do the same.¹⁴ Every member law school, therefore, publishes a non-discrimination policy announcing its commitment to prohibiting intolerance based on certain protected categories.¹⁵ In 1990, the AALS chose to add sexual orientation to its list of protected categories in an effort to prevent potential institutional bias against homosexual students and faculty.¹⁶ The non-discrimination policies of member law schools are meant to cover all aspects of law school administration,¹⁷ including the recruitment process by which legal employers seek out law students for summer or post-graduation employment.¹⁸

It is in the recruiting context that the U.S. military and the AALS, as well as some of its member institutions, have run squarely into one another. The military uses on-campus recruiting to seek out new Judge Advocates as well as interns for summer JAG Corps internships.¹⁹ As mentioned, the AALS has sought to ensure that this process is free of discrimination.²⁰ However, since the military continues to operate with the "Don't

¹³ Bylaws of the Association of American Law Schools, Inc. § 6-1(b)(iv), available at <http://www.aals.org/bylaws.html> (last visited Sept. 16, 2005) [hereinafter AALS Bylaws] (articulating that the AALS' core values include a commitment to "a diverse faculty and staff hired, promoted, and retained based on meeting and supporting high standards of teaching and scholarship and in accordance with principles of non-discrimination").

¹⁴ The Bylaw states:

A member school shall provide equality of opportunity in legal education for all persons, including faculty and employees with respect to hiring, continuation, promotion and tenure, applicants for admission, enrolled students, and graduates, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, disability, or sexual orientation.

Id. § 6-3(a).

¹⁵ See *infra* notes 44–50 and accompanying text.

¹⁶ See Law, *supra* note 4, at 121; Ingle, *supra* note 4, at 99.

¹⁷ See *supra* note 14.

¹⁸ See AALS Bylaws, *supra* note 13, § 6-3(b) ("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.").

¹⁹ See Kim, *supra* note 10, at 34.

²⁰ See *supra* notes 16–18 and accompanying text.

Ask, Don't Tell"²¹ policy regarding service by homosexual military personnel, the AALS considers the military, in its capacity as a potential employer, to be in contravention of its non-discrimination directive.²² After the adoption of sexual orientation as a protected category in 1990, law schools were required to ban military recruiting on-campus²³—that is, until Congress answered back with passage of the Solomon Amendment.²⁴ This controversial piece of legislation was offered by then U.S. Representative Gerald Solomon of New York (“Rep. Solomon”) as an amendment to Congress’ authorization of Department of Defense (“DOD” or “DoD”) spending for 1995.²⁵ Though it has taken on different forms, the Solomon Amendment essentially requires colleges and universities, including the law schools within them, to permit military recruiting on-campus as a condition of receiving certain kinds of federal funding.²⁶ Rather than force member law schools to risk losing their own funding or jeopardize the funding of their parent university, the AALS has permitted law schools to allow JAG recruiting, even though such is still considered a violation of its non-discrimination policy.²⁷

Not surprisingly, several law school faculty members and students, as well as associations made up of them, have challenged the constitutionality of the Solomon Amendment in a string of recent cases. In *Forum for Academic & Institutional Rights v. Rumsfeld*,²⁸ *Burbank v. Rumsfeld*,²⁹ *Student Members of SAME v. Rumsfeld*,³⁰ and *Burt v. Rumsfeld*,³¹ the plaintiffs have

²¹ See 10 U.S.C. § 654(b) (2000); see also *infra* Part II (discussing the military’s “Don’t Ask, Don’t Tell” policy).

²² See Law, *supra* note 4, at 122–23 (recognizing that prior to the Solomon Amendment, the AALS required its member schools to prohibit on-campus military recruiting); Ingle, *supra* note 4, at 99 (noting that since the military would not certify its compliance with the AALS non-discrimination policy, “military recruiters were barred from using career services offices for on-campus interviews and were not allowed on campus”).

²³ See *infra* Part I(B) (detailing the AALS policy on sexual orientation as a protected category).

²⁴ See *infra* Part I(C) (providing an overview of the history and requirements of the Solomon Amendment).

²⁵ See *infra* Part I(C) (describing the development and purpose of the Solomon Amendment).

²⁶ See 10 U.S.C.A. § 983 (West & Supp. 2005).

²⁷ See Memorandum from Carl C. Monk to Deans, *supra* note 4.

²⁸ 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

²⁹ No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 19, 2004).

³⁰ 321 F. Supp. 2d 388 (D. Conn. 2004).

³¹ 354 F. Supp. 2d 156 (D. Conn. 2005).

argued that the Solomon Amendment violates their First Amendment rights to freedom of speech and expressive association, and in some instances their Fifth Amendment equal protection and due process rights.³² Part I of this Note will discuss the history and directives of the Solomon Amendment. Part II will briefly outline the U.S. military's "Don't Ask, Don't Tell" policy regarding homosexuals in the armed forces. Part III will explore the claims raised by the plaintiffs in cases challenging the constitutionality of the Solomon Amendment. Finally, Part IV will explain why, for better or worse, the concerns of those who oppose the Solomon Amendment must yield to the powers of Congress.

I. A HISTORY OF THE BATTLE OVER ATTEMPTS TO BAN MILITARY RECRUITING

A. *Pre-Solomon Congressional Funding Requirements*

The passage of the Solomon Amendment in 1994 was not the first time the federal government sought to prohibit the barring of military recruiters on campuses.³³ Indeed, Rep. Solomon himself felt that passage of the amendment would do no more than "simply . . . enforc[e] existing law."³⁴ The controversy between the military's recruiting efforts and the colleges within which these efforts are undertaken goes back at least to the Vietnam War era.³⁵ In the late 1960s and early 1970s, in an effort to ensure that the military continued to have access to

³² See *infra* Part III (providing an overview of the claims presented by the plaintiffs in cases challenging the Solomon Amendment).

³³ See *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld (FAIR I)*, 291 F. Supp. 2d 269 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005). The district court noted, "A policy of discouraging barriers to on-campus military recruitment pre-dates the 1994 passage of the Solomon Amendment by nearly thirty years." *Id.* at 278 (citing *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986)). Although the district court decision was reversed on appeal, the opinion contains a thorough treatment of the history and issues present in the litigation. It will, therefore, be referenced throughout this Note as a source of information.

³⁴ 140 CONG. REC. H11439 (daily ed. May 23, 1994) (statement of Rep. Solomon).

³⁵ See *FAIR I*, 291 F. Supp. 2d at 278 ("Congress enacted legislation in the 1960s and 1970s that, much like the Solomon Amendment, authorized the withholding of defense funds from schools that maintained a policy barring military recruiters or otherwise eliminated the Reserve Officers Training Corps program.").

college campuses for the purposes of recruiting, Congress, in several appropriations bills, conditioned the receipt of various federal funds on the effectuation of policies that met this goal, or at least did not inhibit it.³⁶ The 1973 DOD Authorization Act, for instance, made it clear that a college could not expect to receive federal funds if it was found to prohibit military recruiters from accessing its campus.³⁷ The gauntlet, it seemed, had been thrown down.

B. Just Leave Your Money at the Door!—Law School Action in the Pre-Solomon Era

Universities and their law schools did not respond to the pre-Solomon appropriations bills directly. Rather than engage in outright protest, many law schools adopted universal non-discrimination policies and relied on those policies to prohibit any discriminatory employer from accessing their campuses.³⁸ As far back as 1978, New York University School of Law (“NYU Law”) adopted “a policy of equal treatment of its faculty, students, and staff members, without regard to sex, *sexual orientation*, marital or parental status, race, color, religion, national origin, age, or handicap.”³⁹ It was the first of its kind in an American law school,⁴⁰ and served as the basis by which NYU Law would make unavailable its career placement office to employers who did not adhere to the principles of the policy.⁴¹ That same year, Yale Law School implemented a similar non-discrimination policy⁴²

³⁶ See *id.* (citing the Department of Defense Authorization Acts of 1973 and 1971, as well as the National Aeronautics and Space Administration Authorization Acts of 1969, each of which authorized the withholding of federal funds to colleges and universities that bar military recruiting).

³⁷ *Id.* (referencing the 1973 DOD Authorization Act’s strong funding prohibition language). The DOD Authorization Act of 1973 stated:

No part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if . . . recruiting personnel . . . are being barred by the policy of such institution from the premises of the institution

Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972).

³⁸ See Law, *supra* note 4, at 120–21.

³⁹ *Id.* at 120 (emphasis added).

⁴⁰ See *id.*

⁴¹ See *id.*

⁴² See *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 166 (D. Conn. 2005) (explaining that in 1978 Yale Law School prohibited discrimination on the basis of sexual orientation); see also Yale Law School Career Development Office,

and has since refused the services of its Career Development Office to employers who will not declare their compliance with the policy.⁴³ Several law schools soon followed the lead of NYU and Yale.⁴⁴

The AALS was next to act. In 1990, the House of Representatives of the AALS made a unanimous decision to include "sexual orientation" as a category to be protected from discrimination in all aspects of law school life.⁴⁵ Specifically, AALS Bylaw Section 6-3(b) provides that 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 . . . sexual orientation."⁴⁶ Further, the Association obligates member schools to make all potential employers aware of AALS Bylaw Section 6-3 and receive an employer's pledge to honor the non-discrimination policy contained therein.⁴⁷ These provisions are listed under Article 6 of the Association's Bylaws, entitled "Requirements of Membership."⁴⁸ Because compliance with the AALS' bylaws is a criterion for accreditation by the Association,⁴⁹ it is not surprising that "all of the more than [then] 160 member law

http://www.law.yale.edu/outside/html/Career_Development/cdo-index.htm (last visited Sept. 16, 2005). The Non-Discrimination Policy of Yale Law School states, "Yale Law School is committed to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious creed, gender (including discrimination taking the form of sexual harassment), marital, parental or veteran status, *sexual orientation*, or the prejudice of clients." *Id.* (emphasis added).

⁴³ See Yale Law School Career Development Office, *supra* note 42. The Yale policy also explicitly states that, "All employers using the school's placement services are required to abide by [the] policy." *Id.*; see also *Burt*, 354 F. Supp. 2d at 165-68 (describing the background to the plaintiff school's non-discrimination policy and the Solomon Amendment); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 390 (D. Conn. 2004) (detailing the history of the plaintiffs' school's non-discrimination policy in the context of challenging the Solomon Amendment).

⁴⁴ See Law, *supra* note 4, at 120-21; see also Inqli, *supra* note 4, at 99 ("For years, . . . law schools . . . have adhered to nondiscrimination policies that include sexual orientation.").

⁴⁵ AALS Bylaws, *supra* note 13, § 6-3; see also Law, *supra* note 4, at 121; Inqli, *supra* note 4, at 99.

⁴⁶ AALS Bylaws, *supra* note 13, § 6-3(b).

⁴⁷ *Id.* ("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.").

⁴⁸ *Id.* §§ 6-1 to 6-10.

⁴⁹ See *supra* notes 11-12 and accompanying text.

schools of the AALS extended their non-discrimination policies to cover sexual orientation.”⁵⁰ For reasons that will be explained more fully below, the military could not take the kind of non-discrimination policy compliance oath that was effectively required of every employer seeking access to law school placement offices across the country.

C. Rep. Solomon’s Easy “Rider”—Firing Back by Amendment

The attempts by the AALS and its member schools to prevent the military from on-campus recruiting were seemingly, if only temporarily, successful. In 1994, a congressionally authorized study determined that at least 140 colleges and universities “ha[d] denied recruiters access to their campus[es].”⁵¹ In response, Congress passed an amendment to the 1995 Defense Department spending bill, which was proposed by Rep. Solomon.⁵² This amendment sought to deny certain DOD funds to institutions of higher education, as well as subelements of those institutions, that prohibited campus access to military recruiters.⁵³ However, this proposed legislation did not have its sponsor’s desired effect “because law schools receive little if any DoD funding.”⁵⁴ Consequently, Rep. Solomon proposed another amendment, this time to the Omnibus Consolidated

⁵⁰ *FAIR I*, 291 F. Supp. 2d 269, 280 (D.N.J. 2003), *rev’d*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (exemplifying the AALS’ commitment to improving the legal profession through legal education, as in 1990 when it voted to include sexual orientation as a protected category in non-discrimination policies).

⁵¹ 140 CONG. REC. S15500 (daily ed. July 1, 1994) (statement of Sen. Nickles).

⁵² See *FAIR I*, 291 F. Supp. 2d at 278 (relying on legislative history to support the claim that “[t]he apparent impetus for the Solomon Amendment was the continued refusal of many educational institutions to allow the military to engage in on-campus recruiting”).

In support of his amendment, Rep. Solomon urged that the proposal was designed to

tell[] recipients of Federal money at colleges and universities that if [they] do not like the Armed Forces, if [they] do not like its policies, that is fine.

That is [their] first-amendment rights. But do not expect Federal dollars to support [their] interference with [] military recruiters.

140 CONG. REC. H11439 (daily ed. May 23, 1994) (statement of Rep. Solomon).

⁵³ See National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558(a), 108 Stat. 2663, 2776 (1994) (codified as amended at 10 U.S.C.A. § 983 (West & Supp. 2005)).

⁵⁴ Kapczynski, *supra* note 4, at 675; see also *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 167 (D. Conn. 2005) (noting that “[l]aw schools . . . are not typically recipients of large amounts of federal funding”); Law, *supra* note 4, at 121 (stating that “[t]he Solomon Amendment posed no problem for law schools or the AALS”).

Appropriations Act of 1997⁵⁵ that expanded the reach of the original Solomon Amendment to federal “funds made available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.”⁵⁶ Additionally, the funding limitations of the new amendment were to be applied to any “grant of funds to be available for student aid.”⁵⁷

The restrictions on student aid, however, were apparently a step too far. As a result, Congress passed an amendment in 1999, which was introduced by Representative Barney Frank of Massachusetts and Representative Tom Campbell of California. This amendment made the limitations no longer applicable to funds “available solely for student financial assistance or related administrative costs.”⁵⁸ After a relatively short yet complicated history,⁵⁹ the Solomon Amendment currently provides that certain categories⁶⁰ of federal funds

may [not] be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

(1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting⁶¹

⁵⁵ Pub. L. No. 104-208, § 514(b), 110 Stat. 3009, 3009-271 (1996), *repealed by* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-11 (1999). It is important to note that though parts of the 1996 amendment were repealed, the Solomon Amendment is in full effect as codified as 10 U.S.C.A. § 983 (West & Supp. 2005).

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ Department of Defense Appropriations Act of 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1212, 1260 (1999).

⁵⁹ See *FAIR II*, 390 F.3d 219, 225-28 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (discussing the original amendment and subsequent federal actions as they relate to it); *Burt*, 354 F. Supp. 2d at 166-68 (detailing the legislative history of the Solomon Amendment); Law, *supra* note 4, at 121-23 (describing the history of law school actions in response to changes in the Solomon Amendment); Kapczynski, *supra* note 4, at 673-76 (reviewing changes in the Solomon Amendment over time).

⁶⁰ See 10 U.S.C.A. § 983(d)(1)(A)-(F) (West Supp. 2005) (listing categories of funds covered by the Solomon Amendment).

⁶¹ *Id.* § 983(b). Additional amendments were made to the Solomon Amendment in 2002 to indicate the newly created Department of Homeland Security and

As to how compliance by a particular institution is to be gauged, a 2004 addition to the Solomon Amendment requires that the military be allowed admission to recruit “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.”⁶² Previously, this language had merely been part of the Defense Department’s regulations interpreting the recruitment law.⁶³

D. Implementation of the Solomon Amendment and the AALS Response

Since the Solomon Amendment grants the Secretary of Defense the discretion to determine whether or not an institution of higher education is in compliance with the law, the DOD is authorized to promulgate regulations as to how the amendment will be implemented.⁶⁴ The DOD’s initial interpretation of the statute was to deny federal funds *only* to the subelement itself (e.g., a law school) and not the parent institution.⁶⁵ As such, the AALS continued to mandate that member institutions prohibit military recruiting because the first version of the Solomon Amendment was “inconsequential.”⁶⁶

substitute it for the Department of Transportation in the bill. *See* 10 U.S.C. § 983(b), as amended by Pub. L. No. 107-296, §§ 1704(b)(1), (g), 116 Stat. 2314, 2316 (2002).

⁶² Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552(a)(2), 118 Stat. 1811, 1911 (2004).

⁶³ *See Burt*, 354 F. Supp. 2d at 168 (noting that the access requirement in the former regulation was intended as a “safe harbor provision,” but that it is now “an affirmative duty”).

In wording the new . . . substantive requirement, the DOD borrowed language from the existing policy’s regulatory exception—32 C.F.R. 216.4(c) (exempting from Solomon Act compliance a law school that ‘presents evidence that the degree of access by military recruiters is at least equal in quality and scope to that afforded to other employers’).

FAIR II, 390 F.3d at 227 n.6.

⁶⁴ *See* 10 U.S.C.A. § 983.

⁶⁵ *See* Defense Federal Acquisition Regulation Supplement, 61 Fed. Reg. 7739, 7740 (Feb. 29, 1996); *see also Burt*, 354 F. Supp. 2d at 167 (reviewing the DOD’s original regulation and determining that “if a subelement of a university, like a law school, denied access to military recruiters, then only that subelement would lose funding, not the entire institution”); Law, *supra* note 4, at 121 (asserting that a non-compliant law school, for instance, risked losing funding going only to itself and not the entire college or university).

⁶⁶ Valdes, *supra* note 4, at 354. Francisco Valdes, the author of the cited article, was the 1997 Chair of the AALS Section on Gay and Lesbian Legal Issues. *See id.* n.*.

In 1997, however, after the Solomon Amendment was amended to include funds distributed by other federal departments, including educational funds, the AALS allowed law schools to decide for themselves whether or not to comply,⁶⁷ even though “the applicable regulations continued to cabin the consequences of a subelement’s failure to grant access to military recruiters to that subelement itself, such that non-compliance did not affect the university as a whole.”⁶⁸ The AALS did so because educational loans—at that time subject to limitation at the Secretary of Defense’s judgment of non-compliance—were “significant to many schools.”⁶⁹ The requirement to bar discriminatory employers from on-campus recruiting was replaced, however, with the passage of the 1999 Frank-Campbell Amendment, which withdrew from DOD limitation federal funds meant exclusively for student financial aid.⁷⁰

The claims at issue in the recent cases challenging the Solomon Amendment arose out of the DOD’s most recent interpretation of the statute.⁷¹ In 2000, the DOD issued new interim regulations that were to become effective immediately,⁷² and which have since become permanent.⁷³ The new regulations state that an “[i]nstitution of higher education . . . includes *all subelements* of such an institution.”⁷⁴ This change abolished the previous law school policy which “treated schools and colleges

⁶⁷ See Law, *supra* note 4, at 122 (quoting Memorandum 96–15 from Carl Monk, Executive Vice President and Executive Director of the AALS, to Deans of Member and Fee-paid Schools (May 28, 1996)).

⁶⁸ *Burt*, 354 F. Supp. 2d at 167.

⁶⁹ Valdes, *supra* note 4, at 355; see also Roaney, *supra* note 4, at 21 (estimating potential losses of federal funds to law schools in real-dollar amounts as anywhere between \$500,000 to \$1,000,000).

⁷⁰ See *supra* note 58 and accompanying text.

⁷¹ See *Burt*, 354 F. Supp. 2d at 168–70 (explaining how the suit arose out of the DOD’s advisement that the law school was not in compliance with current federal requirements); *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, at *4–6 (E.D. Pa. Aug. 19, 2004) (describing the controversy as growing out of the law school’s non-compliance with the Solomon Amendment under current DOD regulations); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 390–92 (D. Conn. 2004) (discussing the student-plaintiffs’ belief that the present construction of the Solomon Amendment was “unreasonable” and identifying current conflict as arising out of law school’s non-compliance).

⁷² See Defense Federal Acquisition Regulation Supplement; Institutions of Higher Education, 65 Fed. Reg. 2056, 2056–57 (Jan. 13, 2000) (codified at 48 C.F.R. § 209.470 (2004)).

⁷³ See 48 C.F.R. § 209.470 (2004).

⁷⁴ *Id.* (emphasis added).

within a university as independent actors.”⁷⁵ Consequently, if a law school was found to be in contravention of the dictates of the Solomon Amendment, the funding of the entire parent institution would become eligible for limitation at the direction of the Secretary of Defense.⁷⁶ This is the case at least as to funds flowing from the DOD; funds appropriated by the other departments listed in the Solomon Amendment will only be denied to the subelement deemed in violation of the statute.⁷⁷ As a direct result of the new regulations, the AALS and its member institutions have been forced to lift their non-discrimination policies as applied to military recruiters.⁷⁸

II. “DON’T ASK, DON’T TELL”: THE POLICY THAT LAUNCHED A THOUSAND HARDSHIPS

The storm swirling around the rather short life of the Solomon Amendment pales in comparison to the whirlwind of controversy surrounding the U.S. military’s “Don’t Ask, Don’t Tell” policy.⁷⁹ The dawn of the Clinton administration brought to the public’s attention a debate over the military’s approach to the service of homosexuals in the armed forces.⁸⁰ At President

⁷⁵ Law, *supra* note 4, at 123.

⁷⁶ See *Burt*, 354 F. Supp. 2d at 167 (citing 48 C.F.R. § 252.209–7005 (2000)).

⁷⁷ See *FAIR II*, 390 F.3d 219, 227 (3d Cir. 2004) (citing 32 C.F.R. § 216.3(b)(1) (2004) for the proposition that an “offending subelement’s parent institution is penalized with the loss of only DOD funds”).

⁷⁸ See Law, *supra* note 4, at 123; see also *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, at *6 (E.D. Pa. Aug. 19, 2004) (“Under the threat of losing federal funding because of alleged noncompliance, the University President ordered the Law School not to enforce its anti-discrimination policy against military recruiters.”); *FAIR I*, 291 F. Supp. 2d 269, 284 (D.N.J. 2003), *rev’d*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (“As of the fall 2003 recruiting season, every law school in the nation that receives federal funds has suspended permanently their non-discrimination policies as applied to military recruiters.”).

⁷⁹ See Law, *supra* note 4, at 119 (“The ‘don’t ask, don’t tell’ policy adopted by the Clinton administration in 1996 has been a disaster.”); Diane H. Mazur, *Word Games, War Games*, 98 MICH. L. REV. 1590, 1590 (2000) (“The issue of military service by gay citizens became . . . a cultural standoff . . .”); Schaen, *supra* note 4, at 1365–66 (“Unless the . . . policy is changed or declared unconstitutional, gay-rights supporters will be forced to find other ways of protesting it.”).

⁸⁰ See, e.g., Mazur, *supra* note 79, at 1590 (portraying America’s interest in military service by gays in the early 1990s as an “obsession”); Aaron A. Seamon, Comment, *The Flawed Compromise of 10 U.S.C. § 654: An Assessment of the Military’s “Don’t Ask, Don’t Tell” Policy*, 24 U. DAYTON L. REV. 319, 324–25 (1999) (discussing public policy debate surrounding gays in the military at the start of the Clinton administration).

Clinton's urging, "Congress began exploring a legislative solution to the problem."⁸¹ The result was the 1993 compromise commonly called "Don't Ask, Don't Tell."⁸² The policy's basic arrangement permits homosexuals to serve in the military by making it unlawful to inquire about the sexual orientation of service-members,⁸³ while also prohibiting those serving in the military from disclosing their homosexuality by word or by deed.⁸⁴

Since "Don't Ask, Don't Tell" continues to mandate silence on the issue of sexual orientation,⁸⁵ "[m]any . . . believe that it is just the latest incarnation of a long-standing ban on homosexuals in the military."⁸⁶ Despite the fact that the policy has routinely

⁸¹ Seamon, *supra* note 80, at 325.

⁸² *Id.* at 327.

⁸³ See Schaen, *supra* note 4, at 1362–63 ("[C]ommanders are not permitted to conduct investigations for the purpose of determining a service member's sexual orientation."); Gavin W. Scotti, Jr., Note, *Queer Eye for the Military Guy: Will "Don't Ask, Don't Tell" Survive in the Wake of Lawrence v. Texas?*, 78 ST. JOHN'S L. REV. 897, 898 & n.5 (2004) (citing Aaron Belkin, *Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?*, PARAMETERS, Summer 2003, at 108, available at <http://carlisle-www.army.mil/usawc/parameters/03summer/belkin.pdf>) (summarizing the history of the "Don't Ask, Don't Tell" policy)).

⁸⁴ See 10 U.S.C. § 654(b) (2000):

POLICY.—A member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made . . . :

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless . . . the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual . . . unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

⁸⁵ See Scotti, *supra* note 83, at 900 (noting that "Don't Ask, Don't Tell" was repeatedly upheld by federal circuit courts and that the Supreme Court has not ruled as to its constitutionality).

⁸⁶ Ingle, *supra* note 4, at 89.

been upheld as constitutional,⁸⁷ many individuals continue to view the law as discriminatory against homosexuals.⁸⁸ Though the current conflict between law schools and the military centers on the Solomon Amendment, it is the “Don’t Ask, Don’t Tell” policy that undergirds the entire controversy.⁸⁹

III. A CONSTITUTIONAL CLINIC: STUDENTS AND FACULTY

⁸⁷ See, e.g., *Able v. United States*, 155 F.3d 628, 636 (2d Cir. 1998) (holding that the “Don’t Ask, Don’t Tell” policy does not violate the Equal Protection Clause); *Holmes v. Cal. Army Nat’l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997) (finding that the “Don’t Ask, Don’t Tell” policy does not violate the First Amendment, stating that although an “admission . . . [is] made in speech, . . . that does not mean that the First Amendment precludes the use of the admission as evidence of the facts admitted” (quoting *Pruitt v. Cheney*, 963 F.2d 1160, 1164 (9th Cir. 1991))); *Philips v. Perry*, 106 F.3d 1420, 1429–30 (9th Cir. 1997) (upholding the “Don’t Ask, Don’t Tell” policy against Equal Protection and First Amendment claims); *Richenberg v. Perry*, 97 F.3d 256, 261 (8th Cir. 1996) (“We join six other circuits in concluding that the military may exclude those who engage in homosexual acts”); *Thomasson v. Perry*, 80 F.3d 915, 931 (4th Cir. 1996) (concluding that the “Don’t Ask, Don’t Tell” policy withstands First Amendment attack and reasoning that the pertinent law “does not target speech declaring homosexuality; rather, it targets homosexual acts and the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence”); *Steffan v. Perry*, 41 F.3d 677, 691–93 (D.C. Cir. 1994) (en banc) (deciding that the dismissal of openly gay Navy midshipmen under the “Don’t Ask, Don’t Tell” policy does not raise valid First Amendment or Equal Protection claims). *But see* *Scotti*, *supra* note 83 (discussing whether the “Don’t Ask, Don’t Tell” policy will be upheld as constitutional following the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), which granted privacy rights to homosexual conduct).

⁸⁸ See *Law*, *supra* note 4, at 119 (“[T]he military stands out as an anomaly as it pursues an open, explicit policy of discrimination on the basis of sexual orientation.”); *Ingli*, *supra* note 4, at 89 (“The military’s policy on homosexuals is considered discriminatory”); *Schaen*, *supra* note 4, at 1359 (“The military discriminates against homosexuals.”).

⁸⁹ See generally *FAIR II*, 390 F. 3d 219, 224–28 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (discussing that the suit arose out of the law school’s reliance on a non-discrimination policy which barred military recruiting due to the discriminatory effect of the “Don’t Ask, Don’t Tell” policy under the Solomon Amendment); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 168 (D. Conn. 2005) (“In light of Congress’s . . . ‘Don’t Ask, Don’t Tell’ policy, [the Department of Defense] has refused to certify its compliance with [Yale] Law School’s [Nondiscrimination Policy]. As a result, . . . [it] has been denied use of the [Career Development Office] since 1978.”); *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, at *5 (E.D. Pa. Aug. 19, 2004) (noting that the lawsuit originated due to the military’s inability to “verify [to the university’s career services office] that it does not discriminate against its gay and lesbian members”); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 390 (D. Conn. 2004) (“In light of the military’s . . . ‘Don’t Ask, Don’t Tell’ policy, the Department of Defense has refused to certify its compliance with [Yale] Law School’s [Nondiscrimination Policy] and has thus been denied the use of [its] Career Development Office.”).

CHALLENGE THE MILITARY

Recently, associations comprised of law school faculty and students have brought suits challenging the constitutionality of the Solomon Amendment.⁹⁰ With minor variations on a general theme, the plaintiffs in these cases have asserted that the statute violates their constitutional rights as embodied in the First and Fifth Amendments to the U.S. Constitution.⁹¹ The claims asserted by the plaintiffs involved in these cases will be discussed in turn.

In *Forum for Academic & Institutional Rights v. Rumsfeld*,⁹² the Third Circuit Court of Appeals reversed a district court decision that held that the Solomon Amendment would likely be found constitutional.⁹³ The plaintiff, FAIR, an organization comprised of law schools and faculty members, asserted that the Solomon Amendment placed an unconstitutional condition on the distribution of government funds by penalizing law schools for exercising their First Amendment rights.⁹⁴ The plaintiffs first argued that a law school qualifies as an expressive association, and as such, the government cannot impair their ability to effectively “disseminate their chosen message.”⁹⁵ Furthermore, they urged the court to find that the First Amendment protected their freedom from being forced “to propagate, accommodate, and subsidize the military’s [expressive act of] recruiting.”⁹⁶ The Solomon Amendment, according to FAIR, impermissibly treads on these two distinct First Amendment speech interests and, thus, a preliminary injunction should have been granted.⁹⁷ For

⁹⁰ See, e.g., *FAIR II*, 390 F.3d at 224; *Burt*, 354 F. Supp. 2d at 158–59; *Burbank*, 2004 U.S. Dist. LEXIS at *1–2; *Student Members of SAME*, 321 F. Supp. 2d at 390.

⁹¹ See *FAIR II*, 390 F.3d at 230, 235–36, 243 (listing First Amendment claims under the doctrines of expressive association, compelled speech, and expressive conduct); *Burt*, 354 F. Supp. 2d at 159 (describing plaintiffs’ assertion that adherence to the Solomon Amendment “violates their freedoms of speech and association and violates their substantive due process right of educational autonomy”); *Burbank*, 2004 U.S. Dist. LEXIS 17509, at *6 (commenting that the plaintiffs challenged the Solomon Amendment on First and Fifth Amendment grounds); *Student Members of SAME*, 321 F. Supp. 2d at 390 (observing that the lawsuit was based upon First and Fifth Amendment claims).

⁹² 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

⁹³ See *id.* at 224.

⁹⁴ See *id.* at 224, 229.

⁹⁵ *Id.* at 233.

⁹⁶ *Id.* at 236.

⁹⁷ See *id.* at 230 (noting the law schools’ First Amendment right to expressive association and freedom from compelled speech).

reasons that will be explored more fully below, the Third Circuit found that FAIR had made a strong showing, through the doctrines of compelled speech and expressive association, that it would likely succeed in having the Solomon Amendment be deemed unconstitutional.⁹⁸

In *Student Members of SAME v. Rumsfeld*,⁹⁹ two student organizations of the Yale Law School, the Student/Faculty Alliance for Military Equality (“SAME”) and Outlaws, “an organization formed with the goal of educating the Law School community about legal issues affecting lesbian, gay, bisexual and transgender persons,”¹⁰⁰ brought suit against the Secretary of Defense claiming the application of the Solomon Amendment violated their First and Fifth Amendment rights.¹⁰¹ The organizations’ first claim was that the Solomon Amendment infringed on their freedom of expressive association—a liberty “implicit in the right to engage in activities protected by the First Amendment.”¹⁰² Government actions that intruded into an association’s affairs, the court explained, may have violated this constitutional right.¹⁰³

The student groups urged that the Solomon Amendment compelled the law school to abandon its non-discrimination policy and, thus, forced onto the law school—their association—a message of intolerance with which it disagrees.¹⁰⁴ The court, however, determined that the organizations did not have standing to pursue this associational claim because they do not set the policies of the law school.¹⁰⁵ The court relied on a similar justification (that the students were not proper parties) for rejecting the plaintiffs’ claim that the Solomon Amendment represented viewpoint discrimination.¹⁰⁶ To support their claim, the students unsuccessfully asserted that the DOD’s application of the Solomon Amendment discriminated against Yale Law School because of its choice to be an association that does not

⁹⁸ *See id.* at 246.

⁹⁹ 321 F. Supp. 2d 388 (D. Conn. 2004).

¹⁰⁰ *Id.* at 390.

¹⁰¹ *See id.*

¹⁰² *Id.* at 393 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

¹⁰³ *See id.* (citing *Roberts*, 468 U.S. at 623).

¹⁰⁴ *See id.* at 393–94.

¹⁰⁵ *See id.* at 394.

¹⁰⁶ *See id.* at 395.

discriminate against gays and lesbians.¹⁰⁷

The plaintiffs further argued that they had a constitutional right to receive information, such as the message of tolerance expressed in the law school's non-discrimination policy.¹⁰⁸ This is a right that has not only been recognized, but also deemed "particularly important for students."¹⁰⁹ The court permitted this challenge because

[t]he students have alleged that they are recipients of the faculty's message, through the [non-discrimination policy], that discrimination against gays and lesbians is wrong and will not be tolerated within the law school community, and that, but for the Solomon Amendment and the defendant's application of it, they would receive that message.¹¹⁰

The court also permitted the student organizations to pursue their equal protection argument against the DOD.¹¹¹ The students claimed that the statute in question was specifically aimed at ending protests against the "Don't Ask, Don't Tell" policy at colleges and universities.¹¹² Additionally, the student organizations argued that the Solomon Amendment obliged the law school to lift its non-discrimination policy.¹¹³ As such, the law singled out homosexual students for unequal treatment since it mandated that the law school allow a recruiter, with whom gay student members of the plaintiff-organizations were forbidden to meet, to come on campus.¹¹⁴ Though the court noted that its circuit has upheld "Don't Ask, Don't Tell," it recognized that the calculus for standing and for the likelihood of success on the merits of the claim are different, and consequently, determined that the Solomon Amendment could be challenged as causing

¹⁰⁷ *See id.*

¹⁰⁸ *See id.* at 394.

¹⁰⁹ *Id.* (quoting *Fox v. Bd. of Trs. of State Univ. of N.Y.*, 841 F.2d 1207, 1212 (2d Cir. 1988)).

¹¹⁰ *Id.* at 395.

¹¹¹ *See id.* at 396.

¹¹² *See id.*

¹¹³ *See id.* 395–96 (discussing the argument that the law school faculty was essentially forced to suspend the non-discrimination policy because of the threats aimed at the school).

¹¹⁴ *See id.* at 395–96. While no students are actually denied the right to meet with a military recruiter, openly gay students would find their on-campus interviews fruitless at best because the "Don't Ask, Don't Tell" policy demands silence as to one's sexuality.

prejudicial treatment of the plaintiffs' homosexual members.¹¹⁵

In *Burt v. Rumsfeld*,¹¹⁶ a companion case to *Student Members of SAME*, members of the Yale Law School faculty challenged the Solomon Amendment as an intrusion on their First Amendment freedom of expressive association and on Fifth Amendment due process grounds.¹¹⁷ Here, the court permitted the expressive association claim that it had denied the plaintiffs in *Student Members of SAME*.¹¹⁸ The faculty raised the same associational arguments as the members of SAME and Outlaws, but were deemed to have standing since the faculty was the party that voted to implement the non-discrimination policy (i.e., determine the rules of the association).¹¹⁹

The faculty-plaintiffs also asserted that the Solomon Amendment infringed on their freedom of association and right to not be compelled to speak.¹²⁰ They argued that the adoption of the non-discrimination policy was designed to send a message that "discrimination will not be tolerated."¹²¹ In enacting the non-discrimination policy, the Yale faculty sought to apply it universally within the law school, including extending it to employers who recruit at Yale.¹²² Since the Solomon Amendment conditioned funding on allowing military recruiting at the law school, the plaintiffs argued that the law required them to silence their message of non-discrimination, thus violating their freedom of speech.¹²³

The faculty also raised a Fifth Amendment due process claim against the Secretary of Defense.¹²⁴ Though the argument in *Burt* as to this issue is not entirely clear, the basic assertion by the plaintiffs was that substantive due process protects "educational autonomy" as well as the student-teacher relationship,¹²⁵ and that the Solomon Amendment hampered this freedom because the faculty was no longer able to oppose

¹¹⁵ *See id.*

¹¹⁶ 354 F. Supp. 2d 156 (D. Conn. 2005).

¹¹⁷ *See id.* at 171.

¹¹⁸ *See id.* at 185–87.

¹¹⁹ *See id.* at 160.

¹²⁰ *See id.* at 171.

¹²¹ *Id.*

¹²² *See id.* at 166.

¹²³ *See id.* at 171.

¹²⁴ *See id.*

¹²⁵ *Id.*

discrimination and foster a protective environment for its students.¹²⁶ Additionally, a Yale Law School professor, claimed a denial of his First Amendment right as the Solomon Amendment compelled him to aid in the dissemination of a message with which he and the faculty disagree.¹²⁷ In this action, the court determined that while no Fifth Amendment violation was found, the Solomon Amendment placed an unconstitutional condition on the receipt of federal funds by violating the plaintiffs' freedoms of speech and expressive association.¹²⁸

In *Burbank v. Rumsfeld*,¹²⁹ faculty and students of the University of Pennsylvania Law School brought suit against the Secretary of Defense challenging the DOD's interpretation of the Solomon Amendment and the potential enforcement of its funding limitations against the institution.¹³⁰ The First Amendment arguments raised by the plaintiffs were nearly identical to those in the two other cases.¹³¹ Indeed, the court relied heavily on these prior cases in deciding that the faculty-plaintiffs could pursue their claims that the Solomon Amendment infringed upon their "*First Amendment* rights to free speech, free expression, free association, and academic freedom."¹³² The court disagreed, however, as to the Fifth Amendment arguments asserted by the plaintiffs, holding that they did not have standing to raise equal protection or due process challenges against the government as they failed to articulate a cognizable injury protected by that amendment.¹³³

¹²⁶ *See id.*

¹²⁷ *See id.*

¹²⁸ *See id.* at 189–90.

¹²⁹ No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 19, 2004).

¹³⁰ *See id.* at *1–2.

¹³¹ *See id.* at *7–11.

¹³² *Id.* at *8–9.

¹³³ *See id.* at *12.

IV. WINNING THE WAR: WHY THE SOLOMON AMENDMENT DOES NOT INFRINGE ON FIRST AMENDMENT RIGHTS¹³⁴

A. *Overcoming Challenges Based on Freedom of Speech*

The Solomon Amendment should survive any claims rooted in the plaintiffs' freedom of speech. These First Amendment challenges to the law have taken various forms. The plaintiffs successfully argued in two cases that the law improperly burdens the freedom of association, impermissibly compels speech, and wrongly hinders expressive association.¹³⁵ A different test and rationale applies to expressive association claims and, therefore, that challenge will be treated separately below.¹³⁶

1. Claims Based on the Doctrines of Expressive Association and Expressive Conduct

The Solomon Amendment, contrary to the claims of the plaintiffs, does not directly regulate speech or the sending and receiving of a particular message. Rather, the law most directly regulates conduct undertaken by particular institutions.¹³⁷ The funding limitations of the Solomon Amendment only go into effect when an institution of higher education or a subelement thereof "has a policy or practice . . . that either prohibits, or in effect prevents [military personnel] from gaining entry to campuses, or access to students . . . for purposes of military

¹³⁴ This Note will not address the Fifth Amendment claims raised by the plaintiffs in the above cases for two significant reasons. First, not all of the courts addressing the challenges to the Solomon Amendment found a cognizable injury to either due process or equal protection interests. Second, the courts that did find a cognizable Fifth Amendment injury cast doubt upon the viability of such a claim. For instance, the court in *Student Members of SAME* explained that the student-plaintiffs' challenge of the Solomon Amendment on equal protection grounds was "dubious at best." *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 396 (D. Conn. 2004). Additionally, the court in *Burt* held that the Solomon Amendment did not violate substantive due process. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 188–89 (D. Conn. 2005). Consequently, this Note will only explore why the Solomon Amendment should survive any First Amendment challenges.

¹³⁵ See *FAIR II*, 390 F.3d 219, 246 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005); *Burt*, 354 F. Supp. 2d at 178–83.

¹³⁶ See *infra* Part IV.B.

¹³⁷ See 10 U.S.C.A. § 983 (West & Supp. 2005); *FAIR I*, 291 F. Supp. 2d 269, 306 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) ("The Solomon Amendment merely conditions federal funds on campus and student access for military recruiting . . .").

recruiting.”¹³⁸ Therefore, by the language of the statute, a law school would be denied funding not for expressing a belief that discrimination is a bad thing, but only for attempting to give weight to that belief by closing its doors to military recruiters.

It is of course true that the conduct at issue—enforcing a non-discrimination policy to bar military recruiting—contains an element of expression. However, the Supreme Court has determined that so-called “expressive conduct” deserves a test different from that for pure speech limitations. In *United States v. O'Brien*,¹³⁹ a case dealing with an individual convicted of burning his draft card in violation of federal law, the Court recognized that certain conduct can have both speech and non-speech elements.¹⁴⁰ Although the Solomon Amendment primarily targets conduct, it does have an incidental effect on speech as law schools have been forced to suspend their non-discrimination policies, at least as applied to the military.¹⁴¹ Nevertheless, the Supreme Court has cautioned that it “cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person . . . intends . . . to express an idea.”¹⁴² In *O'Brien*, the Court set forth a test to determine whether a regulation that implicates conduct primarily and expression incidentally is constitutional.¹⁴³ The Court stated:

[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.¹⁴⁴

Under the *O'Brien* test, the Solomon Amendment should be upheld over the challenges raised by the law student and faculty-plaintiffs in *FAIR II* and *Burt*. As to the first part of the test, the regulation is clearly within the Congress’ power to raise and support a military.¹⁴⁵ Indeed, the *O'Brien* Court urged that “[t]he

¹³⁸ 10 U.S.C.A. § 983(b).

¹³⁹ 391 U.S. 367 (1968).

¹⁴⁰ *See id.* at 376.

¹⁴¹ *See FAIR I*, 291 F. Supp. 2d at 311.

¹⁴² *O'Brien*, 391 U.S. at 376.

¹⁴³ *See id.* at 376–77.

¹⁴⁴ *Id.* at 377.

¹⁴⁵ *See supra* note 5 and accompanying text.

constitutional power of Congress to raise and support armies and to make all laws necessary and proper to that end is broad and sweeping.”¹⁴⁶ In *O’Brien*, the Court upheld the power of the government to set provisions for how the conscription of military troops would be most efficiently accomplished, even though it infringed on the plaintiff’s freedom of expression.¹⁴⁷ It would be passing strange to assert, as the plaintiffs challenging the Solomon Amendment must, that even though Congress has the capacity to *draft* citizens for military service and limit modes of conduct that frustrate that end, it nevertheless lacks the authority to govern the *recruitment* of military personnel simply because a speech interest is incidentally involved.

Equally clear is that the Solomon Amendment passes the second *O’Brien* prong by furthering the substantial governmental interest of recruitment of service-members. The power of the military to recruit citizens for service in the armed forces is both permitted by the Constitution¹⁴⁸ and mandated by Congress.¹⁴⁹ Again, the Court in *O’Brien* made it clear that “the Nation has a vital interest in having a system for raising armies that functions with maximum efficiency and is capable of easily and quickly responding to continually changing circumstances.”¹⁵⁰ Certainly, having access to law schools to recruit Judge Advocates for the various branches of the military is encompassed in the efficiency principle outlined in *O’Brien* and likewise represents an important federal interest.

The governmental interest of Congress in insisting on access to institutions of higher education and students for the purposes of military recruiting is “unrelated to the suppression of free expression,”¹⁵¹ and thus, meets *O’Brien*’s third prong. As discussed above, the language of the Solomon Amendment does not condition federal funding on the adoption or rejection of any particular viewpoint with regard to the military; it simply

¹⁴⁶ *O’Brien*, 391 U.S. at 377 (citing *Lichter v. United States*, 334 U.S. 742, 755–58 (1948)).

¹⁴⁷ *See id.* at 377–81.

¹⁴⁸ *See United States v. Seeger*, 326 F.2d 846, 854 (2d Cir. 1954), *cert. granted*, 377 U.S. 922 (1964), *aff’d*, 380 U.S. 163 (1965) (affirming Congress’ power to recruit forces).

¹⁴⁹ *See* 10 U.S.C. § 503(a) (2000) (obliging the armed forces to “conduct intensive recruiting campaigns to obtain enlistments”).

¹⁵⁰ *O’Brien*, 391 U.S. at 381.

¹⁵¹ *Id.* at 377.

provides penalties to those colleges and universities that, *for whatever reason*, prohibit the military's on-campus recruiting efforts.¹⁵²

In *O'Brien*, the appellant was charged with destroying his Selective Service registration card, which he did for the purpose of protesting the draft and the Vietnam War.¹⁵³ The Court upheld his conviction, even though the applicable law arguably implicated his freedom of symbolic speech, because he was being punished for the "noncommunicative impact of his conduct, and for nothing else."¹⁵⁴ The same proposition holds as regards any institutions that violate the proscriptions of the Solomon Amendment. It is the act of frustrating the military's attempts to access a particular campus that runs afoul of the Solomon Amendment, not the message conveyed, if any, when an institution does so. Presumably, a law school would risk losing funds whether it closed its doors to the military in order to make a statement about discrimination or if it did so because its students had not fared well in seeking employment within the JAG Corps.

The Solomon Amendment also comports with the fourth *O'Brien* requirement as the regulation does not inhibit the incidental concerns of the law schools any more than "is essential to the furtherance of [the government's] interest."¹⁵⁵ "Later Supreme Court cases have stated that to satisfy the *O'Brien* standard, 'a regulation need not be the least speech-restrictive means of advancing the Government's interests.'"¹⁵⁶ All that is required of the Solomon Amendment to satisfy this prong is a finding that the efforts of the military to recruit personnel "would be achieved less effectively absent the regulation."¹⁵⁷

It seems plain that the military's efforts to reach potential service-members would be achieved less effectively if any institution of higher learning could deny recruiters access to campus and students. Furthermore, the Supreme Court has

¹⁵² See 10 U.S.C.A. § 983 (West & Supp. 2005); see also *supra* notes 137–38 and accompanying text.

¹⁵³ See *O'Brien*, 391 U.S. at 376.

¹⁵⁴ *Id.* at 382.

¹⁵⁵ *Id.* at 377.

¹⁵⁶ *FAIR I*, 291 F. Supp. 2d 269, 313 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

¹⁵⁷ *Id.* (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

noted the “evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the . . . plausibility of the justification raised.”¹⁵⁸ The government’s assertion that greater access to college campuses is required to assist the military in its recruiting efforts seems highly plausible. After all, a college education is required to be commissioned as an officer in the military,¹⁵⁹ and a law degree is required for acceptance into the JAG Corps.¹⁶⁰ Additionally, one of the military’s chief incentives in recruiting is its offer to help enlisted men and women pay (or pay back) their college expenses.¹⁶¹

Furthermore, as this matter directly concerns military issues, the policy choice of the federal legislature to determine the most effective means of recruiting should be given its proper respect. As the authority of Congress in this realm is strikingly extensive and explicit, the Supreme Court has cautioned that “perhaps in no other area has the Court accorded Congress greater deference”¹⁶² since “the scope of Congress’ constitutional power in this area [is] broad [and] the lack of competence on the part of the courts is marked.”¹⁶³

Although the actions of the law schools in barring military recruitment to advance their belief in the principles of non-discrimination seem to fall within the Supreme Court’s “expressive conduct” jurisprudence, the courts that have made determinations on the issue have subjected the Solomon Amendment to strict scrutiny as a violation of First Amendment

¹⁵⁸ *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 391 (2000).

¹⁵⁹ *See, e.g.*, About the Army, Officer, <http://www.goarmy.com/about/officer.jsp> (last visited Sept. 16, 2005); Careers in the Navy, Officer, <http://www.navy.com/officer> (last visited Sept. 16, 2005); U.S. Air Force, Officer Careers, <http://www.airforce.com/careers/officer/careers.php> (last visited Sept. 16, 2005); U.S. Marine Corps, Becoming a Marine Officer, http://www.marines.com/officer_programs/becomingamarineofficer.asp?format=flash (last visited Sept. 16, 2005).

¹⁶⁰ *See Kim, supra* note 10, at 36.

¹⁶¹ *See, e.g.*, Air Force, Enlisted Education, Money for School, <http://www.airforce.com/education/enlisted/moneyForSchool.php> (last visited Sept. 16, 2005); Explore the Navy, Education, <http://www.navy.com/education> (last visited Sept. 16, 2005); U.S. Army, Benefits, Education, <http://www.goarmy.com/benefits/education.jsp> (last visited Sept. 16, 2005); U.S. Marine Corps, Educational Opportunities, http://www.marines.com/enlisted_marines/educationalopps.asp (last visited Sept. 16, 2005).

¹⁶² *Rostker v. Goldberg*, 453 U.S. 57, 64–65 (1981).

¹⁶³ *Id.* at 65.

rights.¹⁶⁴ Nevertheless, the cases relied upon in finding that the Solomon Amendment compels speech are equally unavailing to the law schools. Beyond that, the dissimilarity between the facts giving rise to findings of compelled speech and those in conflict between the law schools and the military highlight the appropriateness of the *O'Brien* test over those presented below.

2. Claims Based on the Doctrine of Compelled Speech

Both *FAIR II* and *Burt* held that the Solomon Amendment compels speech on the part of the faculty-plaintiffs, which constitutes a violation of their First Amendment freedoms.¹⁶⁵ A constitutional violation based on compelled speech can occur in any combination of three distinct ways.¹⁶⁶ The State may impermissibly force a speaker to promulgate speech chosen by the government, require the accommodation or inclusion of another speaker's message, or mandate the subsidization of or contribution "to an organization that engages in speech that the individual opposes."¹⁶⁷ The essence of the courts' similar holdings is that because of the dictates of the Solomon Amendment, the institutions are compelled to either alter their own message about discrimination¹⁶⁸ or assist in the dissemination of the military's message.¹⁶⁹

The courts in *FAIR II* and *Burt* relied on a string of cases in reaching the conclusion that the Solomon Amendment compels speech. In *Pacific Gas & Electric Co. v. Public Utilities*

¹⁶⁴ See *FAIR II*, 390 F.3d 219, 242–43 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (applying strict scrutiny); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 187 (D. Conn. 2005) (same).

¹⁶⁵ See *FAIR II*, 390 F.3d at 243; *Burt*, 354 F. Supp. 2d at 175–78.

¹⁶⁶ See *FAIR II*, 390 F.3d at 235–36.

¹⁶⁷ *Id.* at 236.

¹⁶⁸ See *Burt*, 354 F. Supp. 2d at 178 ("The Solomon Amendment has forced the Faculty to change their message from a categorical statement that 'employers who discriminate . . . are not welcome . . . ' to an equivocal statement that includes the disclaimer 'except for the military.'").

¹⁶⁹ See *FAIR II*, 390 F.3d at 240 ("[B]y distributing newsletters and posting notices, the Solomon Amendment compels law schools to propagate the military's message."). Again, it bears noting that the language of the law in no way requires institutions of higher education to express any statement one way or the other regarding the military's presence on campus. See *supra* note 137 and accompanying text. The fact that law schools feel obliged to respond, either for reasons of conscience or because of their voluntary membership in the Association of American Law Schools is very different from the government compelling a particular response.

Commission,¹⁷⁰ the Supreme Court reversed a state Commission's requirement that a privately owned utility must include messages it opposes in the billing envelopes sent to its customers.¹⁷¹ The plaintiff would have been forced to provide a forum for a particular organization with which it disagreed by reserving space in its monthly statements four times a year.¹⁷² The Court found that such a requirement would force the utility company, which in effect distributed a small newspaper along with its bills,¹⁷³ to "alter [its] speech to conform with an agenda [it did] not set . . . [and] help disseminate hostile views."¹⁷⁴ Reasoning by analogy, the court in *FAIR II* asserted that "compel[ling] the schools to accommodate the military's message in the recruiting-assistance programs [is] . . . [l]ike the forced inclusion of . . . a statement in the extra space of a utility's billing statement."¹⁷⁵ Similarly, in *Burt*, the court cited to *Pacific Gas & Electric* in urging that "[t]he right of the Faculty . . . to refrain from aiding another in the latter's speech has been violated by the Solomon Amendment requirement that the [school] include DoD's recruiting message."¹⁷⁶

The analogy the courts pressed, however, fails in several respects. First, there is no requirement in the Solomon Amendment that is akin to the state Commission's directive that a private utility must actually print and disseminate a statement that is hostile to their own viewpoint.¹⁷⁷ There is also a disconnect between the statements in a newsletter possibly being altered because of fear of a hostile reply in a subsequent edition of that same publication¹⁷⁸ and the perceived mixed message that may be sent if a law school adopts a non-discrimination policy,

¹⁷⁰ 475 U.S. 1 (1986).

¹⁷¹ *See id.* at 20–21.

¹⁷² *See id.* at 5–7.

¹⁷³ *See id.* at 8.

¹⁷⁴ *Id.* at 9, 14.

¹⁷⁵ *FAIR II*, 390 F.3d 219, 240 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

¹⁷⁶ *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 178 (D. Conn. 2005).

¹⁷⁷ *Compare* 10 U.S.C.A. § 983 (West & Supp. 2005) (establishing that funds would be denied to institutions that deny military recruiters access to campuses and students), *with Pacific Gas & Electric*, 475 U.S. at 12–14 (describing the Commission's order to require *Pacific Gas & Electric* to help disseminate views hostile to the utility's interests).

¹⁷⁸ *See Pacific Gas & Electric*, 475 U.S. at 14 ("[The utility] must contend with the fact that whenever it speaks out on a given issue, it may be forced . . . to help disseminate hostile views.").

yet permits military recruiting.¹⁷⁹ To be sure, the law schools have nowhere asserted that they have altered either the words or the substance of their message out of concern for accommodating a potentially unfriendly rejoinder from the military. For the analogy to *Pacific Gas & Electric* to hold, the Solomon Amendment would have to require the law schools to print the military's antagonistic message¹⁸⁰—and what that would be is not entirely clear as the recruiter's function is to discuss employment opportunities¹⁸¹—in exactly the same manner that their own viewpoints are published. This much the law does not do.

The courts in *FAIR II* and *Burt* also relied on *Miami Herald Publishing Co. v. Tornillo*¹⁸² in determining that the Solomon Amendment compels speech.¹⁸³ This case concerned the possible assault on First Amendment liberties as a result of a Florida law that required newspapers to grant political candidates equal space to answer any criticism leveled at them by the publication.¹⁸⁴ Although the Supreme Court made clear in *Miami Herald* that the constitutionality of the statute would be reviewed in the context of the newspaper's First Amendment press liberties,¹⁸⁵ the case may stand for the general proposition that private parties should not be compelled to advance opinions with which they disagree, despite the ability to do so with little extra cost and the capacity to disclaim the contents of the message.¹⁸⁶

¹⁷⁹ See *Burt*, 354 F. Supp. 2d at 178.

¹⁸⁰ The concern in *Pacific Gas & Electric* was that since the utility company was being forced to publish the views of an organization that was opposed to its views, the company might not press its own viewpoints given the knowledge that an adverse statement was not only sure to follow, but would be published at its expense in the exact same forum. See *Pacific Gas & Electric*, 475 U.S. at 12–14.

¹⁸¹ The courts in *FAIR II* and *Burt* are clearly concerned that the law schools are being compelled to propound an idea with which they disagree, but the cases do not say what message the presence of a military recruiter sends. Presumably, since the non-discrimination policies are concerned, inter alia, with sexual orientation discrimination, the hostile message is that of the military's "Don't Ask, Don't Tell" Policy, but there is no suggestion that the recruiters themselves are advancing that particular message.

¹⁸² 418 U.S. 241 (1974).

¹⁸³ See *FAIR II*, 390 F.3d 219, 241 (3d Cir. 2004), cert. granted, 125 S. Ct. 1977 (2005); *Burt*, 354 F. Supp. 2d 156, 177 (D. Conn. 2005).

¹⁸⁴ See *Miami Herald*, 418 U.S. at 243–44.

¹⁸⁵ See *id.* at 243.

¹⁸⁶ See *id.* at 257–58.

The logic of *Miami Herald* was found to be equally applicable in the free speech context to strike down the Solomon Amendment.¹⁸⁷ The court in *FAIR II* reasoned that “[b]y requiring schools to include military recruiters in the interviews . . . , the Solomon Amendment compels the schools to accommodate the military’s message . . . [, and] [l]ike the forced inclusion of . . . a response in a newspaper’s editorial page, this is compelled speech.”¹⁸⁸ The court in *Burt* held that since compelled speech was found even where a newspaper was not viewed as endorsing a forced reply, the military cannot defend the Solomon Amendment by asserting that the law schools would not be viewed as endorsing the government’s message.¹⁸⁹ Such comparisons, however, are faulty.

First, there is strong reason to believe that the holding of *Miami Herald* was reached due to the free press concerns alone, and that it is consequently inapplicable to any free speech analysis. The opinion of the case both opens and closes with concerns over the “right to reply” statute’s effect on a free press,¹⁹⁰ and contains continual references throughout to that same concern.¹⁹¹ Moreover, the Court in *Miami Herald* was particularly concerned with the kind of control editors and publishers should have over the content of their newspapers.¹⁹² The Court explained, “[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials—whether fair or unfair—constitute the exercise of editorial control and judgment.”¹⁹³ Thus, it is plain that the chief concern of the Court was the forced printing of *any* message, as a curtailment of editorial freedom, rather than a more limited concern for a newspaper having to publish statements with which it might disagree. It is difficult to ascertain how the Solomon Amendment infringes on such a freedom. The language of the Florida “right to reply” statute could potentially compel

¹⁸⁷ See *FAIR II*, 390 F.3d at 240; *Burt*, 354 F. Supp. 2d at 176.

¹⁸⁸ *FAIR II*, 390 F.3d at 240.

¹⁸⁹ See *Burt*, 354 F. Supp. 2d at 175–78.

¹⁹⁰ See *Miami Herald*, 418 U.S. at 243, 257–58.

¹⁹¹ See *Miami Herald*, 418 U.S. 241 *passim*.

¹⁹² *Id.* at 256 (“Compelling editors or publishers to publish that which reason tells them should not be published is what is at issue in this case.”) (internal quotation marks omitted).

¹⁹³ *Id.* at 258.

newspapers to print statements whenever they wrote against a particular candidate.¹⁹⁴ The Solomon Amendment itself does not force the law schools to publish any military-approved message as a response to the promulgation of a non-discrimination policy, nor does it compel a reply to the message that the transient presence of military recruiters on campus makes (whatever that may be).¹⁹⁵ To be sure, law schools may indeed *feel* obligated to counter the presence of military recruiters in order to advance their own viewpoint on sexual orientation. But, such internal policy *choices* are in no way compelled by the government or the operation of the Solomon Amendment.

In holding that the Solomon Amendment compels speech, the courts in *FAIR II* and *Burt* drew support from *United States v. United Foods, Inc.*¹⁹⁶ In that case, the Supreme Court held that the federal Mushroom Promotion, Research, and Consumer Information Act¹⁹⁷ (the “Mushroom Promotion Act”) impermissibly compelled speech by “impos[ing] mandatory assessments upon handlers of fresh mushrooms . . . [that] are spent for generic advertising to promote mushroom sales.”¹⁹⁸ The Court noted that the issue at hand was whether the government itself may endorse a certain viewpoint by compelling a specified group of persons, some of whom object to the message, to pay a direct subsidy toward that end.¹⁹⁹ Though the Solomon Amendment contains no such similar provision—the government does not fund the military’s recruiting message with law school dollars—the courts in *FAIR II* and *Burt* reasoned that it is unconstitutional to force the schools to indirectly subsidize military recruiting through school employees and resources,²⁰⁰ even if the party being compelled can communicate its own message effectively.²⁰¹ The language of the Court’s opinion, however, does not support such a broad interpretation. The Court pointedly wrote, “First Amendment concerns apply here because of the requirement that producers [of mushrooms]

¹⁹⁴ See *id.* at 244.

¹⁹⁵ See 10 U.S.C.A. § 983 (West & Supp. 2005).

¹⁹⁶ 533 U.S. 405 (2001).

¹⁹⁷ 7 U.S.C. §§ 6101–12 (2000).

¹⁹⁸ *United Foods*, 533 U.S. at 408.

¹⁹⁹ See *id.* at 410.

²⁰⁰ See *FAIR II*, 390 F.3d 219, 240 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

²⁰¹ See *Burt*, 354 F. Supp. 2d 156, 178–79 (D. Conn. 2005).

subsidize speech with which they disagree.”²⁰²

Thus, compulsion of speech was found in *United Foods* not merely because the individuals challenging the Mushroom Promotion Act felt they could not effectively disagree with a hostile message, but rather because the whole purpose of the act at issue was to force those individuals to directly fund the message they opposed.²⁰³ Additionally, there is little in the opinion to buttress the notion that money spent incidental to the demands of a particular federal law will give rise to a compelled speech claim. In distinguishing a prior case where the Court found no First Amendment deficiencies in a general scheme that only secondarily involved the collection of assessments for speech,²⁰⁴ the Court wrote, “[As concerns the Mushroom Promotion Act], for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.”²⁰⁵ The Solomon Amendment neither seeks direct subsidization of the military’s recruiting message, nor is its primary goal the advertising or dissemination of a particular governmental viewpoint. Again, whatever its ancillary effects, the Solomon Amendment is first and foremost concerned with the recruitment of talented individuals for military service.

In determining that the Solomon Amendment compels speech, both the *FAIR II* and *Burt* courts relied upon the holding of *Wooley v. Maynard*.²⁰⁶ In *Wooley*, the Supreme Court examined whether the state of New Hampshire could constitutionally impose criminal sanctions on individuals who made the state’s motto, “Live Free or Die,” illegible on their license plates because they found it to be irreconcilable with their faith as Jehovah’s Witnesses.²⁰⁷ The Court somewhat broadened the issue to “whether the State may constitutionally require an individual to participate in the dissemination of an ideological

²⁰² *United Foods*, 533 U.S. at 410–11.

²⁰³ *See id.* at 411 (“First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors . . .”).

²⁰⁴ *See Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 469–70 (1997) (stressing that the approved regulations did not impose restraint on producers’ freedom to communicate and did not compel speech or financing of political or ideological views).

²⁰⁵ *United Foods*, 533 U.S. at 411–12.

²⁰⁶ 430 U.S. 705 (1977).

²⁰⁷ *Id.* at 706–07.

message by displaying it on his private property in a manner and for the express purpose that it be observed and read by the public.”²⁰⁸ Such a requirement, the Court declared, was unconstitutional.²⁰⁹

The court in *FAIR II* found the Solomon Amendment sufficiently analogous to the law at issue in *Wooley* and asserted that “the Solomon Amendment compels law schools to propagate the military’s message. Like the forced display of an unwanted motto on one’s license plate, . . . this is compelled speech.”²¹⁰ The court in *Burt* likewise held that the rationale of *Wooley* should be applied to the Solomon Amendment.²¹¹ However, there are significant differences in the conditions imposed by the New Hampshire law at issue in *Wooley* and those imposed by the Solomon Amendment; thus, *Wooley* is unsuitable as precedent for finding the Solomon Amendment unconstitutional.

First, the New Hampshire law made refusal to display the state’s message a crime, for which the plaintiff was ultimately sentenced and required to serve jail time after he refused to pay the previous two fines.²¹² In contrast, the Solomon Amendment only provides for the withholding of federally issued funds for noncompliance.²¹³ Nonetheless, as noted above, the Supreme Court did endorse a broader reading of the holding in *Wooley*.²¹⁴ There is a manifest difference between an individual being compelled with the threat of fines and incarceration to operate as a “mobile billboard”²¹⁵ for an ideological message that is contrary to his religious beliefs, and a law school being persuaded through the use of government dollars to admit recruiters who only indirectly represent policies with which a law school disagrees. This is especially so given the ability of the law schools to continue to propagate whatever message on discrimination they choose.

Second, the difference between the forced display of a motto and giving an incentive for the admission of military recruiters is

²⁰⁸ *Id.* at 713.

²⁰⁹ *See id.* at 714.

²¹⁰ *FAIR II*, 390 F.3d 219, 240 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005).

²¹¹ *See Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 180 (D. Conn. 2005).

²¹² *See Wooley*, 430 U.S. at 707–08.

²¹³ *See* 10 U.S.C.A. § 983(a)–(b) (West & Supp. 2005).

²¹⁴ *See Wooley*, 430 U.S. at 713.

²¹⁵ *Id.* at 715.

more than just one of degree.²¹⁶ With respect to the former, the message being opposed is clear—it is literally written across the back of every automobile—and is part of the very statute at issue in the case.²¹⁷ As regards the latter, the message the law schools oppose is several steps removed from the commands of the Solomon Amendment. One article analyzing the issues involved with the Solomon litigation described the government's message as "the speech of the military, reflected in its anti-homosexual 'don't ask, don't tell' policy and embodied by the presence of its recruiters speaking on campus."²¹⁸ Even the recruiter's speech only implicitly authorizes the discriminatory policy. It is clear that several inferences are required to understand exactly what the conflicting viewpoints are. The government's incentive for allowing admission of military recruiters is distinct, conceptually and constitutionally, from a situation where an individual must display the state's conflicting message every time he or she drives an automobile.

Third, the constitutional infringement at issue in *Wooley* was far more serious a burden on the individual seeking to exercise his religious beliefs than the Solomon Amendment is on law schools. The Supreme Court noted that "[they] are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable."²¹⁹ By sharp contrast, the Solomon Amendment is a federal law that encourages the law schools, a few times a year, to not inhibit public awareness of employment opportunities within an organization that has policies contrary to its own. As the Solomon Amendment merely prevents certain conduct, rather than affirmatively compel individuals to disseminate a particular state viewpoint, it does not present the same constitutional dangers as the scenarios that fit more readily into the Supreme Court's compelled speech jurisprudence.

²¹⁶ *But see Burt*, 354 F. Supp. 2d at 177 (discussing Supreme Court precedent in the area of compelled speech and determining that government requirements that only differ by degree can be equally unconstitutional).

²¹⁷ *See Wooley*, 430 U.S. at 707.

²¹⁸ *Calvert & Richards*, *supra* note 4, at 221 (citation omitted).

²¹⁹ *Wooley*, 430 U.S. at 715.

B. Overcoming Challenges Based on a Right to Expressive Association

The Solomon Amendment should also survive any challenges arising out of the faculty-plaintiffs' right to expressive association.²²⁰ The Supreme Court has previously recognized this First Amendment claim, stating that "[g]overnment actions that may unconstitutionally burden this freedom may take many forms, one of which is 'intrusion into the internal structure or affairs of an association' like a 'regulation that forces the group to accept members it does not desire.'"²²¹ In *Boy Scouts of America v. Dale*,²²² the Supreme Court determined that a state law that compelled the Boy Scouts to accept an openly gay activist in a leadership role of the organization transgressed the association's right to advocate a particular viewpoint.²²³ The Court then developed a three-part test to determine if a particular regulation violates a group's right to expressive association.²²⁴

The Supreme Court first requires a showing that "the group engages in 'expressive association.'"²²⁵ To meet this relatively low threshold requirement, an organization need not be dedicated to advocating a particular viewpoint; rather, "a group must engage in some form of expression, whether it be public or private."²²⁶ Most assuredly, the faculty members in *FAIR II*, *Burt* and *Burbank* meet this prong of the test.²²⁷ Indeed, the

²²⁰ The *FAIR II* and *Burt* cases addressed this issue in different ways, yet the case law relied upon and the analyses offered are similar enough to discuss the cases jointly. *FAIR II* discussed one of the free association-type claims as part of its free speech analysis, stating that one example of compelled speech "is government action that forces a private speaker to accommodate or include another private speaker's message." *FAIR II*, 390 F.3d 219, 236 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005). However, *Burt* analyzed free speech and freedom of expressive association as two separate claims. *See Burt*, 354 F. Supp. 2d at 175–87.

²²¹ *Boy Scouts of America v. Dale*, 530 U.S. 640, 648 (2000) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984)).

²²² *Dale*, 530 U.S. 640.

²²³ *See id.* at 650–61.

²²⁴ *See id.* at 648, 656–57.

²²⁵ *Id.* at 648.

²²⁶ *Id.*

²²⁷ *See FAIR II*, 390 F.3d 219, 231 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) ("[W]e agree with the District Court's conclusion that [law schools] qualify as expressive associations."); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 185 (D. Conn. 2005) ("[The law school] is clearly an expressive association for the purposes of First Amendment analysis."). It is worth noting that the student-plaintiffs were not allowed to proceed on this claim as they did not set the rules of the association allegedly infringed upon. *See supra* Part III (discussing the claims against the

plaintiffs in all three cases were part of the associations that adopted and sought to enforce the non-discrimination policies at issue.²²⁸ Therefore, this ought to be viewed as an expression of the plaintiffs' view that intolerance based on sexual orientation should be opposed.

Second, the Court directs an analysis of whether forcing a particular party into another association pursuant to the regulation in question "significantly affect[s] its expression."²²⁹ However, it is not enough for an organization to demonstrate that accepting an unwanted party "would impair its message."²³⁰ In *Dale*, the state law was improper not solely because it required the Boy Scouts to include gay members, but rather because the law would have demanded that Dale be given a leadership role which would have "force[d] the organization to send a message . . . that [it] accepts homosexual conduct as a legitimate form of behavior."²³¹ The court in *FAIR II* held that the Solomon Amendment similarly required law schools to condone the discriminatory policies of the military with which they disagree.²³² Ironically, the court further noted that "[j]ust as the Boy Scouts believed that 'homosexual conduct is inconsistent with the Scout Oath,' . . . the law schools believe that employment discrimination is inconsistent with their commitment to justice and fairness."²³³ The court in *Burt* drew a similar comparison and noted that "as the inclusion of an open homosexual in an organization opposed to homosexuality obviously impaired the Boy Scouts' message in *Dale*, the inclusion of the military in [the law school's] recruiting program impairs its message [of nondiscrimination]."²³⁴

There is indeed a "compelling analogy"²³⁵ between the issues presented in *Dale* and those presented in the Solomon litigation.

government).

²²⁸ See *FAIR II*, 390 F.3d at 230–32; *Burt*, 354 F. Supp. 2d at 159; *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, at *1–5 (E.D. Pa. Aug. 19, 2004).

²²⁹ *Dale*, 530 U.S. at 656.

²³⁰ *Id.* at 653.

²³¹ *Id.*

²³² See *FAIR II*, 390 F.3d at 231–32 (suggesting that schools would be communicating their approval of employment discrimination by allowing military recruiters on campus).

²³³ *Id.* at 232 (quoting *Dale*, 530 U.S. at 652).

²³⁴ *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 186 (D. Conn. 2005).

²³⁵ *FAIR II*, 390 F.3d at 232.

However, there are several fundamental differences between the Solomon Amendment and the state law challenged in *Dale*. First, the Solomon Amendment does not affirmatively mandate that members of the military be allowed to join the association of faculty at a particular law school in the same way that the public accommodations law in *Dale* required the inclusion of a gay scoutmaster in the Boy Scouts of America. Rather, it merely requires that an academic institution that takes federal funds cannot deny access to on-campus military recruiters.²³⁶

Second, requiring access to a campus for the one or two times a year a military recruiter will visit a law school²³⁷ simply cannot be viewed as having as significant an impact on expression²³⁸ as does providing someone with a leadership role in an organization that expressly rejects that individual's way of life. The analogy would hold only if the Solomon Amendment sought to make a military recruiter not only a member of the faculty, but also an individual with responsibility over setting policies.

Third, the *Dale* test requires a weighing of the First Amendment free association interests against competing social interests.²³⁹ As this prong of the test is essentially a standard strict scrutiny analysis,²⁴⁰ it will be treated below as it applies to all of the First Amendment arguments relied upon by the law schools. Before that, however, it is important to discuss other arguments raised by the plaintiffs challenging the Solomon Amendment. The cases that found for the plaintiffs relied upon another First Amendment case from the Supreme Court that ironically also involved limiting gay rights in the free association context. In *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*,²⁴¹ the Court struck down on First

²³⁶ See 10 U.S.C.A. § 983(a)–(d) (West & Supp. 2005) (declaring that if a school prevents access to military recruiters, that school will be denied federal funds from the Department of Defense and the Department of Education, among other federal organizations).

²³⁷ See Kim, *supra* note 10, at 35 (detailing military recruiting practices during both the fall and spring semesters).

²³⁸ See *Dale*, 530 U.S. at 656 (indicating that having a homosexual as assistant scoutmaster—a role model in a place of authority—“would significantly affect [the Boy Scouts] expression [of disapproval of homosexuality]”).

²³⁹ See *FAIR II*, 390 F.3d at 234 (using this third step to determine whether the Solomon Amendment was constitutional).

²⁴⁰ See *id.* at 234 & n.14 (asserting that because the Solomon Amendment “impairs law schools’ expression, strict scrutiny will apply”).

²⁴¹ 515 U.S. 557 (1995).

Amendment grounds a ruling by the Supreme Judicial Court of Massachusetts that had held that organizers of Boston's St. Patrick's Day Parade could not bar the participation of marchers based only on their sexual orientation.²⁴² The Supreme Court reasoned that "[s]ince every participating unit affects the message conveyed by the private organizers, the state courts' [insistence on non-discrimination] produced an order essentially requiring petitioners to alter the expressive content of their parade."²⁴³

The courts in *FAIR II* and *Burt* both found the Solomon Amendment to inhibit free or expressive association relied upon *Hurley* in reaching that determination. In *FAIR II*, the court maintained that the Solomon Amendment "compels the schools to accommodate the military's message[,] . . . [l]ike the forced inclusion of a parade contingent."²⁴⁴ In a similar vein, the court in *Burt* held that since the law school argued that the Solomon Amendment undermined the message of non-discrimination it wished to convey, the Amendment "substantially interfere[d] with the Faculty Members' ability to advocate their viewpoint . . . [and thus] 'require[d]' [the law school] 'to alter the expressive content' of its policy."²⁴⁵ At first blush, the similarity to *Hurley* seems striking—the law schools are being induced to admit members to an activity, members that they would otherwise like to exclude. However, the logic of *Hurley* only makes sense in the context of inherently expressive activities.²⁴⁶ The court in *FAIR II* recognized this necessary element and determined that "recruiting is expression" as it contains a great deal of communication between parties and aims to persuade students to work for a particular employer.²⁴⁷

The Supreme Court supported a more limited definition of expressive activities in *Hurley* than that offered in *FAIR II*. In

²⁴² See *id.* at 559–64 (proclaiming that "private citizens who organize a parade" cannot be forced to include a contingent that conveys a message of which the organizers do not approve).

²⁴³ *Id.* at 572–73.

²⁴⁴ *FAIR II*, 390 F.3d at 240.

²⁴⁵ *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 187 (D. Conn. 2005) (quoting *Hurley*, 515 U.S. at 572–73).

²⁴⁶ See *Hurley*, 515 U.S. at 568 (differentiating between a parade, which conveys a message, and an ordinary trip from one destination to another).

²⁴⁷ See *FAIR II*, 390 F.3d at 236–37 (explaining "[t]he expressive nature of recruiting").

discussing what would distinguish non-expressive activities from the expressive activity of a parade, the Court noted that “the parade does not consist of individual, unrelated segments that happen to be transmitted together for individual selection by members of the audience [and] [a]lthough each parade unit generally identifies itself, each is understood to contribute something to a common theme.”²⁴⁸ The definition of what a parade *is not* serves as a precise definition of what the recruiting process *is*. The individual participants in a recruitment program are each present to serve their own interests—namely, finding well-qualified potential employees—and are indeed “individual, unrelated segments” of an overall program from which the audience (law students) can pick and choose.²⁴⁹ “Parades and demonstrations, in contrast, are not understood to be so neutrally presented or selectively viewed.”²⁵⁰

The principle underlying the Court’s holding in *Hurley* is that certain activities are by themselves expressive and, as such, selection of groups or individuals to participate in those activities cannot be compelled without violating the First Amendment.²⁵¹ This is so because an organization’s involvement in an expressive activity “would likely be perceived as having resulted from” the organizer’s choice to make the particular statement represented by that participant.²⁵² There is no risk of this occurring with law schools because the Solomon Amendment leaves them free to disavow the government’s message in virtually any way they choose, save one—the barring of military recruiters from campus.

Contrary to the position espoused in *FAIR II*, there is good reason to hold that a parade organizer cannot be forced to include certain contingents in that activity, while a law school can be denied a seemingly similar right. The crucial distinction here does not depend as much on the nature of the *organizer* as it does on the nature of the *activity* involved. Since parades are expressive in a way that recruiting is not, the organizer is as free

²⁴⁸ *Hurley*, 515 U.S. at 576.

²⁴⁹ *Id.*; see generally Ginsburg & Wolf, *supra* note 3 (discussing the on-campus recruiting process).

²⁵⁰ *Hurley*, 515 U.S. at 576.

²⁵¹ See *id.* at 574–75 (announcing that if a speaker does not wish to promote a particular point of view, “that choice is presumed to lie beyond the government’s power to control”).

²⁵² *Id.* at 575 (relating how choosing to include a certain parade contingent shows support for that contingent).

to control the content of the parade in the same way he is free to control the content of any more conventional statement he might make. To illustrate this point in *Hurley*, Justice Souter drew on the metaphor of a parade as a musical score and its organizer as the composer.²⁵³ An equally apt metaphor is to understand the parade arranged by an organizer as comparable in First Amendment value to a sentence uttered by a speaker. The organizer “selects the expressive units of the parade from potential participants”²⁵⁴ in the same way a speaker selects the message of a sentence from all available words. The only reason selection of participants in the parade context has constitutional dimensions is because of the inherent expressive nature of the activity. Recruiting is simply not imbued with such communicative characteristics, and thus, the Solomon Amendment does not inhibit expressive association.

Moreover, it is not at all clear that the Solomon Amendment has presented any burden whatsoever to the expression of the law schools’ message of non-discrimination.²⁵⁵ In fact, the AALS made it plain that a law school would only be excused from noncompliance with its recommended non-discrimination policy if a member school took steps “to ameliorate the detrimental effects of the discrimination coerced by Solomon.”²⁵⁶ A report by the Chair of the AALS Section on Gay and Lesbian Legal Issues, disseminated after passage of the Solomon Amendment, goes so far as to cite examples of how law schools have opposed what they view as the military’s message of discrimination and further provides suggestions for effective ameliorative measures.²⁵⁷ Like their faculty counterparts, law students have also not seen their right to criticize the government inhibited by the Solomon Amendment. Indeed, “some of the most effective means of

²⁵³ See *id.* at 574.

²⁵⁴ *Id.*

²⁵⁵ See *FAIR I*, 291 F. Supp. 2d 269, 306 (D.N.J. 2003), *rev’d*, 390 F.3d 219 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005). In assessing the plaintiffs’ similar expressive association claims as to the burden the Solomon Amendment imposes on law faculty, the district court wrote, “the message of non-discrimination is at the heart of the annual controversy [over allowing on-campus military recruiting], and is therefore re-played and re-endorsed every time there is a controversy on any law school campus.” *Id.*

²⁵⁶ Valdes, *supra* note 4, at 395–96.

²⁵⁷ See generally Valdes, *supra* note 4, 365, 396–98, 418 (discussing, among other things, the “balanced approach” urged by the AALS’s “ten principles” for “excused non-compliance”).

amelioration come not from the administration, but from the students.”²⁵⁸ Though these actions seem to demonstrate unhappiness with the Solomon Amendment, they also show that the law has not, in fact, burdened the expressive association of the law school community.

C. *The Solomon Amendment Withstands Strict Scrutiny*

Even if the Solomon Amendment was found to impinge upon First Amendment rights, it is nonetheless narrowly tailored to a compelling governmental interest.²⁵⁹ The government's interest in having access to college campuses has already been shown to be extremely high.²⁶⁰ In fact, both *FAIR II* and *Burt*, in assessing this prong of the test as applied to the Solomon Amendment, found that the government's interest in raising an effective military is at least compelling.²⁶¹ However, since the *Dale* test requires applying strict scrutiny to the federal law, neither court found that the Solomon Amendment was narrowly tailored enough to pass constitutional muster.²⁶² While the court in *Burt* focused on the lack of proof that the government offered to support its narrow tailoring argument,²⁶³ the court in *FAIR II* asserted that the government's means did not suit its ends because it “ha[d] ample resources to recruit through alternative means.”²⁶⁴ The courts are indeed correct that the Solomon Amendment serves a compelling government interest. However, whether the assertion is that the government has failed to present sufficient proof or that it has other recruiting means at its disposal, the law in question is nevertheless the most appropriate means to meet the government's compelling goal of military recruitment.

The military and the federal government surely possess

²⁵⁸ Law, *supra* note 4, at 128.

²⁵⁹ See, *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 19 (1986) (stating that even if protected speech is hampered, an order restricting First Amendment rights could be held valid if a compelling state interest is achieved by narrowly tailored means).

²⁶⁰ See *supra* notes 148–50 and accompanying text (describing the government's compelling interest in on-campus recruiting).

²⁶¹ See *FAIR II*, 390 F.3d 219, 234 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 187 (D. Conn. 2005).

²⁶² See *FAIR II*, 390 F.3d at 234–35; *Burt*, 354 F. Supp. 2d at 187.

²⁶³ See *Burt*, 354 F. Supp. 2d at 187.

²⁶⁴ *FAIR II*, 390 F.3d at 235.

sufficient resources to conduct methods of recruiting that do not involve their presence at law school recruiting programs.²⁶⁵ That notwithstanding, those alternative methods would not produce the military's desired results as on-campus recruiting and access to a law school's career placement office remain the most effective tools a legal employer has to attract law students.²⁶⁶ A survey of the career placement offices of some of the nation's premiere law schools as well as the breadth of participation in their recruiting programs by legal employers bears this out.²⁶⁷ For instance, the Career Development Office of Yale Law School (the faculty of which, incidentally, were the plaintiffs in the *Burt* case) notes that "over 250 employers" attend their interview programs²⁶⁸ and that "[t]he majority of second-year students obtain summer positions through" those programs.²⁶⁹ Summer positions are clearly a crucial part of the legal recruitment process according to a recent survey on legal hiring conducted by the National Association of Law Placement ("NALP"), which found that roughly 91% of summer employees received offers for a full-time associate position.²⁷⁰ The Career Services Office of the

²⁶⁵ See *id.* at 234–35 (detailing alternative recruitment methods to which the military may avail itself).

²⁶⁶ The dissent in *FAIR II* noted the reality and import of the legal hiring process, arguing "[i]t is important for private employers to appear on campus to recruit law school graduates for positions . . . replete with interviews, followed by dinners and parties, but somehow the military will [be expected to] recruit its lawyers without appearing on campus." *FAIR II*, 390 F.3d at 255 (Aldisert, J., dissenting).

²⁶⁷ See, e.g., Harvard Law School Office of Career Services, What We Do, http://www.law.harvard.edu/ocs/About_OCS/What_We_Do.htm (last visited Sept. 16, 2005) ("Each year, the OCS coordinates over 10,000 interviews with over 800 employers for HLS students."); New York University School of Law Office of Career Services, On-Campus Recruiting Programs, <http://www.law.nyu.edu/depts/careerservices/recruiting/index.html> (last visited Sept. 16, 2005) ("During 2003-2004, over 557 private law firms, public interest organizations, government agencies, corporations, and public accounting firms visited NYU School of Law to interview J.D. students."); Stanford Law School Office of Career Services, Recruiting, <http://www.law.stanford.edu/admin/ocs/employers/recruiting> (last visited Sept. 16, 2005) ("The majority of our 2L and 3L students participate in, and find employment through, [the Fall Campus Interview] program.").

²⁶⁸ YALE LAW SCHOOL CAREER DEVELOPMENT OFFICE, INTRODUCTION TO CAREER DEVELOPMENT 2005–2006, at 4, available at http://www.law.yale.edu/outside/pdf/Career_Development/cdo-Intro_guide.pdf.

²⁶⁹ *Id.* at 10.

²⁷⁰ NAT'L ASS'N FOR LAW PLACEMENT, PERSPECTIVES ON FALL 2004 LAW STUDENT RECRUITING 13 (2005), available at http://www.nalp.org/assets/34_fall04.pdf.

Columbia Law School further boasts that “[o]ur on-campus interview programs and in office resources are the source for employment for *over 80%* of our graduating JD class.”²⁷¹ Given the fact that so many employers consider attendance at law school recruiting programs essential to attracting potential employees and that such recruiting programs are phenomenally successful, there is strong evidence to suggest that the only way the military can fulfill its mandate to “conduct intensive recruiting campaigns to obtain enlistments”²⁷² is to ensure its access to on-campus recruiting programs at law schools. Thus, the Solomon Amendment contemplates the most effective and narrowly tailored means toward achieving the compelling interest of maintaining the armed forces.

CONCLUSION

Congressional policies and objectives that further the interests of the military are often viewed as highly controversial. Nowhere, perhaps, is this more true than in the academic setting,²⁷³ especially when such a policy forces academic institutions to make a Hobson’s choice between complying with a federal policy by compromising on an issue of principle or rejecting the policy at the risk of losing substantial amounts of federal funds that directly subsidize the important work being done at colleges and universities. Nevertheless, the Constitution does not always reconcile crises of conscience. For better or worse, Congress has enjoyed considerable latitude in the exercise of its spending power in furthering the objectives it deems important at a particular moment in time,²⁷⁴ especially as concerns the military.²⁷⁵

Congress’ power, and its responsibility, is remarkably broad when it comes to its constitutional duty to build and maintain an

²⁷¹ Columbia Law School Office of Career Services, Employers, http://www.law.columbia.edu/careers/career_services/employers (last visited Sept. 16, 2005) (emphasis added).

²⁷² 10 U.S.C. § 503(a) (2000).

²⁷³ See Calvert & Richards, *supra* note 4, at 209 (“[T]he battle over the Solomon Amendment really amounts to a classic clash between the conservative military machine . . . and the elite liberal confines of academia.”).

²⁷⁴ See, James V. Corbelli, Note, *Tower of Power: South Dakota v. Dole and the Strength of the Spending Power*, 49 U. PITT. L. REV. 1097, 1104–05 (1988) (“The Court has increasingly allowed a strong and liberal use of the spending power.”).

²⁷⁵ See *supra* notes 162–63 and accompanying text.

effective military. It goes without saying that even those sweeping powers of Congress cannot trammel the individual rights guaranteed by the First and Fifth Amendments to the United States Constitution. Indeed, this Note in no way seeks to present such a bold proposition. Rather, the foregoing asserts that the Solomon Amendment simply does not operate in such a way as to implicate First and Fifth Amendment guarantees, at least not more than incidentally. Consequently, the concerns of those law students and faculty who take umbrage with the law and seek to oppose the military's message must yield to the federal government's necessary and proper function of continuing to recruit talented and highly educated individuals for service in the nation's armed forces. This is especially so since there is still considerable question as to how much law schools have even had to restrict their protest of military policy as a result of the Solomon Amendment.

The right of individuals to express their disagreement with any of the government's policies is not hindered by the presence of military recruiters on campus. An honest survey of the actions taken by law students and faculty since the controversial bill became law reveals that the Solomon Amendment leaves firmly intact the careful balance of the government's need for military recruitment and the right of individuals to express their opposition to military policies in the academic setting. Perhaps law schools would do a greater service by treating the present controversy less as an "academic exercise"²⁷⁶ and more as an

²⁷⁶ *FAIR II*, 390 F.3d 219, 255 (3d Cir. 2004), *cert. granted*, 125 S. Ct. 1977 (2005) (Aldisert, J., dissenting). In a particularly pointed and noteworthy dissent, Judge Aldisert wrote:

What disturbs me personally and as a judge is that the law schools seem to approach this question as an academic exercise, a question on a constitutional law examination or a moot court topic, with no thought of the effect of their action on the supply of military lawyers and military judges . . . Somehow, Appellants urge, better *law* graduates will be attracted to the military legal branches with its lower pay and fewer benefits by some other recruiting method . . . There is no explanation, however, why the law schools consider it important to have private national law firms come to campus and boast about first year associates' salaries and signing bonuses and emphasize that if the students want to clerk for a federal judge for a year, the firm will add another bonus. . . . But we don't want military recruiters to pollute our students. No, say the law schools, what's sauce for the private sector goose is not sauce for the military gander. No, say the law schools, we don't need a level playing field; let the military shift for themselves.

opportunity to engage the government in a fruitful dialogue while exposing the nation's top law students to every possible career choice.

In its demand for total exclusion of military recruiters from their campuses, "fair play" is not a phrase in the law schools' lexicon.
Id.