

# The Solomon Amendment Is Constitutional and Does Not Violate Academic Freedom

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### Doublethink

“War Is Peace” and “Freedom Is Slavery”  
1984, by George Orwell

Academic freedom is furthered by allowing law schools to deny students the freedom to hear military recruiters’ viewpoint.  
Third Circuit Court of Appeals in *Fair v. Rumsfeld*

### INTRODUCTION

The Solomon Amendment, 10 U.S.C. § 1983, requires the Secretary of Defense to withhold federal funds from any institution of higher learning which denies military recruiters access to the institution’s campus equal to the access afforded other employers. This statute has created a conflict between law schools and the military. Virtually all law schools have adopted a non-discrimination policy, mandated by the American Association of Law Schools (“AALS”), which prohibits any discrimination based on sexual orientation. The military, however, applies, as required by statute, the “Don’t Ask, Don’t Tell” policy, which precludes any non-closeted homosexual from military employment.

Law schools sought federal court intervention to declare the Solomon Amendment unconstitutional. Their claim was that the Department of Defense violated the law schools’ free speech and free association constitutional rights by conditioning their receipt of federal funds on the requirement to associate with, and endorse, the military’s discriminatory employment policies—an endorsement they assert will flow from allowing the military to recruit under the law schools’ auspices.

After the law schools’ application for a preliminary injunction against enforcement of the Solomon Amendment was denied in the district court, the Third Circuit Court of Appeals, in *Forum for Academic*

*and Institutional Rights* (“FAIR”) *v. Rumsfeld*, by a 2-1 split, in June 2004, reversed and granted the preliminary injunction.<sup>1</sup> The United States Supreme Court has granted the government’s application for certiorari,<sup>2</sup> and will soon hear that appeal.<sup>3</sup>

#### PURPOSE OF THIS ARTICLE

This article does not evaluate the merits or shortcomings of the military’s “Don’t Ask, Don’t Tell” policy. Like it or not—there are able proponents and opponents of the policy—it is a policy enacted into statute by Congress and signed into law by President Clinton. And it has been upheld by each of the several courts that have been asked to declare it unconstitutional. The proper venue for questioning the advisability of the “Don’t Ask, Don’t Tell” policy thus is in Congress, not the courts. It is apparently in recognition of that reality that the plaintiffs in *FAIR v. Rumsfeld* do not raise, as an issue, the constitutionality of the “Don’t Ask, Don’t Tell” policy.

Given that reality, the issue addressed in this article is the constitutionality of the Solomon Amendment. This article will demonstrate that the Solomon Amendment is a proper exercise of the Spending Clause by the federal government that is within the Constitution and does not violate the First Amendment rights—academic freedom—of law professors, law schools, and law students.

This article will begin, in Part I, with the three promulgations which resulted in the clash of views and, ultimately, the *FAIR v. Rumsfeld* lawsuit: the text of the Solomon Amendment and its legislative history; the text of the “Don’t Ask, Don’t Tell” statute, and then the text and relevant history of the law schools’ non-discrimination policy which the law schools assert they would be required to violate if military recruiters were allowed on-campus access to students. In Part II, this article will review the decision by the Court of Appeals for the Third Circuit in *FAIR v. Rumsfeld*.

Part III will examine “academic freedom” arguments that have been advanced by opponents of the Solomon Amendment and demonstrate that allowing military recruiters onto law school campuses would be more consistent with the principles of “academic freedom.” Part IV will show that the Solomon Amendment is within the federal government’s powers under the Spending Clause. Part V will argue that the constitutionality of the Solomon Amendment should be subject to a

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<sup>1</sup> *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004).

<sup>2</sup> *Rumsfeld v. FAIR*, 125 S. Ct. 1977 (2005).

<sup>3</sup> Oral arguments are scheduled for Tuesday, December 6, 2005.

standard of intermediate scrutiny, rather than strict scrutiny as was applied by the Third Circuit.

#### I. STATUTES/LEGISLATIVE HISTORY AND LAW SCHOOL POLICIES

##### A. *The Solomon Amendment*

The Solomon Amendment in its current form, codified in 10 U.S.C. § 983, reads:

**(b) Denial of funds for preventing military recruiting on campus.**—No funds described in subsection (d)(1) may be provided by contract or by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents—

**(1)** the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer. . . .

. . . .

**(c) Exceptions.**—The limitation established in subsection (a) or (b) shall not apply to an institution of higher education (or any subelement of that institution) if the Secretary of Defense determines that—

**(1)** the institution (and each subelement of that institution) has ceased the policy or practice described in that subsection; or

**(2)** the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

**(d) Covered funds.**—**(1)** Except as provided in paragraph (2), the limitations established in subsections (a) and (b) apply to the following:

**(A)** Any funds made available for the Department of Defense.

**(B)** Any funds made available for any department or agency for which regular appropriations are made in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act.

**(C)** Any funds made available for the Department of Homeland Security.

**(D)** Any funds made available for the National Nuclear Security Administration of the Department of Energy.

**(E)** Any funds made available for the Department of Transportation.

**(F)** Any funds made available for the Central Intelligence Agency.

**(2)** Any federal funding specified in paragraph (1) that is provided to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance, may be used for the purpose for which the funding is provided.

The Solomon Amendment was first proposed in the Spring of 1994 by Congressman Gerald B. Solomon, from whom the amendment takes its common name. Solomon proposed the bill as a means to solve the problem facing the military as a result of the concerted action by colleges and universities across the country to prohibit military recruiters on campus. Solomon recognized that these same institutions were more than willing to accept research grants and other funding from the Pentagon.<sup>4</sup> The bill sought to gain access to college campuses for military recruiters by conditioning the award of Pentagon funds on the institutions allowing access to military recruiters. According to the legislative history, the purpose of the Solomon Amendment was to “not give taxpayer dollars to institutions . . . interfering with the federal government’s constitutionally mandated function of raising a military,” while increasing the numbers recruited of “the most highly qualified candidates from around the country.”<sup>5</sup> Rep. Solomon made clear that his purpose was not to violate any school’s academic freedom, as the Solomon Amendment left all schools free to deny military recruiters access to their campus, but the federal government then could withhold federal funding. He stated:

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<sup>4</sup> 140 CONG. REC. H3861 (daily ed. May 23, 1994).

<sup>5</sup> 141 CONG. REC. E13-01 (Jan. 4, 1995).

Tell recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies, that is fine. That is your First Amendment right. But do not expect Federal dollars to support your interference with our military recruiters.<sup>6</sup>

More recently, the House Committee report, in support of the 2004 Amendment, made clear that the purpose of the Solomon Amendment was to ensure a strong military:

[A]t no time since World War II, has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer armed services have been called upon to serve and they are performing their mission at the highest standard. The military's ability to perform at this standard can only be maintained with effective and uninhibited recruitment programs. Successful recruitment relies heavily upon the ability of military recruiters to have access to students on the campuses of colleges and universities that is equal to other employers.<sup>7</sup>

The Solomon Amendment, in its original form, was enacted and signed into law by President Clinton in April 1994.<sup>8</sup> Originally the Solomon Amendment applied only to Department of Defense funds granted to the particular subelement of a school, e.g., the law school, that prohibited military recruiting, not the entire school.<sup>9</sup> As a practical matter, this original Solomon Amendment had little bark and no bite. Since law schools generally did not receive much funding through the Department of Defense, it did not stop most law schools from continuing to bar military recruiters from their campuses. And it had little, if any, effect on the parent institutions, who were the major recipients of Department of Defense funding, because their Department of Defense funding was not withheld when a subelement, such as its law school, blocked military recruiting.

In response to the continued law school prohibition of military recruiters, Congress, in 1997, amended the Solomon Amendment to include Departments of Transportation, Labor, Health and Human Services, and Education funding within the grants and contracts which the Secretary of Defense was to withhold when an institution prohibited

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<sup>6</sup> 140 CONG. REC. H3861 (daily ed. May 23, 1994).

<sup>7</sup> H.R. REP. NO. 108-443(I), at 3-4 (2004).

<sup>8</sup> National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

<sup>9</sup> *Id.* at § 558.

military recruiters from recruiting on campus.<sup>10</sup> While the Solomon Amendment, with this revision, continued to have an impact only on the specific part of a university which barred military recruiters, usually the law school, this change authorized the Secretary of Defense to withhold federal financial aid from law school students.<sup>11</sup> This latter threat led many law schools to except the military from the nondiscrimination policy or abandon it altogether.<sup>12</sup>

In 1999, the Frank-Campbell Amendment was passed, altering the Solomon Amendment to exclude any impact on financial aid funds or related administrative costs.<sup>13</sup> This resulted in many of the law schools readopting, and again enforcing, their nondiscrimination policies, prohibiting the military from recruiting on campus.

In 2000, interim regulations were adopted defining “institution” as including subelements, which meant that, if a subelement, e.g., the law school, of a school prohibited military recruiters from recruiting on campus, federal funds were to be withheld from the entire school.<sup>14</sup>

After the September 11, 2001, terrorist attacks, the government recognized an increased need for the nation’s best men and women to join the military. Strict enforcement of the Solomon Amendment occurred. The interim regulations were made final in 2003. Schools were threatened with loss of federal funds on evidence of “outright bans, prohibitions against recruiting in law school buildings, and other limits on military recruiters that are more restrictive than for private law firms.”<sup>15</sup> It had the impact which the Solomon Amendment intended: most schools which had previously discriminated against military recruiters suddenly renounced the supposed principle of non-discrimination in favor of the other spelling of principal—meaning money—and allowed equal access to military recruiters.

Unable to overcome the practical constraints of the Solomon Amendment, most schools then took the government to court, claiming the Solomon Amendment violated their First Amendment Rights.<sup>16</sup> That lawsuit resulted in the Third Circuit’s decision in *FAIR v. Rumsfeld*, and

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<sup>10</sup> Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996).

<sup>11</sup> *Id.*

<sup>12</sup> Lindsay Gayle Stevenson, Note, *Military Discrimination on the Basis of Sexual Orientation: “Don’t Ask, Don’t Tell” and the Solomon Amendment*, 37 *LOY. L.A. L. REV.* 1331, 1352 (2004).

<sup>13</sup> Act of Oct. 25, 1999, Pub. L. No. 106-79, § 8120, 113 Stat. 1212, 1260.

<sup>14</sup> See 48 C.F.R. § 209.470-1 (2000).

<sup>15</sup> Patrick Healy, *Despite Concerns, Law Schools Admit Military Recruiters*, *BOSTON GLOBE*, Nov. 12, 2002, at A1, available at <http://www.lawschool100.com/campus/military.htm>.

<sup>16</sup> *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004).

will culminate in a Supreme Court opinion later this Supreme Court term.

*B. Don't Ask, Don't Tell*

In 1993, Congress enacted, and President Clinton signed into law, 10 U.S.C. § 654, what is commonly known as the “Don't Ask, Don't Tell” policy, making into binding law what had been military policy concerning homosexuals in the military:

A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense 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 . . . .

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect . . . .

(3) That the member has married or attempted to marry a person known to be of the same biological sex. . . .<sup>17</sup>

*C. Law Schools' Non-Discrimination Policies*

For many years, the AALS, an association of more than 160 law schools, has mandated a non-discrimination policy for its member law schools. Originally, that policy did not cover sexual orientation, but prohibited discrimination on what were then the recognized subjects for opposition to discrimination: national origin, religion, gender, race, ethnicity, marital status, parental status, veteran status, physical status and age. Some law schools, on their own, added sexual orientation as a protected category in the late 1970s and thereafter.<sup>18</sup>

Virtually every law school in this country revised their non-discrimination policy to add sexual orientation, when, in 1990, the AALS did so. Law school non-discrimination policies through the current time typically use the following or very similar language, committing the law school “to a policy against discrimination based upon age, color, handicap or disability, ethnic or national origin, race, religion, religious

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<sup>17</sup> National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(b), 107 Stat. 1547, 1671-72 (1993) (codified at 10 U.S.C. § 654(b) (2000)).

<sup>18</sup> FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 280 (D.N.J. 2003).

creed, gender (including discrimination taking the form of sexual harassment, marital, parental or veteran status, or sexual orientation).<sup>19</sup>

Prior to the inclusion of sexual orientation, the military in fact was in violation of the law schools' policies against discrimination based on age and disability, given that the military will not accept recruits who are older than 34 for active duty and 39 for reserve duty, nor recruits who are not able bodied.<sup>20</sup> Significantly, there is no report—even through the current time—of any law school barring military recruiters because of age or disability discrimination in violation of the law school's non-discrimination policies. The battle lines between the military and law schools, on the subject of violation of law schools' non-discrimination policies, were only drawn when sexual orientation was added as a protected category.

## II. FORUM FOR ACADEMIC AND INSTITUTIONAL RIGHTS V. RUMSFELD

Beginning in the 1980s, certain law schools began prohibiting military recruiters access to their campuses for violating their nondiscrimination policies.<sup>21</sup> The passage of the Solomon Amendment in 1994 created a major conflict between the government and the law schools. As the Solomon Amendment was amended, the amount of government funding that the Secretary of Defense could withhold from law schools increased as the Secretary was commanded by statute to withhold monies from other departments and then withhold monies from the parent institution for any discrimination against military recruiters by a subelement law school.<sup>22</sup> Prior to September 11, 2001—in an apparent attempt by the government to avoid a confrontation—law schools were not denied federal funds if they accommodated military recruiters by merely granting them access to their campuses without giving them the full support and aid in scheduling interviews that was given to employers which did not violate the law schools' nondiscrimination policies.<sup>23</sup> After 9/11, however, the Department of Defense began requiring that law schools grant military recruiters the same treatment as given to private employers.

In 2004, Congress codified this practice into the Solomon Amendment, amending the statute to penalize law schools and their parent institutions for failing to provide military recruiters access “in a

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<sup>19</sup> *Id.*

<sup>20</sup> U.S. Army Careers & Jobs, <http://www.goarmy.com/JobCatList.do?fw=careerindex> (last visited Nov. 11, 2005).

<sup>21</sup> *FAIR*, 390 F.3d at 225.

<sup>22</sup> *Id.* at 226-27.

<sup>23</sup> *Id.* at 227.

manner that is at least equal in quality and scope to the access to campuses and students that is provided to any other employer.”<sup>24</sup> In response, FAIR and a few other organizations and individuals sued the Department of Defense and other government departments, claiming that the policy violated the First Amendment rights of the law schools, and sought a preliminary injunction.

#### A. *The Parties*

##### 1. The Plaintiffs

The plaintiffs were FAIR, the Society of American Law Teachers, Inc., the Coalition for Equality, a Boston College Law School student group, Rutgers Gay and Lesbian Caucus, two law professors and three law students.<sup>25</sup>

FAIR members were law schools and entire law faculties that voted to join FAIR.<sup>26</sup> Initially all of the members of FAIR were anonymous, and declined to disclose their identity. To meet the Government’s motion to dismiss on lack of standing—to sustain FAIR’s standing would require a finding that members of the plaintiff association individually “would otherwise have standing to sue in their own right”<sup>27</sup>—FAIR first submitted the FAIR membership list for the court’s *in camera* review, i.e., without disclosing the identity of any individual member to defendants.<sup>28</sup> In the end, FAIR amended its complaint to identify two of its members, a law school and the faculty of another, which was held “sufficient to establish that FAIR members have standing in their own right to bring this action.”<sup>29</sup>

##### 2. The Defendants

Named defendants were the respective cabinet Secretaries of the Departments of Defense, Education, Labor, Health and Human Services, Transportation, and Homeland Security.<sup>30</sup>

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<sup>24</sup> Ronald W. Reagan National Defense Authorization Bill for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004) (to be codified at 10 U.S.C. § 983).

<sup>25</sup> FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 274 (D.N.J. 2003).

<sup>26</sup> *Id.* at 286.

<sup>27</sup> *Id.* at 285.

<sup>28</sup> *Id.* at 286 n.6.

<sup>29</sup> *Id.* at 289.

<sup>30</sup> *Id.* at 276.

*B. District Court Decision*

The district court denied plaintiffs' motion for preliminary injunction as well as the government's motion to dismiss on ground of plaintiffs' lack of standing.<sup>31</sup> The Court of Appeals for the Third Circuit then heard the appeal.

*C. Third Circuit Decision*

## 1. Majority Opinion

Two members of the three-judge Third Circuit panel held that "FAIR . . . demonstrated a likelihood of success on the merits of its First Amendment claims and that it is entitled to preliminary injunctive relief," reversing the district court's decision.<sup>32</sup> The majority opinion in *FAIR* found that the Solomon Amendment violated the unconstitutional conditions doctrine by impairing the First Amendment rights of the law schools.<sup>33</sup> The unconstitutional conditions doctrine holds that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech."<sup>34</sup>

The majority decision in *FAIR* pursued two avenues of analysis in determining whether the Solomon Amendment violates the First Amendment interests of the law schools. First, the court considered whether the law schools constitute "expressive associations' whose First Amendment right to disseminate their chosen message is impaired by the inclusion of military recruiters on their campuses."<sup>35</sup> Then, the court considered whether "the law schools are insulated by free speech protections from being compelled to assist military recruiters in the expressive act of recruiting."<sup>36</sup> The Third Circuit applied strict scrutiny ("A regulation . . . must be narrowly tailored to serve a compelling government interest, and must use the least restrictive means of promoting the Government's asserted interest") rather than intermediate scrutiny (regulation constitutional if it "furthers an important government interest that would be achieved less effectively without that action"), though in the decision the court states that the outcome would be the same under either scrutiny standard.<sup>37</sup> The reasoning in the majority

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<sup>31</sup> *Id.* at 322.

<sup>32</sup> *FAIR v. Rumsfeld*, 390 F.3d 219, 224 (3d Cir. 2004).

<sup>33</sup> *See id.* at 229-30.

<sup>34</sup> *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

<sup>35</sup> *FAIR*, 390 F.3d at 230.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

decision will be explained here and responded to in the later sections of this article.

*a. Expressive Association Analysis*

The majority applied the elements of an expressive association claim as set forth in *Boy Scouts of America v. Dale*:<sup>38</sup> (1) whether the group is an “expressive association;” (2) whether the state action significantly affects the group’s ability to advocate its viewpoint, and (3) whether the state’s interest justifies any burden it imposes on the group’s expressive association.<sup>39</sup> First, the majority relied on *Dale* for the rule that a group does not need to exist for the sole purpose of expression to be considered an “expressive association.”<sup>40</sup> In *Dale*, the Supreme Court determined the Boy Scouts of America to be an expressive association, because it “seeks to transmit . . . a system of values [and] engages in expressive activity.”<sup>41</sup> The Third Circuit determined that educational institutions are similarly an expressive association because one of their purposes is to instill a system of values in their students.<sup>42</sup>

The court then examined whether the Solomon Amendment affects the law schools’ ability to advocate its point of view. Applying its reading of *Dale*, the court reasoned that, just as forcing the Boy Scouts to allow an openly gay scout master would force the Boy Scouts to send a message that they accept homosexual behavior, contrary to the Scout Oath, “the presence of military recruiters would, at the very least, force law schools to send a message both to students and the legal community, that the law schools accept employment discrimination as a legitimate form of behavior.”<sup>43</sup> The Third Circuit rejected the district court’s argument that there is a difference between forced inclusion within a group and the forced periodic presence at a group’s location, finding that the duration of a burden is not determinative of whether a constitutional violation has occurred.<sup>44</sup> The court concluded that FAIR satisfied the second element of the unconstitutional conditions claim, because FAIR offered evidence of their belief that the Solomon Amendment impaired their ability to present their message, and the court must ““give deference to an association’s view of what would impair its expression.””<sup>45</sup>

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<sup>38</sup> 530 U.S. 640 (2000).

<sup>39</sup> *Id.* at 648-49.

<sup>40</sup> *Id.* at 648.

<sup>41</sup> *Id.* at 650.

<sup>42</sup> *FAIR*, 390 F.3d at 231.

<sup>43</sup> *Id.* at 232 (internal quotes omitted).

<sup>44</sup> *See id.* at 233.

<sup>45</sup> *Id.* at 233 (quoting *Dale*, 530 U.S. at 653).

The Third Circuit then moved on to the third step of the expressive association claim established in *Dale*, applying a balancing of the First Amendment interests affected by the Solomon Amendment with the government's interests, to determine whether the statute violates the Constitution. The Third Circuit did not dispute that the government has a compelling interest in recruiting talented students to be military lawyers.<sup>46</sup> The district court had determined that intermediate scrutiny applied, because it found the Solomon Amendment did not directly burden expressive association rights, but the Third Circuit found that the Solomon Amendment does in fact directly impair the law schools' expression and applied strict scrutiny.<sup>47</sup> The Third Circuit found that the Solomon Amendment could not be tailored much more broadly, citing examples such as television and radio advertisements as alternatives to recruiting directly on campus.<sup>48</sup> The availability of less-restrictive means alone made the Solomon Amendment unconstitutional under strict scrutiny analysis, but the Third Circuit also asserted that the government's failure to produce any evidence, demonstrating that a lesser restriction would not achieve the government's goal of attracting talented military lawyers, caused the Solomon Amendment to be unconstitutional under intermediate scrutiny as well.<sup>49</sup>

The Third Circuit concluded that FAIR's claim satisfied the requirements of an expressive association claim, warranting a preliminary injunction against the government's enforcement of the Solomon Amendment, because FAIR had a "reasonable likelihood of success on the merits of its expressive association claim against the Solomon Amendment."<sup>50</sup>

*b. Compelled Speech Analysis*

The Third Circuit then pursued a second avenue of analysis, determining that, in violation of the First Amendment, the Solomon Amendment compels the law schools to express the government's views. The compelled speech doctrine is said to prohibit the government from forcing a private speaker to advance a message dictated by the government,<sup>51</sup> forcing a private speaker to include another private

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<sup>46</sup> *Id.* at 234.

<sup>47</sup> *Id.* at 234 n.14.

<sup>48</sup> *Id.* at 234-35.

<sup>49</sup> *Id.* at 245.

<sup>50</sup> *Id.* at 235.

<sup>51</sup> *See Wooley v. Maynard*, 430 U.S. 705, 717 (1977).

speaker's message,<sup>52</sup> or forcing an entity or individual to subsidize an organization that promotes speech that the entity or individual opposes.<sup>53</sup> The Third Circuit concluded that the Solomon Amendment violated all of these three asserted prohibitions of the compelled speech doctrine.

In order for the Solomon Amendment to violate the compelled speech doctrine, recruiting must constitute speech. The Third Circuit found that recruiting is a form of expression, because of the "oral and written communication that recruiting entails . . . [and] its purpose—to convince prospective employees that an employer is worth working for."<sup>54</sup> (The majority opinion did not even consider whether the law schools, in asserted support of the schools' academic freedom, were in fact violating the academic freedom of all students, by prohibiting them from listening to, on campus, the views expressed by military recruiters.) The Third Circuit majority stated that the Solomon Amendment compels law schools to endorse speech from the military, and thereby promote an employer with whose discriminatory policies the law schools disagree.<sup>55</sup> It concluded that this is compelled expression "in all three proscribed ways: propagation, accommodation, and subsidy," because the law schools must promote the military's message by allowing them to recruit on campus, accommodate the military's message by allowing them on campus, and subsidize the military's message by using career services staff to assist the military in getting its message to the students.<sup>56</sup>

The majority opinion gave no weight to FAIR's factual admissions that the AALS had suggested that law schools engage in ameliorative measures, which would make clear that they oppose the military policy, to avoid any appearance of law schools' endorsement of the military's discriminatory policy. Those measures included informing students that "the military discriminates on a basis not permitted by the school's non-discrimination rules," and scheduling "forums or panels for the discussion of the military policy . . . ."<sup>57</sup> The majority also appeared to have ignored its own finding that "the record is replete with references to student protesters and public condemnation,"<sup>58</sup> as well as its record recitations of law school "administrators, faculty and students" criticizing military policies while military recruiters were on campus.<sup>59</sup>

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<sup>52</sup> Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, 515 U.S. 557, 581 (1995).

<sup>53</sup> Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235 (1977).

<sup>54</sup> FAIR, 390 F.3d at 236-37.

<sup>55</sup> *Id.* at 236.

<sup>56</sup> *Id.* at 239-40.

<sup>57</sup> FAIR, 291 F. Supp. 2d at 281 (quoting Rosenkranz Decl. ¶ 10, Ex. 3).

<sup>58</sup> FAIR, 390 F.3d at 245.

<sup>59</sup> *Id.* at 239.

Despite these facts and holdings, the Third Circuit questioned whether the Solomon Amendment prohibits disclaimers, even though it is clear that law schools are entitled to disclaim and even protest the military recruiters' presence on campus—and despite the fact that the government, in its brief to the Third Circuit, expressly recognized a law school's right publicly to disagree with the military. The Third Circuit concluded that the law schools' freedom to express their opposing view is irrelevant because “compelled speech concerns [do not] evaporate if a speaker can ameliorate the risk of misattribution by disclaiming the message it is being compelled to propagate.”<sup>60</sup>

The Third Circuit acknowledged that, even if the Solomon Amendment does impair the First Amendment rights of law schools by compelling speech, the statute would still be valid if it survives scrutiny.<sup>61</sup> But the Third Circuit determined that the Solomon Amendment does not survive strict scrutiny, which it chose as the correct standard, or even intermediate scrutiny because the Government failed to show that it cannot recruit effectively without on-campus recruiting, or that it would recruit less effectively by less speech-restrictive means.<sup>62</sup>

## 2. Dissent

In his dissent, Circuit Judge Aldisert would affirm the decision of the district court.<sup>63</sup> Contending that this case is not “a case of First Amendment protection in the nude,”<sup>64</sup> he identified three controlling issues: (1) whether FAIR “overcom[es] the presumption of constitutionality of a congressional statute that is . . . bottomed on the Spending Clause;” (2) whether the law schools' nondiscrimination policies are violated by a military recruiter temporarily being present on campus; and (3) whether, after applying the balancing test, “it can be concluded that the operation of the First Amendment trumps the several clauses of Articles I and II relating to the spending power and support of the military.”<sup>65</sup>

The dissent began with the recognized presumption that congressional statutes are constitutional,<sup>66</sup> citing the decision in *Rust v. Sullivan*<sup>67</sup> which states: “As between two possible interpretations of a

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<sup>60</sup> *Id.* at 241.

<sup>61</sup> *Id.* at 236.

<sup>62</sup> *Id.* at 242.

<sup>63</sup> *Id.* at 246 (Aldisert, J., dissenting).

<sup>64</sup> *Id.* at 246-47.

<sup>65</sup> *Id.* at 247.

<sup>66</sup> *Id.* at 248.

<sup>67</sup> 500 U.S. 173 (1991).

statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which would save the Act.”<sup>68</sup> While the majority may literally be correct in disputing that anyone had raised two interpretations of the Solomon Amendment,<sup>69</sup> the dissent’s point is not that the court should adopt a constitutional interpretation of the Solomon Amendment, but that the amendment itself is presumed constitutional unless the objectants first “demonstrate that the mere presence of recruiting officers on campus constitutes a compellable inference that the law schools will be objectively and reasonably viewed as violating their anti-discrimination policies.”<sup>70</sup> Even if FAIR had produced such evidence, the dissent explained that it would then have to demonstrate that the infringement on law schools’ First Amendment rights outweighed Congressional interests reflected in provisions of Article I of the Constitution.<sup>71</sup>

The dissent argued that the majority failed to take into consideration many constitutional provisions that support the government’s interests advanced by the Solomon Amendment and that predate the adoption of the First Amendment in the Bill of Rights.<sup>72</sup> The dissent cited the Spending Power Clause, which granted “Congress . . . the Power To lay and collect Taxes . . . to . . . provide for the common Defense and general Welfare of the United States . . .”<sup>73</sup> and the Military Powers Clause which granted Congress the power “to raise and support Armies . . . to provide and maintain a Navy . . . [and] to make Rules for the Government and Regulation of the land and naval forces.”<sup>74</sup> And the dissent referenced the Necessary and Proper Clause, authorizing Congress “to make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>75</sup>

Referring to these provisions, the dissent asserted that there is no case in which an act of Congress intended to support the military was declared unconstitutional by “application of the seminal doctrine that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected interests.”<sup>76</sup> The dissent’s conclusion was

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<sup>68</sup> *Id.* at 190.

<sup>69</sup> *See FAIR*, 390 F.3d at 229 n.8 (citing *Rust*, 500 U.S. at 190).

<sup>70</sup> *Id.* at 250 (Aldisert, J., dissenting).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 249.

<sup>73</sup> U.S. CONST. art. I, § 8, cl. 1.

<sup>74</sup> U.S. CONST. art. I, § 8, cl. 12-14.

<sup>75</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>76</sup> *FAIR*, 390 F.3d at 250 (Aldisert, J., dissenting) (internal quotes omitted).

that, by reversing the district court decision on these grounds, the Third Circuit had essentially created new law that is not supported by precedent.<sup>77</sup>

The dissent first questioned whether the impact of the Solomon Amendment on law schools' First Amendment rights—the right not to appear to be violating their anti-discrimination policy—is even relevant, because a military recruiter on campus for a few days cannot allow such an inference.<sup>78</sup> However, assuming such an inference were possible, the dissent addressed whether any “First Amendment concerns trump” Congress' adoption of the Solomon Amendment in furtherance of its performance of its and the President's duties “under Article I and II to support the military.”<sup>79</sup> The dissent started by citing *Roberts v. United States Jaycees*,<sup>80</sup> which held that “[t]he right to associate for expressive purposes is not . . . absolute,” where there are “compelling state interests, unrelated to the suppression of idea, that cannot be achieved through means significantly less restrictive of associational freedoms.”<sup>81</sup>

The dissent identified the two “competing interests” that have to be balanced: the “interest in public safety [as] expressed in clauses of Articles I and II of the Constitution relating to support of the military” and “the interest in free speech [as] found in the First Amendment.”<sup>82</sup>

In applying this balancing test, the dissent pointed out that the Supreme Court has “consistently deferred to congressional decisions relating to the military” due to the broad constitutional powers delegated to Congress and the lack of competence of the courts in determining such issues.<sup>83</sup> Considering the arguments advanced by FAIR that the military could attract their candidates without stepping on the campus, the dissent explained that this is not in harmony with the concepts of a level playing field, since private law firms, who have resources available comparable to the military, yet are more attractive due to their higher pay and bonuses, are afforded complete access on campus.<sup>84</sup> Because the military will inevitably be damaged in its recruiting pursuits without access to law school campuses, the dissent concluded that the balance was in favor of the Solomon Amendment, particularly, because “the validity of such regulations does not turn on a judge's agreement with the responsible

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<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 253.

<sup>79</sup> *Id.*

<sup>80</sup> 468 U.S. 609 (1984).

<sup>81</sup> *FAIR*, 390 F.3d at 253 (Aldisert, J., dissenting) (quoting *U.S. Jaycees*, 468 U.S. at 623).

<sup>82</sup> *Id.* at 254.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 255.

decisionmaker concerning the most appropriate method for promoting significant government interests.”<sup>85</sup>

*a. Compelled Speech Claim*<sup>86</sup>

Turning to FAIR’s compelled speech claim, the dissent rejected FAIR’s reliance on *Hurley*, reasoning that “nothing in *Hurley* suggests that the Solomon Amendment crosses the line into unconstitutionality.”<sup>87</sup> The dissent argued that recruiting, though it involves speaking, is more of an economic transaction; “the expression is entirely subordinate to the transaction itself.”<sup>88</sup> Also, the dissent explained that, in *Hurley*, the Supreme Court had found that the group sought to march “as a way to express pride in . . . [being] openly gay, lesbian and bisexual individuals”—*i.e.*, to convey a pro-homosexuality message.<sup>89</sup> Further, its participation in the parade “would likely be perceived as having resulted from the [parade organizers’] customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possibly of support as well,” because the “role of the parade organizers . . . consisted of choosing the messages that would comprise the parade,” suggesting that the message of a chosen marching group “would be attributed to the organizers themselves.”<sup>90</sup>

The dissent pointed out that in *FAIR*, unlike *Hurley*, the expression is a subsidiary part of the activity, whereas in *Hurley* the expression (the parade) was the activity.<sup>91</sup> It contrasted “bystanders watching a passing parade,” with “law school students and . . . their professors [who] are an extraordinarily sophisticated and well-informed group” who would not likely “perceive a military recruiter’s on-campus activities as reflecting the school’s . . . determination” that it gives a stamp of approval to the military’s message.<sup>92</sup> Further, the “likelihood that the military’s recruiting will be seen as part of a law school’s own message is particularly small when schools can take—and have taken—ameliorative steps to publicize their continuing disagreement with the military’s

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<sup>85</sup> *Id.* (citing *United States v. Albertini*, 472 U.S. 675, 689 (1985)).

<sup>86</sup> The dissent concluded that, in evaluating this and the expressive association claim, the correct standard is intermediate scrutiny, contrary to the majority’s choice of strict scrutiny. *Id.* at 246-62 (majority opinion). While the majority held that it would reach the same conclusion of unconstitutionality under either scrutiny standard, *id.* at 244, the dissent did not consider the result under strict scrutiny.

<sup>87</sup> *Id.* at 256 (Aldisert, J., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (citing *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 561 (1995)).

<sup>90</sup> *Id.* at 256-57 (quoting *Hurley*, 515 U.S. at 572).

<sup>91</sup> *Id.* at 256.

<sup>92</sup> *Id.* at 257.

policies . . . .”<sup>93</sup> The dissent concluded that the holding in *Hurley* did not apply to prevent judicial deference to Congress on military matters.<sup>94</sup>

*b. Expressive Association Claim*

The dissent then responded to the majority’s finding of merit in FAIR’s expressive association claim. The dissent explained that, while the First Amendment does protect expressive associations, “the Supreme Court has required a close relationship between the [government] action and the affected expressive activity to find a constitutional violation.”<sup>95</sup> The dissent found that the impact of the Solomon Amendment on the law schools’ interests of expression to be extremely remote and not to violate the First Amendment.<sup>96</sup> Applying the balancing test, the government’s interests present in the Solomon Amendment outweigh the remote and incidental infringements on the First Amendment rights of the law schools.<sup>97</sup>

The dissent dissected the cases relied on by the majority to show that they are inapposite to the issue of military recruiters. The dissent explained that those cases involved governmental requirements that private entities or persons pay for someone else’s speech or advertisements,<sup>98</sup> whereas the Solomon Amendment does not require law schools to pay anything to the government.<sup>99</sup> Further, the dissent explained that, even if the schools were required to give payments to the government to support the military’s recruiting efforts, there was precedent to allow more latitude for compelled support of government speech than private speech.<sup>100</sup>

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This article will now examine in some detail criticisms of the majority decision, expanding on some of the arguments found in the dissent, and advancing other arguments for the conclusion that the Solomon Amendment was improperly determined to violate the Constitution in *FAIR v. Rumsfeld*.

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<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (citing *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000)).

<sup>96</sup> *Id.* at 257.

<sup>97</sup> *Id.*

<sup>98</sup> *See id.* at 258.

<sup>99</sup> *See id.*

<sup>100</sup> *See id.* (citing *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 259 (1977)).

### III. THE SOLOMON AMENDMENT FURTHERS — DOES NOT VIOLATE — ACADEMIC FREEDOM

The *sine qua non* of the Third Circuit majority decision is that the Solomon Amendment violates the law schools' academic freedom – the protection afforded by the First Amendment to school communities. It is only that conclusion that allowed the Third Circuit to hold the Solomon Amendment unconstitutional as violating academic freedom. If it did not violate academic freedom, the Solomon Amendment must be held to be constitutional.

In fact, the Solomon Amendment enhances academic freedom, rather than violating it. The Solomon Amendment uses the power of the federal purse to require law schools to allow students on campus the freedom to hear the message of military recruiters to the same extent they are permitted to hear the message of other recruiters. The law schools seek to continue to exclude military recruiters—*i.e.*, not permit students the option to hear their message—because the law schools do not agree with the military's "Don't Ask, Don't Tell" policy.

The law schools assert that their reason for excluding military recruiters is that military qualifications for employment, *i.e.*, the "Don't Ask, Don't Tell" policy, require rejection of gay people, and thus violates the law schools' non-discriminatory policy which bars discrimination based on sexual orientation.

Even if that were an accurate representation of the law schools' motive, it would only mean that the law schools seek to impede military recruiters, who represent a view different from the law schools' view on the usefulness of gay persons to the military, from expressing the military's view to students who wish to hear it. The law schools' non-discrimination policy, to the extent it expresses the law schools' opinion on that issue, is nothing more than just that—its expression of its opinion on an issue on which students are entitled to disagree, if academic freedom has any meaning. Unlike some of the other categories included in the law schools' non-discrimination policy (*e.g.*, discrimination based on race), which are designated by statute as illegal, the military's "Don't Ask, Don't Tell" policy is not only not proscribed by law, but has been enacted by Congress, signed into law by President Clinton,<sup>101</sup> and upheld

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<sup>101</sup> National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, 107 Stat. 1547, 1671-72 (1993) (codified at 10 U.S.C. § 654(b) (2000)).

by each of the courts<sup>102</sup> that have considered an attack on its constitutionality.<sup>103</sup>

While not directly relevant, there are circumstances that strongly suggest that the law schools, in their opposition to military recruiters, are merely attempting to create pressure on the government to revoke the “Don’t Ask, Don’t Tell” policy, and not because the law schools are seeking to prevent violation of their non-discrimination policies. As already discussed,<sup>104</sup> law schools’ non-discrimination policies purport also to preclude employers who discriminate on the basis of “age” and “handicap or disability.” Although the military will not accept recruits older than 34 for active duty,<sup>105</sup> and those who are not able-bodied<sup>106</sup> (obvious “violations” of law schools’ non-discrimination policies), no law school has cited those violations as a reason for excluding military recruiters. The apparent reason: acceptance that the military can exercise its judgment to decide that over-age and disabled persons are not consistent with an efficiently performing military. But law schools refuse to accept the judgment of the military (and Congress) that gays are not consistent with an efficiently performing military. What is the difference? Clearly the answer is that equal treatment of gays is a front-burner politically-correct issue. Looked at in that manner, all law schools have the right to demonstrate and lobby Congress for a change in military policy towards gays, but those who disagree have an equal right to express themselves—including by listening to the message of military recruiters on campus.

The law schools’ and the Third Circuit’s claim that the Solomon Amendment violates academic freedom by requiring law schools to allow military recruiters on campus makes a mockery of academic freedom (Freedom of Speech) as defined by the Supreme Court.<sup>107</sup> The

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<sup>102</sup> See *Able v. United States*, 155 F.3d 628 (2d Cir. 1998); *Richenberg v. Perry*, 97 F.3d 256 (8th Cir. 1996), *cert. denied*, 522 U.S. 807 (1997); *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.), *cert. denied*, 519 U.S. 948 (1996).

<sup>103</sup> This view is not inconsistent with university administrators’ responsibility to exercise appropriate authority over student actions to prevent illegal or other disruptive conduct on campus. Military recruiters on campus does not fit within such conduct.

<sup>104</sup> See *supra* text accompanying note 19.

<sup>105</sup> U.S. Army Careers & Jobs, <http://www.goarmy.com/JobCatList.do?fw=careerindex> (last visited Nov. 11, 2005).

<sup>106</sup> *Id.*

<sup>107</sup> Most of the defining of academic freedom has been done by the courts in the context of state action, including state schools. While non-state schools may well have the right to violate the academic freedom of their students, as the Civil Rights statutes in this context apply only to state action, these cases provide the courts’ definition of academic freedom. That definition must be applied to determine if there is any merit to the law schools’ assertion of violation of academic freedom by the Solomon Amendment.

Supreme Court has repeatedly held that an essential element of the First Amendment is the right to “receive information and ideas”<sup>108</sup>—the very right the law schools wish to withhold from students by preventing students from hearing the military “information and ideas” on campus. This freedom to receive information that a person wishes to hear “is a necessary predicate to the *recipient’s* meaningful exercise of his own rights of speech, press and political freedom.”<sup>109</sup> And “[a]t the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas and beliefs deserving of expression, consideration, and adherence.”<sup>110</sup> No reason exists to exclude from that First Amendment protection the law students’ right to “decide for himself or herself” whether the military recruiter’s message is “deserving of expression, consideration and” acceptance.<sup>111</sup>

As the Supreme Court recognized, “this right is ‘nowhere more vital’ than in our schools and universities. The college classroom with its surrounding environs is particularly the ‘marketplace of ideas,’”<sup>112</sup> which is at the heart of academic freedom.<sup>113</sup> A marketplace of ideas requires a “wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”<sup>114</sup> The objective is that “students must always remain free to inquire, to study and to evaluate . . . .”<sup>115</sup> “In our system, students may not be regarded as closed-circuit recipients of only that which the [school] chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.”<sup>116</sup>

Based on these Supreme Court definitions of academic freedom, it is clear that what the law schools are asking the courts to permit is the opposite of academic freedom. The law schools seek to deny students the option to hear the military recruiters’ “information and ideas,” deny military recruiters access to the “market place of ideas” on campus, and deny students the freedom to “inquire” of military recruiters, to “study” the military recruiters’ message, and “to evaluate” those ideas.

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<sup>108</sup> *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

<sup>109</sup> *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

<sup>110</sup> *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

<sup>111</sup> *Id.*

<sup>112</sup> *Kleindienst*, 408 U.S. at 763 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

<sup>113</sup> *Healy v. James*, 408 U.S. 169, 180-81 (1972).

<sup>114</sup> *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

<sup>115</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>116</sup> *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 511 (1969).

The law schools' position that they have the right to protect their academic freedom against being forced to associate with military recruiters and military policies is meritless. Assuming *arguendo*<sup>117</sup> that law schools, *qua* institutions, are forced to associate with military recruiters, it would not alter the reality that academic freedom is enhanced by protecting the students' right to hear the military message, if they choose to do so.

Simply put, what the law schools assert is that, because they do not agree with the military's policy, they have a right to prevent students who wish to hear the military's message to do so. It is axiomatic that it is the antithesis of academic freedom for one group of students and faculty members (the *FAIR* plaintiffs) to prevent the dissemination of a message that other students wish to hear, merely because the *FAIR* plaintiffs disagree with the message.

At the heart of the fallacy inherent in the law schools' position is that they see academic freedom as primarily for the benefit of administration and faculty (and those students who agree with the administration), with academic freedom of students restrictable through administration-proclaimed self-serving definitions of politically correct and acceptable forms of thought and speech designed to limit free expression on campus. To the contrary, academic freedom is not the exclusive property of law school administrations and some group of faculty members. Colleges exist for the education of students, with students being the primary beneficiaries of academic freedom. The law school administrations are the fiduciaries of that right, with the duty to implement it for the benefit of the students.

*Board of Education, Island Trees Union Free School District No. 26 v. Pico*,<sup>118</sup> provides precedent for how *FAIR* should have been decided. In that case, the Supreme Court recognized that schools have a right to establish their curriculum in furtherance of their "legitimate . . . interest in promoting . . . values be they social, moral, or political" on their students without interference from the government.<sup>119</sup> This is analogous to *FAIR*'s arguments regarding the law schools' right to disseminate a message against the military's discrimination on the basis of sexual orientation. But significantly, in *Pico*, the Supreme Court did not extend the school's right to control curriculum to the content of the library. The Court distinguished between the classroom and the library. The library was for voluntary exposure to speech, whereas the classroom

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<sup>117</sup> See *infra* pp. 32-34 for a discussion as to why no violation of law schools' right of association occurs merely because law schools allow military recruiters on campus.

<sup>118</sup> 457 U.S. 853 (1982).

<sup>119</sup> *Id.* at 864 (quoting Pet'r-Appellee's Br. 10).

curriculum was mandated by the school. Because library “books . . . by their nature are optional rather than required reading” for students, the Court held that a school board did not have the right to prevent students from being exposed, in the library, to ideas with which the school board disagreed.<sup>120</sup> The Court further held that “school officials cannot suppress expressions of feeling with which they do not wish to contend.”<sup>121</sup>

Similarly, the Solomon Amendment ensures that students have access to the military message, if they desire to hear it. The Solomon Amendment does not dictate what law schools may teach in the classroom. Law schools that attempt to block military presence at employment fairs is due to those law schools’ disagreement with the military’s policies. It is equivalent to the school board in *Pico* attempting to remove books from the library because the board disagreed with the books’ messages. In *Pico*, the Court held that a local school board has discretion “to add to the libraries of their schools . . . [but not] . . . the discretion to remove books” where the purpose is the suppression of ideas.<sup>122</sup> The law schools’ barring of military recruiters was equivalent of what the Supreme Court held improper in *Pico*: the removal of an employer to suppress the ideas espoused by that recruiter—an attempt to prevent students from hearing these ideas, because the administration disagreed with that recruiter’s message.

An employment fair, like a library, is dependent on students voluntarily seeking out a message. To the extent law schools have a right to instill their message and values in their students, such right may not extend to barring students from obtaining the message of others, including at an employment fair. As *Pico* held, to the extent the school administrations attempt to block students’ access to other viewpoints, it is the law schools, not the government, that are violating the academic freedom of its students.

Further, the Supreme Court has made clear that the responsibility of college administrations is to protect students’ academic freedom rights, not those of the administration. In affording prime importance to students’ right to hear “a diversity of views from”<sup>123</sup> speakers, the Court explained:

The quality and creative power of student intellectual life to this day remains a vital measure of a school’s influence and attainment. For the University, by regulation, to cast disapproval

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<sup>120</sup> *Id.* at 862, 871.

<sup>121</sup> *Id.* at 868 (quoting *Tinker*, 393 U.S. at 511).

<sup>122</sup> *Id.* at 871-72.

<sup>123</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

on particular viewpoints of its students risks the suppression of free speech and creative inquiry in . . . its college and university campuses.<sup>124</sup>

The Supreme Court has recognized, in analogous situations, that it is the First Amendment rights of the patrons of the institution, not the institution itself, which must be protected. In the context of a library, the Supreme Court declined to decide whether or not the library itself had a First Amendment right or whether, assuming one, it was violated; instead, it focused on whether “their patrons’ First Amendment Rights” had been violated, because they were the ultimate beneficiaries of free speech rights in a library context.<sup>125</sup> Likewise, in the law school context, students are the ultimate beneficiaries, whose academic freedom rights are not restricted, but enhanced by being allowed to hear the views of diverse recruiters, including the military.

In the corporate context, as well, the Supreme Court recognized that the entity’s First Amendment rights were subordinate to that of the corporate “members”—the shareholders. It held that SEC “regulations that limit management’s ability to exclude some shareholders’ views from corporate communications do not infringe corporate First Amendment rights.”<sup>126</sup> So too, in the broadcasting context, the Court rejected broadcasters’ claim that their First Amendment rights were violated when the FCC required them to allow fair comment by any persons attacked by broadcasters, holding “[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.”<sup>127</sup>

It is no answer to argue that students remain free to hear the message of military recruiters off campus.<sup>128</sup> The same could have been said about the ability of students in *Pico* to go to a non-school library or a book store to obtain the book banned in *Pico*. That would not suffice from an academic freedom standpoint, because “[t]he school library—sponsored, financed, and supervised by the school—is the principal locus of [students’] freedom” to “inquire, to study and to evaluate”<sup>129</sup>—just as the employment fair, sponsored, financed, and supervised by the school, is the principal locus of students’ freedom to inquire, study and evaluate employment opportunities. To paraphrase the Supreme Court’s explanation in *Pico*: listening to military recruiters “is completely

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<sup>124</sup> *Id.* at 836.

<sup>125</sup> *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 214 (2003).

<sup>126</sup> *Pacific Gas & Elec. Co. v. Pub. Utils. Comm’n*, 475 U.S. 1, 15 n.10 (1986).

<sup>127</sup> *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969).

<sup>128</sup> *Cf. FAIR*, 390 F.3d 219, 235 (3d Cir. 2004).

<sup>129</sup> *Bd. of Educ. v. Pico*, 457 U.S. 853, 868-69 (1982).

voluntary on the part of students.”<sup>130</sup> Their selection of which recruiters to listen to at the law school’s employment fair “is entirely a matter of free choice;” the employment fairs “afford them an opportunity . . . that is wholly optional.”<sup>131</sup> The *Pico* Court held that to the extent that the school administration “intended by their . . . decision to deny [students] access to ideas with which [the administration] disagreed, . . . then [the school administration] have exercised their discretion in violation of the Constitution.”<sup>132</sup> *A fortiori*, this reasoning, applied to junior high school and high school students, must control the definition of academic freedom as to law schools’ preventing law school students from hearing the message of military recruiters.

An argument that academic freedom of students is not violated by denial of campus facilities as long as the students can pursue their goals off campus, was expressly rejected by the Supreme Court in *Healy v. James*.<sup>133</sup> There, a college president, opposed to the message of a student group, refused to allow its use of campus facilities to meet. The president’s conduct was held inconsistent with the need to maintain and protect the “marketplace of ideas” and safeguard academic freedom.<sup>134</sup> The ability of this student group to meet off campus did not “ameliorate significantly the disabilities imposed by the president’s action.”<sup>135</sup> So too, the law schools’ violation of academic freedom in refusing to allow students to hear the military recruiters’ message on campus is not ameliorated by the ability of students to hear that message off campus.

In the end, FAIR relies, for its academic freedom violation claim, on the undisputed rule that the government may not “discriminate against speech on the basis of its viewpoint.”<sup>136</sup> In fact, no such violation of the law schools’ speech rights occurs because each law school can continue to speak freely against military policy. But, to sustain FAIR’s position requires a holding that the law schools can “discriminate against [the military’s] speech on the basis of its viewpoint” on homosexuals in the military. That finding would make a mockery of academic freedom. Thus, contrary to the assertion that the Solomon Amendment violates academic freedom, which was the *desideratum* of the Third Circuit’s decision, it is the law schools which are violating academic freedom and the Solomon Amendment which is protecting it.

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<sup>130</sup> *Id.* at 869.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 871.

<sup>133</sup> 408 U.S. 169 (1972).

<sup>134</sup> *Id.* at 180-81.

<sup>135</sup> *Id.* at 183.

<sup>136</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

IV. THE SOLOMON AMENDMENT IS A PROPER EXERCISE OF  
CONGRESSIONAL POWER UNDER THE SPENDING CLAUSE

As recently as 2003, in *United States v. American Library Ass'n*,<sup>137</sup> the Supreme Court held that “Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives.”<sup>138</sup> This was not new law, but a reaffirmation of a long-standing rule.<sup>139</sup> The Court explained that the only limitation on that power is that Congress thereby “may not ‘induce’ the recipient ‘to engage in activities that would themselves be unconstitutional.’”<sup>140</sup> That limitation, known as the “unconstitutional conditions doctrine”—on which the Third Circuit majority relied—requires a determination of “whether the condition that Congress requires ‘would . . . be unconstitutional’ if performed by the [law school] itself.”<sup>141</sup>

Applying that test, there could be nothing unconstitutional about the Solomon Amendment as, without dispute, law schools would not be acting in an unconstitutional manner if they allowed military recruiters on campus. Both the Third Circuit and the district court held the *American Library Ass'n* rule inapplicable because the Solomon Amendment did not withhold funds from a specific spending program which contained the condition, but affected all funds under all programs run by each of the government departments.<sup>142</sup>

With due deference to both of those courts, this exclusion of the government interests, as expressed in the Solomon Amendment, from the government’s right to condition its funding on what Congress believes is necessary to support government policies, is simplistic and therefore erroneous. Without the protection of our military forces, our government would not exist. In that event, no governmental department would exist, and thus no funding of law schools and other institutions of higher learning could then be given. The Constitution and Supreme Court decisions make clear that military recruitment—which the Solomon Amendment was intended to assist—is a fundamental and overriding public interest that has as its aim the preservation of our country’s very

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<sup>137</sup> 539 U.S. 194 (2003).

<sup>138</sup> *Id.* at 203 (citing *South Dakota v. Dole*, 483 U.S. 203, 206 (1987)).

<sup>139</sup> *See, e.g.,* *Grove City College v. Bell*, 465 U.S. 555, 575 (1984) (“Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept.”).

<sup>140</sup> *Am. Library Ass'n*, 539 U.S. at 203 (quoting *Dole*, 483 U.S. at 210 (1987)).

<sup>141</sup> *Id.* at 203 n.2.

<sup>142</sup> *FAIR*, 390 F.3d 219, 229 n.9 (3d Cir. 2004); *FAIR*, 291 F. Supp. 2d 269, 299-300 (D.N.J. 2003).

existence.<sup>143</sup> Hence, Congress's conditioning of funds for learning institutions on law schools not impeding the government's ability to recruit able persons for the military, is, in reality, related to all and each funding made by each government department. It cannot be that the Supreme Court would insist on form over substance by requiring Congress to include in each approval of appropriation for a funding program the boilerplate of "reliance on our military for the ability to make educational grants," or words to that effect, in order to recognize that reality. Hence, under *American Library Ass'n*, the Solomon Amendment condition was constitutional.

In any event, Congress has previously used its power of the purse to condition federal funding for educational institutions on compliance with federal policies unrelated to the specific federal funding. For example, Congress has conditioned federal funding on no sexual discrimination<sup>144</sup> and no racial discrimination.<sup>145</sup> No one has even suggested those statutes, of general impact on all federal funding, are unconstitutional because they were not limited to the specific funding program. And although the anti-sexual discrimination statute barred funding by "[e]ach Federal department and agency which is empowered to extend Federal financial assistance to any education program"<sup>146</sup>—i.e., not related to a specific program—it was held constitutional.<sup>147</sup>

Significantly, even if the lower courts were correct in holding that *American Library Ass'n* was inapplicable because the Solomon Amendment was not limited to a single program, the Solomon Amendment still should not be held to impose an unconstitutional condition. First, the principle inherent in *American Library Ass'n*, of the "wide latitude" that is recognized that Congress has "to attach conditions on the receipt of federal assistance,"<sup>148</sup> remains the rule and, applied to the Solomon Amendment, makes it constitutional.

Second, the military recruiter's message, which the law schools assert is violating their First Amendment rights through forcing them to be associated with it, is clearly the government's own message. In the recent decision *Johanns v. Livestock Marketing Ass'n*,<sup>149</sup> the Supreme Court expressly held that "the Government's own speech . . . is exempt

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<sup>143</sup> See U.S. CONST. art. I, § 8, cls. 12-13; 10 U.S.C. § 503(a) (2000); *Grutter v. Bollinger*, 539 U.S. 306, 331 (2003); *United States v. O'Brien*, 371 U.S. 367, 377 (1968).

<sup>144</sup> 20 U.S.C. §§ 1681(a), 1682 (2000).

<sup>145</sup> 42 U.S.C. § 2000(d) (2000 & Supp. I 2001).

<sup>146</sup> 20 U.S.C. § 1682 (2000).

<sup>147</sup> See *Grove City College v. Bell*, 465 U.S. 555 (1984).

<sup>148</sup> *United States v. Am. Library Ass'n*, 539 U.S. 194, 203 (2003).

<sup>149</sup> 125 S. Ct. 2055 (2005).

from First Amendment scrutiny”<sup>150</sup> in a context analogous—indeed, *a fortiori*—to that in the *FAIR* case. In *Johanns*, the plaintiffs objected to being required to fund advertising by a private sector group, but for the government’s purpose and approved by the government.<sup>151</sup> Those plaintiffs objected that it “unconstitutionally compel[led] [them] to subsidize speech to which they object,”<sup>152</sup> and provide “their seeming endorsement to promote a message with which they do not agree.”<sup>153</sup> Similarly, the *FAIR* plaintiffs objected to being compelled to provide room, staff and services to the military speech to which they objected, and thus, they claim, appear to endorse it. Noting that all prior “First Amendment challenges to . . . compelled expression” had not involved “government compelled subsidy of the government’s own speech,”<sup>154</sup> the Court held those prior decisions irrelevant where it is government speech asserted to violate the plaintiffs’ First Amendment rights. Given that recent decision, the *FAIR* plaintiffs may not object to military recruiters, i.e., government speech, on campus as a violation of plaintiffs’ First Amendment rights.

Third, the four cases<sup>155</sup> on which the majority in the Third Circuit relied, to hold the Solomon Amendment to be an unconstitutional condition, are inapposite; they each involved direct sanction for, or restriction of, speech. In *Perry v. Sindermann*,<sup>156</sup> the administration of a state junior college declined to renew a professor’s contract, due to, he asserted, his exercise of his free speech right in “his testimony before legislative committees and his other statements critical of the Regents’ policies.”<sup>157</sup> *Speiser v. Randall*<sup>158</sup> likewise involved denial of a benefit (there, a tax exemption) “for engaging in certain speech.”<sup>159</sup> *Rosenberger v. Rector and Visitors of the University of Virginia*<sup>160</sup> also involved a state university’s administration penalizing a student organization because of its viewpoint.

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<sup>150</sup> *Id.* at 2058.

<sup>151</sup> *See id.* at 2059-60.

<sup>152</sup> *Id.* at 2060.

<sup>153</sup> *Id.* at 2064.

<sup>154</sup> *Id.* at 2060.

<sup>155</sup> *See FAIR*, 390 F.3d 219, 229 (3d Cir. 2004) (citing *Perry v. Sindermann*, 408 U.S. 593 (1972); *Speiser v. Randall*, 357 U.S. 513 (1958); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995); and *FCC v. League of Women Voters*, 468 U.S. 364 (1984)).

<sup>156</sup> 408 U.S. 593 (1972).

<sup>157</sup> *Id.* at 598.

<sup>158</sup> 357 U.S. 513 (1958).

<sup>159</sup> *Id.* at 518.

<sup>160</sup> 515 U.S. 819 (1995).

The fourth case cited by the Third Circuit majority, *FCC v. League of Women Voters*,<sup>161</sup> expressly conditioned receipt of federal funds by non-commercial broadcasting stations on their not expressing their opinions in broadcasting, i.e., imposing a direct prohibition on “a form of speech—namely the expression of editorial opinion—that lies at the heart of First Amendment protection.”<sup>162</sup> Indeed, the Court described what was at stake in that case as “the liberty to discuss publicly . . . Freedom of discussion.”<sup>163</sup>

Unlike what was found unconstitutional in each of these four cases, the Solomon Amendment does not prohibit law schools from expressing their opinion on military policy or otherwise penalize the law schools for their speech or expression of views. Indeed, the right of all law schools to speak out against military policy is unaffected by the Solomon Amendment.<sup>164</sup>

It is ironic that the Third Circuit majority should purport to rely on these four cases because the rationale of those opinions is the antithesis of the law schools’ position on the Solomon Amendment: that they have the right to prevent their students from exercising their academic freedom to listen to the views of military recruiters if the students wanted to do so.

For example, to paraphrase the Supreme Court’s holding in *Rosenberger*, the law schools’ “denial of [the military’s] request for [equal treatment] . . . is based upon viewpoint discrimination.”<sup>165</sup> And “[f]or the University, by regulation, to cast disapproval on particular viewpoints of its students”—such as those who wish to hear the military’s message—“risks the suppression of free speech and creative inquiry in one of the vital centers for the nation’s intellectual life, its college and university campuses.”<sup>166</sup>

Each of those four cases held unconstitutional an actual restraint on speech. The *FAIR* plaintiffs do not claim that the Solomon Amendment imposes any restraint of anyone’s speech. Rather, they claim that the law schools’ right of association is violated by the Solomon Act, which, they say, pressures the law schools into associating with, and thus endorsing, the military policies with which they disagree, merely by allowing military recruiters to be one of many employers appearing on campus to be interviewed by those students who wish to sign up.

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<sup>161</sup> 468 U.S. 364 (1984).

<sup>162</sup> *Id.* at 381.

<sup>163</sup> *Id.* at 381-82 (quoting *Thornhill v. Alabama*, 310 U.S. 88, 101-02 (1940)).

<sup>164</sup> See discussion *supra* p. 14-15.

<sup>165</sup> 515 U.S. at 832.

<sup>166</sup> *Id.* at 836.

Also, in *Speiser*, the Supreme Court, in holding unconstitutional a loyalty oath as a condition to obtain a tax exemption, explained that a loyalty oath has been held constitutional where “there was no attempt directly to control speech but rather to protect . . . some interest clearly within the sphere of governmental concern. . . . [i.e.,] a congressional purpose . . . to achieve an objective other than restraint of speech.”<sup>167</sup> No one disputes that the Solomon Amendment’s purpose was not to restrain speech—indeed the Third Circuit majority so assumed<sup>168</sup>—but to further an interest clearly within the sphere of governmental concern: military recruitment, which, as previously shown,<sup>169</sup> is necessary to the preservation of our country. FAIR conceded that the “government’s interest in raising an army is important, even compelling . . . and so, too, we can presume is its interest in hiring JAG lawyers.”<sup>170</sup> And, as previously discussed,<sup>171</sup> the Solomon Amendment does not in any way limit each law school’s freedom to make clear its opposition to military policies.

The Third Circuit held itself bound, by the Supreme Court decision in *Dale*, to give conclusive deference to the law schools’ assertion that the presence of military recruiters on campus would impair the law schools’ non-discrimination message.<sup>172</sup> To the contrary, *Dale* made explicit that a mere assertion of an associational rights violation is not sufficient to require a finding to that effect:

[T]he freedom of expressive association . . . is not absolute.<sup>173</sup>

and

That is not to say that an expressive association can erect a shield . . . simply by asserting that mere acceptance of a member from a particular group would impair its message.<sup>174</sup>

Rather, to paraphrase the *Dale* opinion, it would have impact on a statute only if “the forced inclusion of [a military recruiter] would significantly affect the [law schools’] ability to advocate public or private viewpoints.”<sup>175</sup> Thus, the Solomon Amendment does not impose an

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<sup>167</sup> *Speiser v. Randall*, 357 U.S. 513, 527 (1958).

<sup>168</sup> *FAIR*, 390 F.3d at 245.

<sup>169</sup> See discussion *supra* p. 5-6.

<sup>170</sup> Brief for the Respondents in Opposition at 23, *FAIR v. Rumsfeld*, 125 S. Ct. 1977 (2005) (No. 04-1152) (in opposition to petition for certiorari).

<sup>171</sup> See discussion *supra* p. 14-15.

<sup>172</sup> *FAIR*, 390 F.3d at 233-34.

<sup>173</sup> 530 U.S. at 648.

<sup>174</sup> *Id.* at 653.

<sup>175</sup> *Id.* at 650.

impact because law schools continue to be free to voice their objections to military policies.

In addition, both practical knowledge and controlling Supreme Court authority reject the argument that law schools, by allowing military recruiters, among a multitude of other recruiters, to interview students on campus, create a message that those law schools are endorsing the military. No law student (and for that matter no employer) believes that a law school is endorsing any particular employer by arranging for many employers to interview students on campus. For example, recruiters may interview on behalf of the National Organization for Women (pro-abortion) as well as on behalf of an anti-abortion legal group, obviously without any suggestion of endorsement of either position. Can you imagine a law school agreeing that it endorses each employer that interviewed on campus, and thus is liable to a student who suffered financial loss after accepting an employment offer from an employer who became bankrupt before the employment commenced? Of course not; and students who have found themselves in this unfortunate situation (which has occurred) have never even suggested that the law school was at fault. There is no reason to treat military recruiters' participation in employment fairs any differently.

It would defy logic for anyone to contend that any law school would be taken as endorsing the policies espoused by a pro-life or a pro-choice speaker, invited to speak on campus and permitted to use school facilities, including the room in which to speak, the school bulletin board to announce the speech, and, often, school funds allotted for such speakers. Likewise, it defies logic to assume that anyone believes that a law school endorses the policies of any specific employer among the hundreds seeking the opportunity to be interviewed by any students who wish to hear the employer's message.

The Supreme Court has itself recognized that no endorsement of the military message comes from allowing the military recruiters equal access to students. In *Rosenberger*, on which the Third Circuit relied, the Supreme Court declared:

A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech . . . . The distinction between the University's own favored message and the private speech of students is evident . . . .<sup>176</sup>

The Supreme Court necessarily found that no violation of associational rights of a school results from allowing students the option to hear, in

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<sup>176</sup> 515 U.S. 819, 834 (1995).

school, a message with which the school administration disagrees, even though the school provides the space, pays for it, and provides the staff to run it. In *Pico*,<sup>177</sup> the school was required to allow students the option to read books in the school library, even though the school administration disagreed with the message of certain books. It was a given that the school facilities (the library) would be used, paid for by the school, and that school staff operated the library. Yet, no violation of any associational right of the schools was found.

So too, in *Healy v. James*,<sup>178</sup> the decision of the president of a college to bar a student group from using campus facilities to convey its message, because the president did not want the college associated with that message, was held unconstitutional. And, to paraphrase the Supreme Court's opinion in *Widmar v. Vincent*, "[i]n light of the large number of [recruiters] meeting on campus, however, we doubt students could draw any reasonable inference of University support from the mere fact of a campus meeting place."<sup>179</sup>

The Supreme Court reached the same conclusion even as to high school students, who are, by definition, less mature than the college and graduate students affected by the Solomon Amendment, stating:

We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support . . . speech that it merely permits on a nondiscriminatory basis.<sup>180</sup>

In analogous, but non-school, situations, the Supreme Court has held that no endorsement of views exists when an entity gives access to its premises for the expression of a differing view. In *PruneYard Shopping Center v. Robins*,<sup>181</sup> the Supreme Court rejected the suggestion—similar to that made by FAIR in attacking the Solomon Amendment as unconstitutional—that the First Amendment association rights of a shopping center owner would be violated by being compelled to allow individuals to express themselves on its property. In reasoning which appears directly applicable to the attack on the Solomon Amendment and the presence of the military on campus, the Supreme Court explained:

The views expressed by members of the public in passing out pamphlets or seeking signatures for a petition . . . will not likely be identified with those of the owner. . . . [Also the owner] can

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<sup>177</sup> 457 U.S. 853 (1982).

<sup>178</sup> 408 U.S. 169 (1972).

<sup>179</sup> 454 U.S. 263, 274 n.14 (1981).

<sup>180</sup> Bd. of Educ. of the Westside Comty. Schs. v. Mergens, 496 U.S. 226, 250 (1990).

<sup>181</sup> 447 U.S. 74 (1980).

expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand.<sup>182</sup>

The law schools are able to disavow any agreement or connection with the military recruiters, and have in fact done so,<sup>183</sup> thereby avoiding any association with the military's views.

In *Turner Broadcasting System, Inc. v. FCC*, the Supreme Court rejected the argument that television cable system operators, if required to carry certain broadcast stations, would be associated with the ideas of those stations:

Given cable's long history of serving as a conduit for broadcast signals, there appears little risk that cable viewers would assume that the broadcast stations carried on a cable system convey ideas or messages endorsed by the cable operator.<sup>184</sup>

Rationally, no difference exists between employers allowed to convey their respective message on campus and broadcast stations being able to convey their respective message on cable.

Significantly, the Court appears unanimous that an institution does not become associated with the message of any one of many allowed to present themselves to students. For example, to quote the dissenting opinion of the four "liberal" justices (Breyer, Ginsburg, Souter and Stevens) in *Boy Scouts of America v. Dale* (altered only to apply that dissenting opinion to law schools):

[I]t is not likely that [any law school] would be understood to send any message . . . simply by admitting someone as a [recruiter]. . . . The notion that an organization of that size and enormous prestige implicitly endorses the views that each of those [recruiters] may express . . . is simply mind boggling.<sup>185</sup>

*Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*<sup>186</sup> and *Boy Scouts of America v. Dale*,<sup>187</sup> in which the Supreme Court upheld the associational rights of organizations to exclude views with which the organization disagreed, are inapposite to the Solomon Amendment, contrary to the Third Circuit's reliance on them. The plaintiff in *Hurley*, an homosexual, objected to being excluded from a parade, which was limited to those who agreed with the organizer's

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<sup>182</sup> *Id.* at 87.

<sup>183</sup> See discussion *supra* p. 14-15.

<sup>184</sup> 512 U.S. 622, 655 (1994).

<sup>185</sup> 530 U.S. 640, 697 (2000) (Stevens, J., dissenting).

<sup>186</sup> 515 U.S. 557 (1995).

<sup>187</sup> 530 U.S. 640 (2000).

message. The parade organizer's position was no different from what the response would be by a Democratic Party parade in rejecting a Republican seeking to participate. The Court held that the parade organization was not "merely 'a conduit' for the speech of participants in the parade," but "itself a speaker."<sup>188</sup> In that parade context, an homosexual's "participation would likely be perceived as having resulted from the [sponsor's] customary determination about a unit admitted to the parade, that its message was worthy of presentation and quite possible of support as well."<sup>189</sup> No such perception would be warranted from military recruiters' appearance on campus, as it is recognized that the purpose of employment fairs is not for the law school to convey an overall message, but an opportunity for students to hear the employment messages of each recruiter.

The Boy Scouts in *Dale* excluded an homosexual who sought a special leadership role as an assistant scoutmaster, thereby compromising the Boy Scouts' message on homosexuality.<sup>190</sup> At employment fairs, in contrast, no special position is given to any one of many recruiters, and no recruiter is an official or representative of the school.

This analysis establishes that the Solomon Amendment does not infringe law schools' freedom of speech or associational rights. But, even assuming, *arguendo*, that the Solomon Amendment "does work some slight infringement on [law schools'] right of expressive association, that infringement is justified because it serves the State's compelling interest."<sup>191</sup> The Supreme Court has stated that an infringement "may be justified by [statutes and] regulations adopted to serve compelling state interests, unrelated to the suppression of idea, that cannot be achieved through means significantly less restrictive of associational freedoms."<sup>192</sup> As noted above,<sup>193</sup> Congress found that the military's recruitment efforts would be impeded without equal access to students in law schools' employment fairs, in a location (often the campus itself) convenient to all students. Thus, "even if enforcement of the [Solomon Amendment] causes some incidental abridgement of . . . protected speech, that effect is no greater than necessary to accomplish the [government's] legitimate purposes,"<sup>194</sup> rendering it constitutional.

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<sup>188</sup> *Hurley*, 515 U.S. at 575.

<sup>189</sup> *Id.*

<sup>190</sup> *Dale*, 530 U.S. 640.

<sup>191</sup> *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987).

<sup>192</sup> *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984).

<sup>193</sup> See discussion *supra* p. 5-6.

<sup>194</sup> *U.S. Jaycees*, 468 U.S. at 628. See *Bob Jones Univ. v. United States*, 461 U.S. 574, 603-04 (1983), which holds that burdening colleges' exercise of First Amendment religious liberty rights by withdrawing tax benefits "will inevitably have a substantial

The Third Circuit majority declined to apply these authorities because the government had not “produce[d] any evidence that [the Solomon Amendment] is no more than necessary to further the government’s interest.”<sup>195</sup> But there is no requirement in these circumstances that the government need disprove that other solutions would meet the government’s need with lesser effect on First Amendment rights and with equal effectiveness. Otherwise “the undoubted ability of lawyers and judges,” who are not budgetarily constrained as Congress is, “to imagine *some* kind of less drastic or restrictive an approach would make it impossible to write laws that deal with the harm that called the statute into being.”<sup>196</sup>

Contrary to the Third Circuit majority position, there have been many cases in which the Supreme Court has upheld legislation or regulations without requiring a factual presentation beyond legislative history. For example, in *United States v. O’Brien*,<sup>197</sup> the Court sustained legislation against draft card burning, on the basis of Congress’s say-so that it was destructive of the Selective Service system, without extrinsic evidence. In *Clark v. Community for Creative Non-Violence*,<sup>198</sup> the Court upheld a regulation against overnight camping based on the Park Service’s judgment that it would protect parks against damage, without any evidentiary showing that overnight camping would damage the park. Indeed, the Court found that the regulation’s “narrow[] focus[] on the Government’s substantial interest” was “apparent” from the face of the regulation.<sup>199</sup> It continued, to hold otherwise would require delegating “the judiciary the authority to replace the Park Service as the manager of the Nation’s parks or endow the judiciary with the competence to judge how much protection of park lands is wise . . .”—a power the Court rejected.<sup>200</sup> And in *United States v. Albertini*<sup>201</sup>—particularly relevant because it involved legislation furthering military security—the Court accepted Congress’s judgment on the need to give military base

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impact on the [school’s] operation,” but such limitation on religious liberty is justified “by showing that it is essential to accomplish an overriding governmental interest.” *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 257-58 (1982)).

<sup>195</sup> *FAIR*, 390 F.3d 219, 246 (3d Cir. 2004).

<sup>196</sup> *United States v. Playboy Entm’t Group, Inc.*, 529 U.S. 803, 841 (2000) (Breyer, J., dissenting). *Accord*, *Ill. Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concurring) (“A judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down.”).

<sup>197</sup> 391 U.S. 367 (1968).

<sup>198</sup> 468 U.S. 288 (1984).

<sup>199</sup> *Id.* at 296.

<sup>200</sup> *Id.* at 299.

<sup>201</sup> 472 U.S. 675, 689 (1985).

commanding officers the right to bar entry to a base, again without any extrinsic evidence. Rather, it rejected the idea—espoused by the Third Circuit in *FAIR*—that “regulations [are] invalid simply because there is some imaginable alternative that might be less burdensome on speech.”<sup>202</sup>

The Third Circuit majority ignored these instructions against judicial second-guessing of legislative decisions by proposing alternate solutions for military recruiting needs, such as “loan repayment programs [or] television and radio advertisements.”<sup>203</sup> But, as the above authorities declare, courts are not supposed to substitute their views as to what legislation should be for Congress’s actual decision, particularly as the Third Circuit admitted that its substitute proposal “may be more costly.”<sup>204</sup> Further, the Third Circuit ignored the doubtlessly correct logic that a military recruitment program focused on a limited target audience of students already interested, at a known time and location, is more effective than an unfocused general public one. Thus, logic, not some unidentified evidence, is all that is needed to conclude that any alternative to on-campus recruiting would not likely be as successful: if on-campus recruiting were not the best way, law schools would not schedule employment fairs, and employers would not come on-campus for that purpose.

It is thus apparent that the Solomon Amendment is not unconstitutional but a proper exercise of Congress’s spending powers.

V. INTERMEDIATE SCRUTINY, NOT STRICT SCRUTINY,  
IS THE PROPER STANDARD TO CONSIDER THE  
CONSTITUTIONALITY OF THE SOLOMON AMENDMENT

Because the Solomon Amendment does not violate the law schools’ First Amendment rights, and, to the extent of any violation, it is *de minimus* in comparison to the important government purpose furthered by it, the Solomon Amendment is constitutional under any standard of scrutiny applied to it.

In fact, the Third Circuit was in error in applying strict scrutiny,<sup>205</sup> thereby disagreeing with the district court’s choice of intermediate scrutiny,<sup>206</sup> pursuant to *United States v. O’Brien*.<sup>207</sup> The Third Circuit held that *O’Brien* applied only when an activity does not involve “speech

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<sup>202</sup> *Id.*

<sup>203</sup> *FAIR*, 390 F.3d 219, 235 (3d Cir. 2004).

<sup>204</sup> *Id.* at 234.

<sup>205</sup> *Id.* at 242.

<sup>206</sup> *FAIR*, 291 F. Supp. 2d 269, 312 (2003).

<sup>207</sup> 391 U.S. 367 (1968)

proper and is not protected under other First Amendment grounds,”<sup>208</sup> referring to expressive conduct. As shown above, the Solomon Amendment does not restrict law schools’ free speech. And, as no one could conclude that a law school endorses any particular employer merely because it is permitted to participate in an employment fair, no association rights of the law schools are implicated.

But, even if it were concluded that free speech rights were infringed by the Solomon Amendment, it would not preclude application of intermediate scrutiny. Contrary to the Third Circuit’s holding, *O’Brien* is applicable to situations in which legislation infringes free speech.

Indeed, *O’Brien* itself was an attack on the constitutionality of the anti-draft card burning statute on the ground that it violated the plaintiff’s free speech rights. There was no dispute that O’Brien burned his draft card to express his opinion against the Vietnam War—i.e., an exercise of free speech. Yet, *O’Brien* applied the intermediate scrutiny standard and upheld the statute’s constitutionality.<sup>209</sup>

The attack on the Solomon Amendment is analogous to the attack on the law prohibiting draft card burning in *O’Brien*. Both the anti-draft card burning law and the Solomon Amendment have many “purposes [that] would be defeated”<sup>210</sup> by their violation without consideration of the speech that may be incidentally restricted (whether protesting the Vietnam War or “Don’t Ask, Don’t Tell”). Also, in both cases Congress had a “legitimate and substantial interest in preventing” violation of these two laws.<sup>211</sup> In *O’Brien*, the Court held that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,”<sup>212</sup> if “the governmental interest is unrelated to the suppression of free expression.”<sup>213</sup>

If the undisputed impact on draft card burners’ free speech rights in *O’Brien* was subject to intermediate, not strict, scrutiny, clearly any questionable impact on law schools’ free speech rights in *FAIR* must also call for intermediate scrutiny.

Other Supreme Court decisions similarly did not apply strict scrutiny even though the statute in question was conceded to infringe on free speech. For example, the Court in *United States v. Albertini*, relied

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<sup>208</sup> *FAIR*, 390 F.3d at 243.

<sup>209</sup> *O’Brien*, 391 U.S. 367.

<sup>210</sup> *Id.* at 378.

<sup>211</sup> *Id.* at 380.

<sup>212</sup> *Id.* at 376.

<sup>213</sup> *Id.* at 377.

on *O'Brien* to uphold the constitutionality of a statute despite recognizing the “burden on speech” that occurred.<sup>214</sup>

The Court in *O'Brien* allowed the obvious functions served by the Selective Service cards to be sufficient evidence of its legitimate purpose.<sup>215</sup> Thus, it is inappropriate for the Third Circuit to have demanded extra evidence beyond the obvious purpose of improving military recruiting that Congress has determined to be served by the Solomon Amendment.

The Supreme Court has further held that:

courts must accord substantial deference to the predictive judgments of Congress . . . Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable. As an institution, moreover, Congress is far better equipped than the judiciary to “amass and evaluate the vast amounts of data” . . .<sup>216</sup>

The Third Circuit ignored this precedent by demanding that Congress provide more evidence than is present in the legislative history and by discounting Congress’s determination that the Solomon Amendment is an effective way of fulfilling Congress’s goals. The Third Circuit usurped the Congressional role and performed evaluations about which the Supreme Court has held the judiciary to be inadequately equipped to make.

The Third Circuit, while selecting the strict scrutiny standard, also held that its ruling would not be different under intermediate scrutiny. In purporting to apply intermediate scrutiny, the Third Circuit did not dispute that the Solomon Amendment fulfills three of the four asserted criteria for constitutionality. That court’s dispute was limited to whether the Solomon Amendment infringes on First Amendment rights more than is essential.<sup>217</sup> This purported application of intermediate scrutiny is essentially strict scrutiny disguised, because the court applied the strict scrutiny standard that, since a less restrictive measure can be imagined, the regulation must be unconstitutional.

Intermediate scrutiny does not require the statute be the least-restrictive means of accomplishing the government’s goals.<sup>218</sup> Rather, a statute satisfies the narrowly tailored requirement and the “incidental

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<sup>214</sup> *United States v. Albertini*, 472 U.S. 675, 689 (1985). *Accord*, *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

<sup>215</sup> 391 U.S. at 380.

<sup>216</sup> *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665 (1994) (citation omitted).

<sup>217</sup> *FAIR*, 390 F.3d 219, 245 (3d Cir. 2004).

<sup>218</sup> *See Turner*, 512 U.S. at 662.

burden on speech is no greater than is essential . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>219</sup> Other Circuits have applied this application of intermediate scrutiny. For example, in *Casey v. City of Newport, Rhode Island*,<sup>220</sup> the First Circuit described a regulation as valid that “promoted a substantial government interest . . . that would have been achieved less effectively absent the regulation, and . . . did so without burdening substantially more speech than necessary.”<sup>221</sup> Therefore, if the scrutiny standard would affect the determination, intermediate scrutiny should have been applied.

#### V. CONCLUSION

The Solomon Amendment does not infringe academic freedom nor violate the Spending Clause. Rather, the Solomon Amendment serves the important purpose of establishing and maintaining a capable military, a duty of Congress under Article I. Also, it enhances academic freedom of students by conditioning the grant of federal funds on permitting students the right to choose to hear the military recruiter’s message. The Third Circuit decision depends on an erroneous finding that the Solomon Amendment violates the First Amendment, which it does not, and, if at all, certainly not to the extent that it overcomes Congress’s valid purpose in enacting it.

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<sup>219</sup> *Albertini*, 472 U.S. at 689

<sup>220</sup> 308 F.3d 106 (1st Cir. 2002).

<sup>221</sup> *Id.* at 113.