

HAS SOLOMON'S REIGN COME TO AN END?

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INTRODUCTION

No doubt a cry of satisfaction rose up across many college and university campuses when, in separate opinions, a federal district court and a federal court of appeals both held the Solomon Amendment (“Solomon”)¹ to be an unconstitutional restriction on the First Amendment rights of various groups involved in higher education.² Students and faculty members have long protested the presence of military recruiters on college and university campuses, largely compelled by the threat of losing federal funds unrelated to military purposes. Their opposition to both the military’s policy of not employing openly avowed homosexuals and the coerced presence of recruiters has hardly gone unnoticed.³

Although Solomon applies to colleges and universities who receive federal funds, this note examines the implications for law schools in particular because the challenges to the statute thus far have been brought by members of law school communities. The simple statement that accompanies military recruiting materials in law school career services offices is probably most law students’ introduction to this debate. Due to the widespread membership of the American Association of Law Schools (“AALS”), whose bylaws include a policy against allowing employers who discriminate on the basis of sexual orientation to recruit on-campus, this is an issue that affects students more profoundly than it inconveniences their effort to interview with the armed services.

Part I briefly outlines the history of Solomon. Initially enacted as a rider to the Defense Authorization bill in 1994, it was amended in 1997 and underwent its most recent revision in the summer of 2004. In short, Solomon allows the Department of Defense (“DoD”) to withhold nearly all federal funds, regardless of

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1. 10 U.S.C. § 983 (1998 & West Supp. 2005).

2. Forum for Academic & Institutional Rights [“FAIR”] v. Rumsfeld, 390 F.3d 219 (3d Cir. 2004), *cert granted*, No. 04-1152, 2005 WL 483339 (May 2, 2005) (holding Solomon unconstitutional on First Amendment grounds); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (granting summary judgment to plaintiffs on claims of First Amendment violations in enforcement of Solomon at Yale University).

3. For a comprehensive review of ways to protest Solomon, see <http://www.law.georgetown.edu/solomon/Index.html> (last visited May 4, 2005), which is maintained by faculty at the Georgetown University Law Center. In addition to posting letters in opposition to Solomon written by the deans of nine prestigious law schools, the website contains photos of past demonstrations and instructions on how students, faculty, and administrators can oppose Solomon on their campus.

which cabinet department authorized them, from colleges and universities that deny access to campus to ROTC programs or military recruiters. Part II addresses the differing approaches that law schools have taken to complying with Solomon while attempting to maintain their anti-discrimination principles. With the sheer enormity and widespread scope of funds involved, it has become practically impossible for any college or university to enforce their anti-discrimination policy against the military. In practice, for those law schools that officially state that they will not allow discriminatory employers to recruit on campus, it is not feasible to risk invoking Solomon and consequently lose federal dollars by enforcing their policy against the military.

As a result of the impracticability of banning the military from campus, an uneasy compromise was informally reached whereby law schools allowed the military on campus but ensured that their views were heard by way of some form of disparate treatment from the services offered to other employers. That informal compromise was shattered in late 2001, when the DoD put schools on notice that it intended to enforce Solomon against schools that made such distinctions.

Part III discusses the four federal lawsuits that have challenged the constitutionality of Solomon. This includes the status of preliminary motions that were decided in the summer of 2004 and the U.S. District Court for the District of Connecticut's January 2005 ruling that Solomon is unconstitutional. Part IV is a review of the Court of Appeals for the Third Circuit's November 2004 decision ordering a preliminary injunction of enforcement of Solomon pending final resolution of that suit.⁴

Finally, Part V considers the weaknesses of the Third Circuit's application of existing First Amendment jurisprudence and suggests that the long-standing doctrines of deference to both military and academic judgments may force the Court to favor one over the other when the two are in conflict.

I. THE PATH TO SOLOMON

A. EARLY LEGISLATION AND THE INITIAL ENACTMENT OF SOLOMON

Military recruiters on college and university campuses faced significant adversity even before the first academic institution added sexual orientation to its anti-discrimination policy. As early as 1972, with opposition to the conflict in Vietnam apparent on campuses across the country, Congress authorized the DoD to withhold funding to any institution that prohibited military recruiting on its grounds.⁵

4. *FAIR*, 390 F.3d at 246.

5. National Defense Authorization Act for 1973, Pub. L. No. 92-436, 86 Stat. 734 (1972). The Act stated:

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

Id. § 606(a), 86 Stat. at 740.

The social context that brought about Solomon in 1994 was very different from anti-war sentiments that had fueled previous legislation.⁶ Though the military had transitioned to an all-volunteer force that depended on active recruitment of new candidates for its ranks, it was then enjoying a period of sparse operational commitments following the overwhelming success in the 1991 Persian Gulf War. In fact, far from facing a shortfall of personnel, the Army was actively working to shrink the overall size of the force. Recruiting goals were consistently met, and the military continued to assert that it was attracting a smarter and more qualified recruit than at any other time in its history. At the same time, the military was in the process of implementing the newly adopted “Don’t Ask, Don’t Tell, Don’t Pursue” policy with regard to homosexual service members.⁷

With the satisfactory condition of military recruiting at that time, it should not be surprising that the first verbal assaults against the “ivory tower” came from members of Congress and not the DoD.⁸ If the debate on the floor of the House of Representatives does not indicate the largely symbolic nature of the gesture, then the effect certainly would. Because so few funds disbursed on college campuses came from the DoD, the original version of Solomon had relatively little impact on the discrimination policies of law schools, or any other educational institutions, for that matter.

B. The First Revision of Solomon

Realizing that the limit to the scope of funds involved was not having the desired effect, Congress took action. By 1997, a finding of non-compliance with the original version of Solomon by the DoD would subject the institution to loss of funds from the Departments of Education, Transportation, Labor, and Health and Human Services, as well as Defense.⁹ Since this included federal Title IV funds

6. National Defense Authorization Act for 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994) (not codified, but published as 10 U.S.C. § 503 note). Essentially, Solomon was an amendment to the DoD’s annual authorization on how to allocate its funds. Solomon allowed the DoD to withhold funds from any educational institution which denied or effectively prevented the military from obtaining entry to campuses (or access to students on campuses) for recruiting purposes. *Id.* Solomon, in the words of its named sponsor, was offered “on behalf of military preparedness.” 140 CONG. REC. H3861 (1994). Ironically, the DoD actually objected to the proposed amendment as “unnecessary” and “duplicative.” 140 CONG. REC. H3864 (1994). Ultimately, Solomon passed in the House of Representatives by a vote of 271 to 126 and became law when the bill passed the Senate and was signed into law. 140 CONG. REC. H3865 (1994).

7. See 10 U.S.C. § 654 (2000) for codification of the policy on openly gay servicemembers, which prevents the military recruiters from being in compliance with non-discrimination clauses.

8. Representative Solomon of New York is quoted in debate on the House floor as saying, “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. 140 CONG. REC. H3861 (1994). A co-sponsor, Representative Pombo of California went so far as to suggest that the amendment would “send a message over the wall of the ivory tower of higher education” that colleges’ and universities’ “starry-eyed idealism comes with a price.” 140 CONG. REC. H3863 (1994).

9. Omnibus Consolidated Appropriations Act for 1997, Pub. L. No. 104-208, 110 Stat. 3009 (1996). On April 8, 1997, the DoD published an interim rule entitled Military Recruiting

such as federal Work Study, the Perkins Loan Program, and Pell Grants, the Act finally included the teeth that had been missing from the earlier version.¹⁰ Pressure on law schools to conform to Solomon was only compounded by the fact that the Secretary of Defense could withhold not only their funds in the event of non-compliance, but also those of the rest of the college or university at large.¹¹ In 1999, Congress took a step toward paring back the effect of Solomon by no longer including student funds in those that were subject to withholding for non-compliance.¹²

C. Solomon's Present Form

The most recent revision of Solomon occurred in the summer of 2004.¹³ The overall effect of the latest change was to codify the more stringent requirements for compliance that the DoD had been reading into regulations made pursuant to Solomon.¹⁴ In its current form, compliance with Solomon requires that military recruiters receive access that is "at least equal in quality and scope" to the degree of access to students and campuses granted to other recruiters.¹⁵

II. CONFLICT AND UNEASY SOLUTIONS

A. Commitment to Non-discrimination

Enactment of Solomon caused turmoil at law schools across the country. In

and Reserve Officer Training Corps Program Access to Institutions of Higher Education. 62 Fed. Reg. 16,691, 16,694 (Apr. 8, 1997) (codified at 32 C.F.R. pt. 216 (2005)). This rule and the Omnibus Consolidated Appropriations Act for 1997 require the DoD semi-annually to publish a list of the institutions of higher education ineligible for Federal funds. 62 Fed. Reg. at 16,692. As of August 2003, there was only one institution listed as ineligible for federal funds—William Mitchell College of Law, and as of July 2004, there was once again only a single school named—this time the Vermont Law School. 68 Fed. Reg. 48888-01 (Aug. 15, 2003) and 69 Fed. Reg. 43833-01 (July 22, 2004), respectively.

10. See Francisco Valdes, *Solomon's Shames: Law as Might and Inequality*, 23 T. MARSHALL L. REV. 351, 359–60 (1998).

11. DoD regulations currently allow any sub-element of an institution of higher learning (e.g. a law school) that is not in compliance with Solomon to be deprived of its funding from all federal agencies, while the parent college or university only loses funds received directly from the DoD. 32 C.F.R. § 216.3(b)(1) (2005).

12. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, 113 Stat. 512 (1999). Subsidized and un-subsidized Stafford Loans as well as Pell Grants were no longer among the funds that were able to be withheld. See Valdes, *supra* note 10, at 359 n.3.

13. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, 118 Stat. 1811 (2004).

14. Prior to the latest revision, compliance with Solomon required: that institutions not "prohibit or in effect prevent" entry to campuses for recruiting purposes, nor deny access to students while on campus or access to student information for recruiting purposes. In its implementing regulations, however, the DoD interpreted Solomon to require that military recruiters receive access that is "at least equal in quality and scope" to that granted to other recruiters. 32 C.F.R. § 216.4(c) (2005). The effect of the latest revision was to bring the code in line with the DoD's implementing regulations.

15. 10 U.S.C.A. §983 (1998 & West Supp. 2005).

1990, the AALS voted to add sexual orientation to its list of prohibited bases of discrimination.¹⁶ Following that addition, all 165 member schools were required to adopt the clause and take positive steps to be in compliance. Consistent with this adoption, law schools began to prevent the military from interviewing on campus and from using their career development and job placement offices when they failed to agree to abide by the anti-discrimination requirements that civilian recruiters affirmed in exchange for access to campus.¹⁷

B. Changing Landscapes

After Solomon appeared in 1994, the AALS permitted individual law schools to decide whether they would abide by its anti-discrimination policy and face a loss of federal funding or comply with Solomon and make their principles known to students in other ways.¹⁸ Law schools that chose to comply with Solomon were encouraged to accompany access to military materials with a statement that they did so under threat of loss of funding, and to promote dialogue on campuses about

16. The full non-discrimination policy is stated at AALS Bylaw 6-4 and falls under the Article 6 "Requirements for Membership." The Bylaw states:

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

b. A member school shall pursue a policy of providing its students and graduates with equal opportunity to obtain employment, without discrimination or segregation on the ground of race, color, religion, national origin, sex, age, handicap or disability, or sexual orientation. A member school shall communicate to each employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity.

c. A member school shall seek to have a faculty, staff, and student body which are diverse with respect to race, color, and sex. A member school may pursue additional affirmative action objectives.

AALS, BYLAWS OF THE ASSOCIATION OF AMERICAN LAW SCHOOLS, *available at* <http://www.aals.org/bylaws.html> (last visited May 4, 2005) (emphasis added).

17. The relevant AALS Regulation covering non-discrimination by recruiting employers is 6.19, which reads:

A member school shall inform employers of its obligation under Bylaw 6-4(b), and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-4(b). A member school has a further obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in Bylaw 6-4(b).

AALS, EXECUTIVE COMMITTEE REGULATIONS OF THE AMERICAN ASSOCIATION OF AMERICAN LAW SCHOOLS, *available at* <http://www.aals.org/ecr/> (last visited May 4, 2005).

18. Although no specific requirements were imposed by the AALS, its intent was to evaluate the overall efforts of the school to develop a "hospitable environment for its students." See *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 281 (D.N.J. 2003). Such efforts would include the presence of an active gay and lesbian student organization and the presence of openly lesbian and gay faculty and staff. *Id.*

the military's policy with regard to discrimination in employment.¹⁹ Under the threat of a loss of federal funds, many law schools chose to abrogate their stated policy that employers who would discriminate against a portion of their students were not welcome.

Although a handful of schools chose to forgo the funds to maintain their intellectual independence,²⁰ and some moved to complete compliance with Solomon,²¹ most attempted to strike a balance.²² To varying degrees, this generally included allowing access to military recruiters in another part of campus than the law school itself. Likewise, interviews were announced and conducted, but not with the assistance of the law school's career placement services offices. In some cases students had to actively seek out an interview with a recruiter in order to receive information. Additionally, military recruiters were generally not invited to job fairs and other recruiting events, although some law schools allowed them to be present at the request of students. Certainly there was an inconvenience to the government in its recruiting efforts, but the law schools targeted as non-compliant could hardly be said to have denied access to students or campuses.

C. Changing Sentiments

It was not until 2001 that the military departments, which had neither sought the original provision in the first place, nor shown any real interest in enforcing it, began to put colleges and universities on notice of non-compliance and imminent

19. Specifically, the AALS suggested certain "ameliorative" measures that law schools could take if they chose to abrogate their anti-discrimination policy in order to avoid a loss of funding. *Id.* Among these measures were: assurances by the law school to students that the military's discrimination is in violation of its policy and is being accommodated only to avoid a loss of funding and forums or panels for the discussion of the military policy or for discussion of discrimination based on sexual orientation. *Id.*

20. Reportedly, only three institutions have been able to maintain their complete anti-discrimination policy. Patrick Healy, *Despite Concerns, Law Schools Admit Military Recruiters*, BOSTON GLOBE, Nov. 12, 2002, at A1. William Mitchell, Golden Gate, and Vermont law schools receive relatively little funding and have been able to bear the brunt of forfeiture. *Id.* Another, New York University Law School, initially withstood the loss of funding and eventually capitulated under the sheer amount involved. Thomas Adcock, *Law Schools Question Pentagon's Push for Military Recruiters on Campus*, N.Y. L.J., Dec. 3, 2004, at 16. The university reportedly gave up more than \$100,000 from 1998 to 2000, when the threat of greater loss of funding forced it to relent. *Id.*

21. Duke University Law School, which had previously allowed the military to put recruiting materials in the career services office, but had only allowed interviews to take place in the ROTC facility, decided not to resist the DoD's demands when threatened with the loss of \$600,000. Pamela B. Gann, *No-Win Amendment Traps Law Schools*, NAT'L L. J., Oct. 13, 1997, at A23. Reportedly, all eight other schools that the military targeted at the same time as Duke (American, Hamline, Ohio Northern, St. Mary's of Texas, University of Oregon, Willamette, William Mitchell, and Georgia State) also rescinded their policies when faced with the loss of funds. See Terry Carter, *Costly Principles: Pentagon Forces Law Schools to Choose Between Federal Funding and Backing of Gay Rights*, 83 A.B.A. J. 30 (Dec. 30, 1997).

22. For instance, Harvard Law School allowed military recruiters to recruit on campus, but required that they do so at the offices of the student-veterans organization and did not allow its recruiting professionals to assist in scheduling. *FAIR v. Rumsfeld*, 390 F.3d 219, 227 (3d Cir. 2004). Boston College Law School likewise allowed the military on campus to interview, but kept their literature in the library as opposed to the career services office. *Id.*

action as a result.²³ Late in the year, Yale University and the University of Pennsylvania, among others, received letters from the military departments to the effect that their attempts at compromise were no longer satisfactory.²⁴ The DoD's position was that Solomon allowed no distinction to be made between the quality and nature of access being offered to the military vis-à-vis any other recruiter admitted to campus. While the timing of the government's enforcement measures roughly correlates to the horrific attacks of September 11, it is not clear that there was suddenly a shortage of recruits or burden on access that required the DoD's attention.

III. THE "IVORY TOWER" FIRES BACK

Shortly after the DoD began to put colleges and universities on notice of its intent to penalize the disparate treatment of military recruiters, a series of lawsuits were filed in federal court in three separate jurisdictions. The outcomes of these cases are likely to affect law schools across the country, based on the broad membership of the organizations making claims and the ability of federal courts to issue injunctions that reach across circuits in their scope.

Solomon has been in place for nearly ten years without challenge, but in a relatively short space of time, decisions on the merits could be forthcoming in four separate cases which have challenged its constitutionality in U.S. district courts in Connecticut, New Jersey, and Pennsylvania.²⁵ Solomon has already been declared unconstitutional by two courts in the space of a few months, a track record which hardly bodes well for Solomon.²⁶ Although the cases are addressed here in the

23. Up until this time, the DoD had actually expressed satisfaction with law schools' participation in "successful" recruiting efforts and did not consider the measures taken by the many law schools who attempted to strike a balance between compliance and principle to be a violation of Solomon. *FAIR v. Rumsfeld*, 291 F. Supp. 2d 269, 282 (D.N.J. 2003).

24. Yale University's Law School had believed it was in compliance in allowing recruiters to visit the campus, access student information, and use law school classrooms for informational meetings when requested by students. Peter H. Schuck, *Equal Opportunity Recruiting*, AM. LAW., Vol. 26 No. 1 (Jan. 2004). Students could even reserve rooms for interviews, and employees of the University were used to assist in scheduling meetings off campus. *Id.* In December 2001, the DoD indicated that this disparity of treatment was risking the \$300 million in grants then being administered to the university. *Id.* Not to be outdone, more than \$500 million in federal aid is apparently riding on the outcome of the University of Pennsylvania's suit, *Burbank v. Rumsfeld*, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004). Scott D. Gerber, *Allow Military Recruitment on Campus*, N.J. L.J., Dec. 29, 2003.

25. *FAIR*, 291 F. Supp. 2d 269 (denying preliminary injunction of enforcement of Solomon sought by various groups), *rev'd*, 390 F.3d 219 (3d Cir. 2004); *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004) (denying preliminary injunction of enforcement of Solomon sought by Yale Law School ("YLS") faculty); *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005) (granting summary judgment to plaintiffs on claims of First Amendment violations in enforcement of Solomon at Yale University); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (denying preliminary injunction of Solomon sought by students of YLS); *Burbank v. Rumsfeld*, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004) (denying preliminary injunction of enforcement of Solomon sought by faculty and students at the University of Pennsylvania Law School).

26. *FAIR*, 390 F.3d at 246 (holding Solomon unconstitutional on First Amendment grounds); and *Burt*, 354 F. Supp. 2d at 178 (granting summary judgment to plaintiffs on claims of

order in which they were brought, the district court's grant of summary judgment in *Burt v. Rumsfeld* is actually the most recent of the decisions, and, as will be seen, generally applies much of the reasoning used by the Third Circuit analysis.

A. *FAIR v. Rumsfeld*

The first challenge to Solomon was brought on September 19, 2003, when several organizations and individuals primarily associated with Rutgers University combined to seek a preliminary injunction against enforcement of Solomon as unconstitutional for three reasons: it is a violation of their First Amendment rights, it discriminates based on viewpoint, and it is unconstitutionally vague.²⁷

With regard to the First Amendment claims, FAIR argued that Solomon, as it was then written, violated their rights to academic freedom, freedom of expressive association, and free speech.²⁸ Because their continued receipt of federal funding

First Amendment violations in enforcement of Solomon at Yale University). Prior to the present line of cases, the government received wide latitude due to the "long-standing Congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters." *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986). In that case, the Third Circuit prohibited the City of Philadelphia from enforcing its own anti-discrimination in employment ordinance (the Philadelphia Fair Practices Ordinance, Philadelphia Code §§ 9-1101 to 9-1110) against the Temple University Law School's placement office. *Id.* at 88. Citing the forerunner to Solomon and a compelling government interest in recruiting for critical military specialties, the court concluded that preemption prevented the City from doing indirectly what it could not do directly, namely preventing Temple from making its facilities "available to the J.A.G. Corps." *Id.* at 89. For nearly twenty years, that basic premise of a compelling government interest would be accepted without being tested.

27. *FAIR*, 291 F. Supp. 2d at 274-76. The named plaintiffs include: FAIR, the Society of American Law Teachers, Inc. ("SALT"), the Coalition for Equity ("CFE"), Rutgers Gay and Lesbian Caucus ("RGLC"), law professors Erwin Chemerinsky, then of the University of Southern California Law School and Sylvia Law of the New York University Law School, and three individually named law students at Rutgers University. *Id.* FAIR is a New Jersey Corporation which consists of law schools and law faculties which vote by majority to join the association. *Id.* at 275. Its stated mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." *Id.* at 275. Membership in FAIR has largely remained secret, although Golden Gate University School of Law, Whittier Law School, New York University Law School, and Chicago-Kent University School of Law all eventually agreed to be named as members for purposes of the lawsuit. *Id.* at 275-76. SALT is a New York corporation which consisted of nine hundred law faculty members at the time of the suit. *Id.* at 275. Its goals include "making the legal profession more inclusive and extending the power of the law to underserved and communities." *Id.* at 276. CFE and RGLC are student organizations, of Boston College and Rutgers University, respectively, devoted to "furthering the rights and interests of all groups including gays and lesbians." *Id.* The named defendants included the individual cabinet secretaries, in their official capacities, of the departments whose funds were subject to withholding for non-compliance. *Id.*

28. The president of FAIR, Professor Kent Greenfield of Boston College Law School, has compared Solomon to "allowing the government to take away the driver's license of anyone who opposes pay raises for government bureaucrats and cutting off social security benefits to retirees who protest the Iraq War." Kent Greenfield, *Imposing Inequality on Law Schools*, WASH. POST, Nov. 10, 2003, at A25. His position that Solomon allows the government to withhold funding unless schools "give up deeply held beliefs about the equality of students" does seem to overstate the case, given the widespread derision of Solomon and "Don't Ask, Don't Tell" that abounds on college campuses. *Id.*

hinged on allowing military recruiters to be present on campus, FAIR posited that an unconstitutional condition was placed on their First Amendment rights.²⁹ In response, the government largely argued that Congress was entitled to wide latitude under the Spending Clause and the authority to raise and support armies.³⁰ The district court noted the strong policy interest in favor of the government's position.³¹

Recognizing the interaction between the Spending Clause and the First Amendment, the district court viewed the constitutionality of Solomon as hinging on the nature and extent of the conditions imposed on receipt of federal funds.³² Although Congress is generally entitled to "less exacting" limitations when acting pursuant to its spending power, that latitude is circumscribed when other constitutionally protected interests are involved.³³ The district court ultimately decided that a sufficient likelihood of success on the First Amendment claims had not been established because "[T]he Solomon Amendment, on its face, does not interfere with academic discourse by condemning or silencing a particular ideology or point of view."³⁴ Because Solomon did not explicitly promote or exclude a certain point of view, the court concluded that the interference with free speech was "incidental."³⁵

Upon reviewing the other First Amendment interests claimed to be affected—academic freedom and expressive association—the court was similarly skeptical.³⁶ After pointing out that academic freedom itself is not absolute, the court determined that previous cases involving an inhibition of academic freedom "have almost exclusively dealt with direct and serious infringements on individual teachers' speech or associational rights."³⁷ Without the direct attack on speech, the court could not be convinced that academic freedom was sufficiently inhibited.³⁸

29. *FAIR*, 291 F. Supp. 2d at 274.

30. *Id.* at 297.

31. *Id.* at 298 ("Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance.") (quoting *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986)).

32. *Id.* at 297.

33. *Id.* at 298.

34. *Id.* at 302.

35. *Id.* at 299.

36. *Id.* at 301–304.

37. *Id.* at 301 (discussing *Bd. of Regents of Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000) (holding that the First Amendment permits a public university to charge its students an activity fee used to fund student political and ideological speech, provided allocation of funding support is viewpoint neutral)); *Wieman v. Updegraff*, 344 U.S. 183 (1952) (requiring state employees to take loyalty oath); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (involving an investigation by the state attorney general into a professor's political ideology and lecture content); *Shelton v. Tucker*, 364 U.S. 479 (1960) (requiring teachers to file affidavits giving names and addresses of all organizations to which they belonged); *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967) (requiring removal of teachers based on treasonable or seditious words)).

38. In his recent comprehensive analysis of threats to constitutional academic freedom, Professor Byrne of the Georgetown University Law Center takes a similar approach to the nature of the plaintiff's academic freedom argument and points out that such claims may actually weaken the ability to redress true violations of that right. Professor Byrne argues:

Although it found that law schools were indeed expressive associations for purposes of invoking the claim of an expressive association violation, the court concluded that the degree of interference was not sufficient to amount to a violation.³⁹ While recognizing that Solomon required an inclusion of unwanted persons that affected the schools' messages and viewpoints, this inclusion did not require that the law schools adopt their message, accept the recruiters as members of their organizations, or bestow on them any semblance of authority.⁴⁰ It also drew a distinction from the fact that the military recruiter is a visitor who arrives on campus only infrequently, and thus could have little effect on the law schools' preferred message of non-discrimination.⁴¹

With regard to FAIR's second claim, because the district court had already concluded that Solomon does not directly regulate speech, Solomon could therefore not result in unconstitutional viewpoint discrimination.⁴² Its reasoning was that a law school which chose to allow military recruiters on campus and accept federal funds was still free to take the ameliorative measures suggested by the AALS and continue to "voice objections" and "disassociate itself from the military recruiters."⁴³ In fact, the court was satisfied with evidence that Solomon notwithstanding, the anti-discrimination message of law schools across the nation was alive and well.⁴⁴

Finally, the court turned to the void-for-vagueness argument. Giving the term "access to campus" its common use, the court determined that the flexibility and broad applicability did not render Solomon impermissibly vague.⁴⁵ After reaching this conclusion, the district court went on to make some interesting comments on the DoD's interpretation of the Act. After looking at the language as then written, which applied to schools which "prohibit[ed] or in effect prevent[ed]" military

To me this argument cries, 'wolf!' It may well be that Congress has acted unconstitutionally in its irrational and cruel discrimination or that the regulations are in excess of statutory authority, but the claim that the amendment violates academic freedom, when they have nothing to do with teaching, scholarship, or curriculum, but only the way students can be recruited for employment, may weaken claims of constitutional academic freedom when they will need to be made.

J. Peter Byrne, *The Threat to Constitutional Academic Freedom*, 31 J.C. & U.L. 79, 140 n.365 (2004).

39. *FAIR*, 291 F. Supp. 2d at 304–05.

40. *Id.* at 304.

41. *Id.*

42. *Id.* at 314–15.

43. *Id.* at 314.

44. *Id.* The court noted:

The first flaw in this argument is that anti-military sentiment can and does thrive in situations where law schools decide to comply with the Solomon Amendment. The record demonstrates that law school administrators, faculty, and students have all openly expressed their disapproval of the military's discriminatory policy through various channels of communication. Some law schools have posted ameliorative statements throughout the school; law faculty and student bar resolutions have openly condemned the military's policy; and faculty and students have held demonstrations protesting the military's presence on campus.

Id.

45. *Id.* at 319–20.

recruiting efforts, the court found the government's insistence on equal access to military recruiters and a lack of "substantial disparity" to be "problematic."⁴⁶ Notwithstanding the fact that the court was unconvinced by the vagueness argument, its discussion of the government's "seemingly unwarranted interpretation" of Solomon⁴⁷ was nothing less than a victory for law schools wishing to argue that much less access was required under Solomon than the military was demanding. Of course, the subsequent Congressional revision of the statute shows that the court's observation was indeed prescient.⁴⁸

Ultimately, the district court denied the request for a preliminary injunction on the grounds that the case was not substantially likely to succeed on the merits.⁴⁹ The plaintiffs appealed to the U.S. Court of Appeals for the Third Circuit, which reversed the decision based on its own analysis of Solomon's constitutionality.⁵⁰ That decision is addressed in Part IV of this note.

B. *Student Members of SAME v. Rumsfeld* and *Burt v. Rumsfeld*

Less than a month before the U.S. District Court for the District of New Jersey ruled on the motion for preliminary injunction in *FAIR v. Rumsfeld*, two similar lawsuits were initiated in federal court in Connecticut. The first suit, *Student Members of SAME v. Rumsfeld*,⁵¹ was brought by two student organizations at Yale Law School ("YLS") and the second suit, *Burt v. Rumsfeld*,⁵² was filed by forty-five members of the faculty at YLS.⁵³ The students alleged that the government's interpretation of Solomon violated their rights to expressive association, to receive information, to equal protection, and also amounted to viewpoint discrimination.⁵⁴ In turn, the law faculty alleged that the regulations violated their First and Fifth Amendment rights and exceeded the scope of the Act itself. The government made a motion to dismiss both suits for lack of standing and lack of ripeness, which was denied in a published opinion issued in the summer of 2004.⁵⁵

46. *Id.* at 320.

47. *Id.* at 321.

48. *Id.* at 319 ("It follows that anything short of preventing or totally thwarting the military's recruitment efforts does not trigger funding denial pursuant to the statute.").

49. *Id.* at 321.

50. *FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004).

51. 321 F. Supp. 2d 388 (D. Conn. 2004)

52. 322 F. Supp. 2d. 189 (D. Conn. 2004).

53. The YLS student organization plaintiffs were the Student/Faculty Alliance for Military Equality ("SAME") and "Outlaws." *SAME*, 321 F. Supp. 2d at 390. The latter's purpose was to educate the YLS community about the legal issues affecting lesbian, gay, bisexual, and transgendered persons. *Id.* The named members of the YLS faculty included Mr. Robert A. Burt. *Burt*, 322 F. Supp. 2d at 194.

54. *SAME*, 321 F. Supp. 2d at 391-92.

55. Additionally, both suits alleged that Yale's policies were compliant with Solomon. First, because their recruiting programs occur off campus, Yale cannot be said to be denying access to campus. Second, Yale concluded that because military recruiters were free to sign the non-discrimination statement and gain access to their career development office, they are in fact providing access that was equal in quality and scope to that granted to non-military recruiters. *Burt*, 354 F. Supp. 2d 156, 170-72 (D. Conn. 2005). The court quickly dispensed with both of

The students' principal claim was that they had chosen to attend YLS, at least in part, because of its non-discrimination policy and message, and their decision to be a part of such an expressive association was curtailed by the government's interpretation of Solomon.⁵⁶ Because Solomon requires law schools to choose between allowing military recruiters onto campus or give up federal funds, the students alleged that their associational rights were violated by the presence of the military, and even more, they were required to adopt the military's discriminatory message.⁵⁷ They further argued that Solomon amounts to viewpoint discrimination because it penalized "only those students, like Plaintiffs, who attend law schools that seek to apply otherwise generally applicable non-discrimination policies to military recruiters."⁵⁸ Lastly, they argued that Solomon also violated their Fifth Amendment right to equal protection.⁵⁹

The district court dismissed the students' expressive association claim on the basis that the law school faculty, and not the students, were the actual determinants of who had a right to be associated with the law school.⁶⁰ Thus, only the faculty could govern whether military recruiters were allowed to participate in the discourse of the law school. For the same reason, the viewpoint discrimination claim was also dismissed.⁶¹ In the court's judgment, it was the prerogative of the faculty to determine what message would be passed on as the official view of the law school.

On the issue of a right to receive information, however, the court found that the students had alleged a cognizable injury in fact.⁶² Namely, were it not for the government's application of Solomon, the students would have been able to receive the law school's message that discrimination against gays and lesbians is not acceptable.⁶³ The court also allowed the equal protection claim to go forward based on the plaintiffs' argument that Solomon required the law school's non-discrimination policy to be repealed with regard to gay and lesbian students

these arguments. "The argument that the military has the opportunity to sign the [law school's Non-Discrimination Policy] is unavailing. The statute does not say that military recruiters must have the same opportunity to comply with an institution's policies as non-military employers, nor does it say that military recruiters must have access to the same procedures as non-military employers in order to gain access to students." *Id.* at 173. "In sum, YLS may offer military recruiters the same opportunity as non-military recruiters to comply with its policy regarding subscription to the NDP, but that policy 'in effect prevents' military recruiters from gaining access to campus and students on campus 'at least equal in quality and scope' to that afforded other recruiters." *Id.* The United States was therefore granted summary judgment on the issue of whether or not YLS was in compliance with the statute. *Id.* at 173-74.

56. *SAME*, 321 F. Supp. 2d at 391.

57. *Id.* at 394.

58. *Id.* at 390.

59. Although the text of the Fifth Amendment does not provide an equal protection clause, the Supreme Court has interpreted the Amendment to require one going back at least as far as 1954. *See Bolling v. Sharpe*, 347 U.S. 497 (1954) (holding that school segregation based on race in the District of Columbia denied African-Americans the equal protection guaranteed by the Fifth Amendment).

60. *SAME*, 321 F. Supp. 2d at 394.

61. *Id.* at 396.

62. *Id.* at 395.

63. *Id.*

alone.⁶⁴ This repeal of the anti-discrimination policy would be a violation of the gay and lesbian students' right to equal protection if it were done "arbitrarily" and "with no legitimate governmental objective."⁶⁵ The district court concluded that these alleged injuries were sufficiently linked the government's threats to cut off funding and that the matter was ripe for adjudication.⁶⁶ A final decision on the merits of the students' remaining claims is still forthcoming.

Based on the reasoning used in the analysis of the students' claims, it is not unexpected that the same district court allowed the faculty plaintiffs to proceed with their separate but related allegations.⁶⁷ The court was satisfied that the faculty speech with regard to an anti-discrimination policy was being suspended because of threats from the DoD.⁶⁸ Similarly, the faculty were being limited in their right to choose with whom to associate as an institution by the fact that the military recruiters were being forced upon them in contravention of their stated message on discrimination.⁶⁹ The court also briefly addressed their Fifth Amendment Due Process allegation that Solomon impinged on their "special relationship between student and teacher."⁷⁰ Although expressing doubt about the merits of the Due Process claim, the court cited *Meyer v. Nebraska*⁷¹ for the proposition that the Supreme Court has recognized such a relationship under certain circumstances. The faculty were thus allowed to proceed with both claims, which had already been found to be ripe for adjudication.⁷²

In January 2005, the district court, in granting summary judgment in favor of the faculty plaintiffs, held Solomon to be an unconstitutional violation of their First Amendment rights and enjoined enforcement of Solomon against Yale University.⁷³ The court ultimately agreed that Solomon placed an unconstitutional condition on the receipt of federal funds (in that the funds affected do not relate to military recruiting),⁷⁴ that the faculty were prevented from sending their chosen message on discrimination,⁷⁵ and that Solomon forces them to associate with the United States military,⁷⁶ an organization whose policies are antithetical to their own.

The court first examined the unconstitutional condition claim under the premise 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."⁷⁷ Although the Supreme Court has conceded that the government's

64. *Id.*

65. *Id.* at 396.

66. *Id.*

67. *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004).

68. *Id.* at 196.

69. *Id.* at 198.

70. *Id.* at 199.

71. 262 U.S. 390 (1923).

72. *Burt*, 322 F. Supp. 2d at 201.

73. *Burt v. Rumsfeld*, 354 F. Supp. 2d 156, 189 (D. Conn. 2005).

74. *Id.* at 174–75.

75. *Id.* at 182.

76. *Id.* at 187.

77. *Id.* at 174 (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

power under the Spending Clause might allow some conditions to be imposed on a grant of funds, these conditions must be reasonably related to the purpose of the federal program.⁷⁸ Here, the over \$300 million at issue for Yale University had no direct relation to military recruiting, so once the court was satisfied that the compelled speech and association violations were established, Solomon necessarily imposed an unconstitutional condition.⁷⁹

Using the same reasoning and line of cases that the Third Circuit employed in analyzing the compelled speech claim in *FAIR*, the district court concluded that “the First Amendment guarantees both ‘the right to speak freely and the right to refrain from speaking at all.’”⁸⁰ By implication, it thus found unavailing the government’s position that assisting military recruiters is not the exercise of speech. Despite the fact that Yale has been on record for over twenty-eight years in opposition to discrimination in employment based on sexual orientation, the court also found a violation in that “The Solomon Amendment has forced the Faculty to change their message from a categorical statement that ‘employers who discriminate based on sexual orientation are not welcome at YLS-sponsored recruiting events to an equivocal statement that includes the disclaimer ‘except for the military.’”⁸¹ Thus, the court concluded that Solomon had forced the faculty to change their stated message and assist the military in the promulgation of its speech.⁸²

Although it accepted at face value that there is a compelling governmental interest in raising an effective military, the court concluded that Solomon is not narrowly tailored to be the least restrictive alternative designed to serve that interest.⁸³ The court was not persuaded that the government had met its burden in this regard, either by a showing that access to Yale’s career services apparatus would have a positive effect on recruiting or by a showing that Congress had considered other alternatives to tying funding to access to campuses.⁸⁴

78. See *South Dakota v. Dole*, 483 U.S. 203 (1987).

79. *Burt*, 354 F. Supp. 2d at 175.

80. *Id.* at 176 (quoting *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). The government’s argument on this point was that the law school is being required to assist the military in the *act* of recruiting and not the expression of any message, and the correct standard would thus be for expressive conduct as set forth in *United States v. O’Brien*, 391 U.S. 367 (1968) (holding that a statute forbidding an individual from destroying his draft card was not a First Amendment violation).

81. *Burt*, 354 F. Supp. 2d at 178.

82. It is unclear exactly what speech YLS has been compelled to assist the government in making. At one point the court employs the *FAIR* majority’s logic that the school has to help the military “convince prospective employees that the employer is worth working for” and at another the law school is “assisting DoD in the dissemination of DoD’s message of its ‘Don’t Ask, Don’t Tell’ policy . . .” *Id.* at 178–80. Perhaps the court finds that both statements are being compelled, but from the record it would seem highly unlikely that anyone would associate either concept with the faculty of YLS.

83. *Id.* at 182.

84. *Id.* In footnote 27 the court pointed out that approximately half of YLS students obtain employment from a source that does not use the Career Development Office or recruit on campus—i.e. judicial law clerks. *Id.* at 182 n. 27. Ironically, the dean of the University of Southern California Law School, Matthew L. Spitzer, by way of showing that the compromise measures taken at his school have been effective, points out that since allowing the military back

The district court found similarly unpersuasive the government's position that Solomon did not require law schools to associate with the military because the risk of the public attributing the military's views on employment of homosexuals to the law schools is "vanishingly small."⁸⁵ The court discussed the rule stated in *Boy Scouts of America v. Dale*⁸⁶ and proceeded to apply the same reasoning as the Third Circuit's *FAIR* analysis, which is addressed in greater detail in Part IV. Thus, the plaintiffs successfully established two separate grounds for overturning Solomon.

Their Fifth Amendment claim did not fare as well. Echoing its earlier sentiments in the preliminary injunction decision, the court concluded that "the scope of this "right to educate" is not as broad as the faculty suggested.⁸⁷ The American "concept of ordered liberty" is not implicated when the federal government passes a law governing who may participate in college recruiting programs."⁸⁸ A small victory, indeed, for the DoD. With that, the district court declared Solomon unconstitutional and enjoined enforcement of it against Yale University based upon the YLS Non-Discrimination Policy.⁸⁹

C. *Burbank v. Rumsfeld*

The summer of 2004 also brought a ruling on summary judgment motions from the U.S. District Court for the Eastern District of Pennsylvania in a challenge to Solomon brought by faculty and students at the University of Pennsylvania.⁹⁰ This case was unique in that in addition to a frontal attack on the constitutionality of Solomon, the plaintiffs also sought a declaratory judgment that their actions were fully in compliance with the regulations and that funding could not properly be revoked.⁹¹ The district court denied the government's motion to dismiss for lack

on campus, the number of graduates placed with the military has risen. Matthew L. Spitzer, *An Open Letter to the USC Law School Community*, August 19, 2002, available at www.law.georgetown.edu/solomon/USCdean.pdf. Although there were none from 1990 to 1993, three were hired from 1994 to 1996, and that number rose to nine between 1997 and 2001. *Id.* So, at least one administrator is willing to laud the gains made by recruiters on campus, even if it is only to justify the limitations on access that have been common.

85. *Burt*, 354 F. Supp. 2d at 184.

86. *Boy Scouts of America v. Dale*, 530 U.S. 640, 659–60 (2000) (holding that a state statute which denied the Boy Scouts of America from revoking the membership of a gay scoutmaster was an unconstitutional limit on the organization's First Amendment right to expressive association).

87. *Burt*, 354 F. Supp. 2d at 188.

88. *Id.*

89. *Id.* at 189.

90. *Burbank v. Rumsfeld*, No. Civ.A. 03-5497, 2004 WL 1925532 (E.D. Pa. Aug. 26, 2004).

91. In 1998, the University of Pennsylvania Law School began referring military recruiters to the institution's main career placement center (the "Office of Career Services" or "OCS") instead of the law school's career placement office. *Id.* at *5. OCS would then notify all law students of the dates that military recruiters would be on campus and subsequently schedule interviews for those interested. *Id.* The Judge Advocate General of the Air Force notified the president of the university that their approach was non-compliant with Solomon and DoD regulations in January of 2003. *Id.* at *2.

of standing and failure to state a claim,⁹² arguments which had been similarly dealt with in each of the earlier cases.

Closely mirroring the claims put forth in the other Solomon lawsuits, the plaintiffs sought a declaration from the court that Solomon was a violation of their First Amendment rights to free speech, association, academic freedom, and their Fifth Amendment rights to due process and equal protection under the law.⁹³ Citing to both the District of New Jersey and Connecticut cases in its opinion, the court denied the government's motion to dismiss the faculty plaintiffs' free speech, association, expression, and academic freedom claims.⁹⁴ Likewise, the students' claims for a right to receive an anti-discriminatory message from the law school were recognized as cognizable injuries-in-fact.⁹⁵ In allowing these claims to proceed, the court declined to grant the plaintiffs summary judgment.⁹⁶ Resolution of the suit is pending.

IV. FAIR TRIUMPHS ON APPEAL

In late 2004, Solomon's fortunes changed sharply when the Court of Appeals for the Third Circuit held by a divided panel that FAIR had a likelihood of success on the merits that warranted the granting of a preliminary injunction.⁹⁷ Although a district court's decision to deny a preliminary injunction is reviewed for abuse of discretion, a court of appeals will apply a de novo standard to any constitutional analysis which the district court uses to reach that decision. Because the U.S. District Court for the District of New Jersey employed its own First Amendment analysis in determining whether to grant the injunction, the Third Circuit exercised plenary review of the constitutional analysis below and reached a sharply different conclusion on the strength of the plaintiff's claims.

A. Underpinnings of the Third Circuit's Reasoning

Before considering the Third Circuit's analysis, it is helpful to review the Supreme Court's jurisprudence on expressive association.⁹⁸ In evaluating the First

92. *Id.* at *5.

93. *Id.* at *2.

94. *Id.* at *5.

95. *Id.*

96. *Id.*

97. *FAIR v. Rumsfeld*, 390 F.3d 219, 246 (3d Cir. 2004). After concluding that FAIR had a reasonable likelihood of success and had met all the other requirements for issuance of an injunction, the Third Circuit remanded the case with an order to issue the preliminary injunction against enforcement of Solomon. *Id.* In addition to a reasonable likelihood of success on the merits, a plaintiff seeking preliminary injunction must also show: irreparable harm absent the injunction, that the harm to the plaintiff absent the injunction is greater than the harm to the defendant in granting it, and that the injunction serves the public interest. *Id.* at 228.

98. In *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984), the Court addressed the concept of a "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" implicit in the protections of the First Amendment. *Id.* at 622. Part of that freedom to associate includes a freedom not to associate by denying group membership to persons who are undesirable. *Id.* at 622–23. Prior to that, the Court recognized in *NAACP v. Alabama*, 357 U.S. 449, 460 (1958), the longstanding tradition that "the freedom to

Amendment expressive association violation asserted by the *FAIR* plaintiffs, the Third Circuit addressed previous Supreme Court holdings in *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*⁹⁹ and *Boy Scouts of America v. Dale*¹⁰⁰ to reach its judgment in favor of FAIR. Much of the rationale behind declaring Solomon unconstitutional depends on the Third Circuit's understanding of *Hurley* and *Dale*.

1. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*

In 1992, organizers formed the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to march in Boston's St. Patrick's Day Parade and "express pride in their Irish heritage as openly gay, lesbian, and bisexual individuals."¹⁰¹ The parade was a formal city event until 1947, when the city gave permission to the South Boston Allied War Veterans Council ("Council") to organize and conduct it.¹⁰² From 1947 to 1992, the Council, which is a private association of various veterans groups in the Boston area, conducted the parade with city funds and use of the official city seal.¹⁰³ After the Council refused to allow GLIB to march as a parade unit in 1992, a state court issued an injunction which allowed them to participate.¹⁰⁴

The Council again denied GLIB's request to march in the 1993 parade, and GLIB subsequently sued in state court alleging, among other things, a violation of the Massachusetts law that prohibited discrimination based on sexual orientation in public accommodations.¹⁰⁵ The parade organizers asserted that forcing admittance of GLIB would violate their First Amendment right to expressive association.¹⁰⁶

In its analysis of the claim, the trial court found that the parade was a mixture of diverse "'patriotic, commercial, political, moral, artistic, religious, athletic, public service, trade union, and eleemosynary themes,' as well as conflicting messages."¹⁰⁷ Based on this lack of a unitary, coherent message, the court held that the parade was a public event and that admitting GLIB could not violate the

engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech."

99. 515 U.S. 557, 573 (1995) (holding that a state law requiring St. Patrick's Day Parade organizers to include a homosexual activist group violated their First Amendment right by altering the expressive content of the parade).

100. 530 U.S. 640, 655 (2000) (holding that state public accommodation law which required the Boy Scouts of America to admit an openly gay scoutmaster violated the Boy Scout's First Amendment right to expressive association).

101. *Hurley*, 515 U.S. at 561.

102. *Id.* at 560.

103. *Id.* at 561.

104. *Id.* at 560-61.

105. *Id.* at 560 (discussing Mass. Gen. Laws § 277:98 (1992)). The law prohibited "any distinction, discrimination, or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation, resort or amusement." *Id.*

106. *Id.* at 558.

107. *Id.* at 562 (quoting the trial court's findings of fact).

organizers' First Amendment right to expressive association.¹⁰⁸ In the court's reasoning, expressive association would require that the parade have a requisite "focus on a specific message, theme, or group."¹⁰⁹ The Supreme Judicial Court of Massachusetts affirmed, finding that it was "impossible to discern any specific expressive purpose entitling the Parade to protection under the First Amendment."¹¹⁰

On appeal, the U.S. Supreme Court agreed that the parade lacked a coherent message, but found that "a private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit their themes to isolate an exact message as the exclusive subject matter of the speech."¹¹¹ Thus, the organizers' were exercising their freedom of speech through the symbolism, the banners, and the participants marching along a route lined with bystanders, even though they did not have a single succinct message.¹¹²

The Court likewise found that GLIB's participation in the parade was intended to be of an expressive nature.¹¹³ GLIB wanted to show the community their existence, to celebrate it, and to support a like-minded group marching in the New York City St. Patrick's Day Parade.¹¹⁴ Viewing both the parade and GLIB as expressive elements, the Court found that admitting GLIB to the parade would require the organizers to alter their chosen expressive content of the parade and expose their message to being shaped by any class of persons protected by the state who wished to join.¹¹⁵ In essence, anyone viewing the parade would assume that the organizers had evaluated GLIB's social message and deemed it worthy of support by inclusion in the parade. In upholding the First Amendment right of the private organizers to exclude GLIB, the Court stated that expression involved not only the right to speak on one subject but also to remain silent on another.¹¹⁶

2. *Boy Scouts of America v. Dale*

In *Boy Scouts of America v. Dale*, the Supreme Court further articulated its position on the nature of an expressive association claim. The Boy Scouts of America ("BSA") removed James Dale from his position as an assistant scoutmaster after he was recognized in local news media as an "avowed homosexual and gay rights activist."¹¹⁷ Dale brought suit under a New Jersey public accommodation statute essentially identical to the Massachusetts statute in

108. *Id.* at 564.

109. *Id.* at 562 (quoting the trial court's findings of law).

110. *Id.* at 564 (quoting *Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc. v. Boston*, 636 N.E.2d 1293, 1299 (Mass. 1994)).

111. *Id.* at 569.

112. *Id.* at 568–570.

113. *Id.*

114. *Id.*

115. *Id.* at 572–73. ("Since every participating unit affects the message conveyed by the private organizers, the state courts' application of the statute produced an order essentially requiring petitioners to alter the expressive content of their parade.").

116. *Id.* at 574.

117. 530 U.S. 640, 643 (2000).

Hurley.¹¹⁸ The BSA defended its decision by arguing that it was a private organization committed to instilling values in young people, that homosexual conduct is inconsistent with those values, and that having to place Dale in a leadership position in the BSA would violate their right to expressive association.¹¹⁹ Although the trial court found in favor of BSA, the intermediate appellate court and New Jersey Supreme Court both ultimately entered judgment on behalf of Dale.¹²⁰

In analyzing whether application of the New Jersey statute constituted a violation of the BSA's expressive association rights, the Court formulated a four step analysis. First, it determined that the Boy Scouts were an expressive association for purposes of First Amendment protection.¹²¹ That is, even though they were not an advocacy group, they engaged in some form of expression (namely the transmittal of a system of values to young people).¹²² Second, the Court considered whether including Dale would significantly affect the BSA's ability to express itself.¹²³ After finding that homosexual conduct was in moral opposition to the BSA's system of values, the Court concluded that directing it to accept an avowed homosexual and gay rights activist would "force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."¹²⁴

Third, the Court considered whether New Jersey's application of its public accommodations law furthered a compelling government interest.¹²⁵ Although recognizing that states may enact public accommodations laws when they find that a given group is the target of discrimination, in the fourth and final step of the analysis, the Court concluded that New Jersey's interest did not justify the severe intrusion on the Boy Scouts' right to freedom of expressive association.¹²⁶ Its quote from *Hurley* seems a fitting summary of the balancing conducted: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."¹²⁷ The Court thus found the requirement of admitting Dale into the BSA to violate the Boy Scouts' right to expressive association.

118. *Id.* at 645 (discussing N.J. Stat. Ann. §§ 10:5-4 and 10:5-5 (West Supp. 2000) (prohibiting discrimination based on sexual orientation in public accommodations)).

119. *Id.* at 644.

120. *Id.* at 646-47 (discussing 706 A.2d 270 (N.J. App. Div. 1998) (holding that denying membership in BSA based on member's homosexuality violated New Jersey public accommodations law) and 734 A.2d 1196 (N.J. 1999) (holding that membership of an avowed homosexual does not violate BSA's expressive association rights because such inclusion does not inhibit the existing members in carrying out their various purposes), respectively).

121. *Id.* at 654-55.

122. *Id.* at 649-50.

123. *Id.* at 656.

124. *Id.* at 653.

125. *Id.* at 656-57.

126. *Id.* at 658-59.

127. *Id.* at 659-60 (quoting *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 579 (1995)).

B. The Majority Opinion in *FAIR*

From the outset, the Third Circuit took notice of the fact 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.”¹²⁸ Solomon would be found unconstitutional if the plaintiffs could show either: that law schools are “expressive associations” whose right to distribute their chosen message is impaired by the forced inclusion of military recruiters (“expressive association claim”) or that their right to free speech is impaired by being compelled to assist military recruiters in the expressive act of recruiting (“compelled speech claim”).¹²⁹

1. The Expressive Association Claim

The Third Circuit first addressed the expressive association claim.¹³⁰ Using the Supreme Court’s analysis from *Dale*,¹³¹ the court systematically found the elements of a successful expressive association claim present in *FAIR*: the group must be an “expressive association,” the state action must significantly affect the group’s ability to advocate its viewpoint, and the state’s interest must not justify the burden it imposes on the group’s expressive association.¹³² In noting that *Dale* does not require that an expressive association be an advocacy group, nor even that the group exist primarily for the purpose of expression, the court easily found that a law school meets the definition by virtue of the values that it seeks to express to its students.¹³³

Next, the court examined the significance of the effect of Solomon on the law schools’ ability to express their viewpoint in light of the plaintiffs’ argument that Solomon interferes with their prerogative to shape the way they educate (including,

128. *FAIR v. Rumsfeld*, 390 F.3d 219, 229 (3d Cir. 2004) (quoting *Perry v. Sindermann*, 408 U.S. 593, 597 (1972)).

129. *Id.* at 230. The court’s finding that only one of those impairments need be shown to invalidate Solomon is based on the strict scrutiny applied in this context. Under such a review, the law must be narrowly tailored to serve a compelling governmental interest and employ the least restrictive means of doing so. *Id.* As the court put it, such a standard inevitably resulted in an “imposing barrier” for the Government. *Id.*

130. Various commentators have noted the irony in how the majority used *Dale*, a case that gave the Boy Scouts the power to discriminate under the First Amendment, to prevent the government from doing so here. See David L. Hudson, Jr., *Boy Scout Case Helps Gay Rights Cause*, ABA JOURNAL E-REPORT (Dec. 3, 2004) (“*Dale’s* expansive view of expressive association turned out to be exactly what was needed to give law schools and organizations in the academic community a basis to resist a government policy.”) (quoting Robert O’Neil). One of the plaintiffs’ lead attorneys, Mr. Joshua Rosenkranz, chose to put it another way: “The [Third Circuit] understood that if bigots have a First Amendment right to exclude gays, then enlightened institutions have a First Amendment right to exclude bigots.” Adcock, *supra* note 20, at 16.

131. *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

132. *FAIR*, 390 F.3d at 231 (quoting *Dale*, 530 U.S. at 648–58).

133. *Id.* In agreeing with the district court that the law schools were expressive associations, the Third Circuit drew from its earlier precedent that “By nature, educational institutions are highly expressive organizations, as their philosophy and values are directly inculcated in their students.” *Id.* (quoting *Circle Schs. v. Pappert*, 381 F.3d 172, 182 (3d Cir. 2004)).

of course, the manner in which they communicate their message).¹³⁴ Finding *Dale* to be controlling, the court acknowledged that “[t]he forced inclusion of an unwanted person in a group’ could significantly affect the group’s ability to advocate its public or private viewpoint.”¹³⁵ Just as a requirement to include an openly gay scoutmaster in the Boy Scouts would have been inconsistent with their stated values and goals and their choice of role models, the court reasoned that forcing law schools to include military recruiters on campus is inconsistent with the law schools’ commitment to justice and fairness and provides role models that are inconsistent with their expectations.¹³⁶ With a last analogy to the *Dale* decision, the court noted that the presence of military recruiters would also force the law schools to send a message to their students and the larger legal community that they accept employment discrimination.¹³⁷

Perhaps anticipating criticism of its reasoning, the court chose to address the findings of the district court that because the military recruiters visited only occasionally, were not accepted as full members of the community, and were not placed in a position of authority, they could therefore not impact on the official message of that community.¹³⁸ The Third Circuit’s response to the district court’s finding was that the limited duration of the intrusion does not eradicate the underlying nature of the First Amendment violation.¹³⁹ To the challenge that recruiters are never really made official speakers of the law school, the court again reverted to *Dale’s* mandate to “give deference to an association’s view of what would impair its expression.”¹⁴⁰ Thus, the court is prepared to accept the law schools’ claims that accepting military recruiters onto campus significantly compromises their stated message at face value.¹⁴¹

Finally, the court examined the differing interests and determined that, on balance, the government had not justified the burden placed on the law school’s First Amendment protected expressive associations.¹⁴² Although recognizing the DoD’s compelling interest in procuring talented military lawyers, its strict scrutiny analysis required that the means to achieving that interest be narrowly tailored.¹⁴³ The court’s conclusion, which ultimately secured the expressive association claim, was that Solomon “could barely be tailored more broadly.”¹⁴⁴

The court reached this position with regard to narrow tailoring based on the fact that the tremendous resources of the government allow it to recruit in other ways

134. *Id.*

135. *Id.* (quoting *Dale*, 530 U.S. at 648.).

136. *Id.* at 232.

137. *Id.*

138. *Id.*

139. *Id.* at 232–33 (discussing *Circle Schs.*, 381 F.3d at 182).

140. *Id.* at 233.

141. The court bolstered its claim that the government’s actions significantly affect the law schools’ message by noting that the latest revision of Solomon codifies the informal enforcement that had been taking place, and thus requires the institutions to “actively assist” military recruiters in a manner equal in quality and scope to the assistance provided other recruiters. *Id.* at 233 n.11.

142. *Id.* at 234.

143. *Id.*

144. *Id.*

that could arguably be just as effective, if not more so, than access to students on campus.¹⁴⁵ By its ability to offer loan repayment programs and to employ advertising through mass media, the DoD could arguably satisfy its recruiting requirements without the assistance of the law schools' space or personnel.¹⁴⁶ The court could not have been blunter in its summation that "The government has failed to proffer a shred of evidence that the Solomon Amendment materially enhances its stated goal."¹⁴⁷ With that, the court was able to conclude that the plaintiffs had established a reasonable likelihood of prevailing on the merits such as to warrant the granting of a preliminary injunction.¹⁴⁸

2. The Compelled Speech Claim

Although the expressive association finding was enough to warrant an injunction by itself, the Third Circuit went on to analyze the merits of FAIR's second claim—that they were being compelled to assist and subsidize the government in its discriminatory message.¹⁴⁹ After initially establishing that recruiting for employment does amount to expression, the court first addressed the schools' opposition to the message that military recruiters espoused and then the requirement that law schools propagate and subsidize that message.¹⁵⁰

Even though the court believed that the "most discordant speech the Solomon Amendment compels the law schools to accept" was the statement by a military recruiter to an openly gay interviewee that he or she was not eligible for military service, it was enough to establish that a dissonant message was being offered.¹⁵¹ Thus, access to campus itself was an objectionable message to law

145. For a foreshadowing of the majority's reasoning on this point, see Lindsay Gayle Stevenson, *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, 1369 (2004) (arguing that on balance the limitation on expressive association is too great because the government can satisfy its interests through "television ads, high school recruiting, bus banners, mailings, word of mouth, and online recruiting tools").

146. The court went even further in suggesting that the DoD might be *more* effective at recruiting were it not having to wage the Solomon campaign. Citing the frequency of protests on campuses across the country, the court found it plausible that the bad publicity might be outdoing any gains made by forced access. *FAIR*, 390 F.3d at 235.

147. *Id.* If the court is correct in this assertion then it seems fitting that Solomon in practice is reduced to the rhetorical symbolism that its authors originally gravitated to. The pressing question would then be how the military departments allowed themselves to be thrust into such a controversy which had no real benefit to them in the first place.

148. *Id.* at 235–36.

149. *Id.* at 236.

150. The Third Circuit was not convinced by the district court's reasoning that recruiting has a solely economic or functional motive and thus does not amount to expression or advocacy of a particular viewpoint. The court concluded that the expression being offered in a recruiting setting is that "our organization is worth working for" and thus compared it to other forms of expression that have a mixed economic/functional and expressive nature. *Id.* at 237. In the court's view, job recruiting can be put alongside soliciting for charitable contributions or for new members of a church. *Id.*

151. *Id.* at 239. The court addresses the state of compelled speech precedent from the U.S. Supreme Court and concluded that the law is unsettled as to whether an actual disagreement is required between the government's message and that of the compelled speaker. Opponents of an

schools, as evidenced by the protests, opposition, and ameliorative efforts taken to counter the government's message on campus.

In assessing whether the statute required law schools to propagate, accommodate, or subsidize the opposed message of the government, the majority of the panel expressly disavowed the lower court's finding that Solomon did not include a direct requirement to participate in dissemination.¹⁵² In fact, the majority found that Solomon required all *three* forms of compelled speech.¹⁵³ Where the district court viewed the ability of law schools to disclaim or disassociate themselves from the message being presented on their campuses by the military as a way to escape the compelled nature of an endorsement, the Third Circuit found that this fact was irrelevant for the discussion of a compelled speech claim.¹⁵⁴

The court enumerated how Solomon resulted in a violation of all three forms of compelled speech. First, because Solomon required law schools to provide access "equal in quality and scope," career services offices would have to assist the military in "getting its message out" the same as they would for any other employer.¹⁵⁵ This type of assistance in distributing materials constituted propagation of the government's message.¹⁵⁶ Second, by requiring that the military be included at job fairs, recruiting receptions, and interview sessions, Solomon was forcing an accommodation of the government's message.¹⁵⁷ Third, by placing demands on the law schools' employees and resources, albeit to a minimal extent, Solomon was requiring law schools to subsidize the government's

outright disagreement requirement, including Justice Souter, as espoused in his dissenting opinion in *Glickman v. Wileman Bros. & Elliot, Inc.*, 521 U.S. 457, 488–89 (1997), would maintain that "protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference . . ." *FAIR*, 390 F.3d at 238–39. Nonetheless, the court concludes that the disagreement over employment of homosexuals would be enough to establish the claim, if disagreement were indeed required by the Supreme Court's prior precedent. *Id.*

152. *FAIR*, 390 F.3d at 240.

153. *Id.*

154. The revision of the statute that took place between the issuance of the district court's opinion and the appellate court's reversal actually furthered the majority's argument. Because the law schools would not disclaim the message of any other on-campus recruiter, they could not disclaim the military's message and still be providing treatment "equal in quality and scope." Yet another place where the revision that was intended to strengthen the statute actually worked toward its undoing.

Of course, the law schools could then limit the quality and scope of the assistance they provided to all of their on-campus employers and avoid invoking Solomon altogether, but the court concluded that would in itself be a First Amendment violation in the form of self-censorship of the kind recognized in *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 257 (1974). *FAIR*, 390 F. 3d at 236.

Regardless, the court cites the plurality opinion of *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 475 U.S. 1, 15 n.11 (1986), for the proposition that "the presence of a disclaimer . . . does not suffice to eliminate the impermissible pressure . . . to respond to [compelled] speech." *FAIR*, 390 F.3d at 241. Further, the court points out that a "forced reply" may actually add to the injury of compelled speech, where an organization would otherwise be free not to respond to the disagreeable speech at all. *FAIR*, 390 F.3d at 241.

155. *FAIR*, 390 F.3d at 240.

156. *Id.*

157. *Id.*

message.¹⁵⁸

In finding that Solomon violated FAIR's First Amendment rights on both the expressive association claim and the compelled speech claim, the court finally turned to whether Solomon might still survive a constitutional challenge under strict scrutiny analysis.¹⁵⁹ Because the government had not made any showing that it would not be able to recruit as effectively using a less restrictive alternative, the court perfunctorily concluded that Solomon was not likely to withstand such a rigid standard.¹⁶⁰

After briefly addressing each of the other factors requisite to the grant of a preliminary injunction, the court remanded the case. Its order to the district court was that the government could no longer condition federal funding on the expression of a message that law schools find incompatible with their objectives, at least not until the DoD is able to show in concrete terms that it has a compelling interest which requires it to be on campus, and that such access is actually the least restrictive alternative.¹⁶¹ The district court is still free on remand to find in favor of the DoD, although this seems unlikely in light of the panel's thorough analysis of First Amendment law as it applies to this case and its statement of the burden the government must meet on a showing of its interests. In February 2005, the government petitioned for a writ of certiorari, which was granted in May 2002, and it remains to be seen whether the Supreme Court will take a similar view of First Amendment law.

C. Judge Aldisert's Dissenting Opinion in *FAIR*

Judge Aldisert's dissent indicates that other interpretations of relevant case law may be applied to future Solomon challenges. Noting, as the majority does, that the right to expressive association is not absolute, Judge Aldisert goes on to address why *Dale* was not the appropriate vehicle for addressing FAIR's claims and he then undertakes a different balancing of the two principal interests that are in conflict.¹⁶²

First, Judge Aldisert points out several critical differences that may make *Dale* inappropriate for application to the facts of the case. For one, unlike the New Jersey statute that required the Boy Scouts to admit someone as a member of their organization, Solomon does not require that the military have any influence on the membership of the faculty, administration, or student bodies of colleges and universities across the country. Further, unlike the scoutmaster who would have been an official representative of the BSA, military recruiters who occasionally arrive on campus do not purport to speak *for* anyone at the university or its law

158. *Id.*

159. *Id.* at 242.

160. *Id.*

161. *Id.*

162. *Id.* at 246–47 (Aldisert, J., dissenting) (“Although I have myriad problems with the fundamental contentions presented by the Appellants and the host of supporting amicus curiae briefs, essentially my disagreement is with the all-pervasive approach that this is a case of First Amendment protection in the nude. It is not.”).

school.¹⁶³ There is no corruption of the law schools' message because the military recruiter remains a visitor who arrives on campus intermittently.¹⁶⁴

Another key distinction from *Dale* is that in arriving on campus, military recruiters' activities can be thought of as expression that is merely incidental to the primary recruiting mission.¹⁶⁵ Their purpose on campus is arguably not to promote any message or "instill values" in anyone, but to show an interest in enlisting the services of qualified men and women.¹⁶⁶ Such an instrumental interest, similar to all the other employers who come to campus, is vastly different than the expressive nature of associations that *Dale* purported to protect.¹⁶⁷

Secondly, Judge Aldisert argues that the majority's analysis is deficient in that it does not properly characterize Solomon as regulating expressive conduct.¹⁶⁸ The Supreme Court has 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."¹⁶⁹ Since Solomon is aimed at conduct which inhibits the ability of recruiters to access campus, and does not directly regulate speech by any college or university actors, Judge Aldisert reasoned that Solomon should be judged under the more liberal standard of scrutiny for nonspeech regulation articulated in *United States v. O'Brien*.¹⁷⁰ Under that standard, the government would not be required to show that it is employing the least restrictive alternative to further its interest.

In beginning his *O'Brien* analysis, Judge Aldisert noted that Congress had clearly expressed that military readiness is a vital interest and the courts have consistently given a great amount of deference to that body's decisions on what is needed for the national defense.¹⁷¹ Judge Aldisert argued that the proper balancing

163. *Id.* at 260.

164. *Id.*

165. *Id.*

166. *Id.*

167. Judge Aldisert in dissent argues that "the fundamental goal of the relationship between adult leaders and boys in the Boy Scout movement is '[t]o instill values in young people,' a goal that is pursued 'by example' as well as by word." *Id.* In contrast, he asserts that military recruiters are not really speaking for anyone in the fullest sense of the term:

Military recruiting is not intended to "instill values" in anyone, nor is it meant to convey any message beyond the military's interest in enlisting qualified men and women to serve as military lawyers and judges. As a result, the burden on the law schools' associational interests is vastly less significant than the burden placed on the BSA by the statute in *Dale*.

Id. (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649–50 (2000)).

168. *Id.*

169. See *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (holding that a federal statute which prohibited the destruction of military draft cards was not a violation of free speech with regard to a person who burned his card in symbolic protest of the Vietnam conflict).

170. The *O'Brien* Court held that regulation of conduct which contains both speech and non-speech elements, albeit incidentally burdening expression, was constitutional if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to furtherance of that interest." *Id.* at 377.

171. *FAIR*, 390 F.3d at 254 ("The case arises in the context of Congress's authority over

of interests would take into account this strong constitutional mandate given to Congress by virtue of the Spending Clause, the power to raise armies and navies, and the Necessary and Proper Clause.¹⁷²

Solomon arguably places only an incidental burden on speech in advancing this powerful governmental interest. After all, Solomon's purpose is "manifestly unrelated to the *suppression* of anyone's expression."¹⁷³ As the majority pointed out, voices of dissent on college and university campuses to the military's policies have hardly been stifled by Solomon.¹⁷⁴ Judge Aldisert argued that, on balance, the intrusion of military recruiters a few days a year must be allowed as the means no greater than essential to achieve compelling state interests unrelated to the suppression of ideas.¹⁷⁵

V. THE FUTURE OF SOLOMON

Rumors of Solomon's demise have perhaps been greatly exaggerated. Not only are there weaknesses in the Third Circuit's application of *Hurley* and *Dale*, but one could argue that the protections provided are counter to one of the overarching themes of the Court's recent expressive association jurisprudence. Further, the Court seems to be facing a reckoning of the competing deference that has traditionally been granted to both the military and the academy. With neither side willing to compromise its position, the Court's decision over which body takes precedence may result in undesirable results regardless of which one is accorded greater deference. While it is uncertain how the Supreme Court will resolve the issues presented, I would like to suggest some possible influences on their analysis of the constitutionality of Solomon.

A. Distinguishing *Hurley* and *Dale*

Several key distinctions make these two cases inappropriate grounds to support the law school's strongest claim for First Amendment relief, namely that Solomon affects their right to express themselves through membership in their organization by requiring the admittance of military recruiters.

First, it is important to note that both *Hurley* and *Dale* were based on a factual

national defense and military affairs, and perhaps in no other area has the [Supreme] Court accorded Congress greater deference.") (quoting *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981)). In light of this traditional deference to congressional action where the military is concerned, Judge Aldisert noted that this is the first instance of an act of Congress "predicated on supporting the military" being 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 . . .'" *Id.* at 249-50.

172. U.S. CONST. art. 1, § 8, cl. 1.

173. *FAIR*, 390 F.3d at 262.

174. *Id.*

175. The critical distinction in applying an *O'Brien* analysis is that the government is no longer subject to a showing of using the least restrictive alternative. Instead, only three elements must be shown: the law must further an important or substantial government interest, it must be unrelated to the suppression of free expression, and the incidental restriction on First Amendment freedoms must be no greater than essential to the furtherance of that interest. *O'Brien*, 391 U.S. at 377.

finding that including the parties who were denied membership would force their respective messages to be attributed to the organization who opposed that message. The fact that the law schools' opposition to the military's discriminatory employment policy is so well known is precisely what weakens their argument that the discriminatory message will be attributed to them. Unlike the bystanders along the parade route or the youths charged to Dale's supervision by the Boy Scouts, law schools in general, and YLS and Rutgers in particular, are not in danger of having anyone assume that their message coincides with that of the military if they were required to put the military's glossy brochures next to all the others. The various statements and ameliorative measures that are present in law schools across the country attest to the vibrant disregard that the academy as a whole bears toward the armed services "Don't Ask, Don't Tell, Don't Pursue" policy. Because Solomon does not force law schools to disseminate a message contrary to their own, it cannot be said to compromise the autonomy of their Free Speech in a way that reaches the violations found in the previous cases.

Second, *Hurley* and *Dale* involved a special role of actors within the organization that is not even closely approximated by the challenges brought in the aforementioned lawsuits. Allowing GLIB to march in the parade would have placed the contested group on an equal footing with all other units that made up the overall message being presented by the parade organizers, and including James Dale as a Scoutmaster would have placed the contested speaker in a direct leadership role within the organization whose views were antithetical to his own. Dale would simultaneously be recognized in the community as a leader in gay rights activism and in the Boy Scouts of America. The nature of these roles led the Court to find that the message of the respective organization would be corrupted if inclusion were mandated.

By contrast, Solomon does not mandate the inclusion of anyone into the membership of the college or university community. Solomon does not require the presence of a single viewpoint on the faculty, administration, or student body of any institution, nor does it require any speaker to be placed in a position of authority on campus. Although the required support for ROTC programs comes closest to including the military as an integrated part of the academic community, this argument has not been advanced in any of the cases to date. Instead, the plaintiffs have argued that the presence of uniformed recruiters on campus results in the military's message being attributed to the institution, its faculty, and students.¹⁷⁶

Not only does this transform the nature of the protections guaranteed by *Hurley* and *Dale*, it is simply not borne out in practice. The overwhelming aversion to military recruiters in the form of protests and vocal opposition on campus was enough to cause the *FAIR* majority to note that the military might be more effective at recruiting on campus without Solomon. Regardless of the wisdom of

176. See Daniel A. Farber, *Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1501 (2001) (asserting that expressive association cases to date have focused on a strong nexus between membership and the choice of speakers, thus calling into question whether the law could support discrimination in membership). The case for applying expressive association law is even weaker, since the military is not included in membership, let alone leadership.

the Third Circuit's suggestion, it evidences the fact that Solomon has not led to any misgivings about a connection between the military and the institutions from which they seek future talent.

Third, the application of Solomon itself is distinguishable from the unconstitutional application of the earlier state statutes involved in *Hurley* and *Dale*. In those cases, state courts interpreted the statutes as mandating inclusion of the respective parties involved in no uncertain terms. If such application of the laws was consistent with the First Amendment, the parade organizers and Boy Scouts of America could not have avoided inclusion in any way short of disbanding their organization. The *Hurley* Court went so far as to point out how such a statute could expose all manner of protected groups being admitted to the parade against the organizers' wishes.¹⁷⁷

By contrast, each of the institutions alleging that Solomon compromises their chosen message is free to exclude whomever they choose, as long as they are willing to forgo federal funds. Where the *Dale* and *Hurley* plaintiffs lacked the ability to control who would officially be included in their organization and who would speak for them, law schools inherently have the ability to control both by simply rejecting the governments offer of funds thereby avoiding Solomon altogether. Because of this difference, the Supreme Court may not look as favorably upon FAIR's attempt to claim the benefit of government funding without employing any of the accompanying restraint that would allow them to maintain their ideological independence.

Finally, the Third Circuit's application of the Supreme Court's recent expressive association jurisprudence does not take into account one of its overarching themes: protection of the minority speaker's views is important to discourse in our society.¹⁷⁸ In the two cases most heavily relied on by the Third Circuit, for example, the Court makes a point of not evaluating the morality of the message being offered by the organization involved. It is concerned only that the particular message they intend to convey be allowed to reach the public square.

In the case of the law school challenges, such a theme is not served by finding a violation. Ironically, it is the military who espouse the unpopular opinion in danger of being drowned out by the majority, at least on college and university campuses. Even if the Court is not inclined to uphold the law as a guarantee that the government's message continues to be heard on campuses across the country, striking it down would not serve to prevent the law schools' views from being offered. As has been consistently pointed out, if Solomon has had any effect on their message, it is to strengthen it rather than to diminish its fervor.

The plaintiffs' compelled speech claim, the second basis for declaring Solomon unconstitutional, seems doomed to fail for many of the same reasons as the expressive association claim. The two are linked in the sense that if the law

177. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995).

178. See Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1860-64 (2001) (asserting that one of three common themes of the Supreme Court's recent expressive association jurisprudence is a protection of "Reasonable Pluralism," which prevents the government from placing limits on those who would present a different or unpopular view from that of the majority).

schools' message is not being affected by the government, and their leaders are not being chosen by the government, they can hardly be said to be delivering the government's message. There is a further distinction, though, in that the military is not on campus as a way to express support for its policies. Like every other employer who comes to campus, it is there to offer positions to qualified individuals. The assistance law schools provide to the military in that endeavor no more constitutes an endorsement of their message than it does the myriad other firms, public interest groups, corporations, and agencies who visit campus each year. They vary in purpose, mission, and vision to such a great extent that the only speech they compel of the college or university is the approval of students obtaining their choice of employment.

In light of these distinctions, and of the inconsistency with a broader purpose which could be inferred from recent expressive association decisions, there is ample opportunity for the Supreme Court to find that Solomon does not violate the law schools' First Amendment rights to expressive association and freedom from compelled speech. Since these claims have been evaluated as the strongest on the merits, and in fact formed the basis for both judgments against the government, an analysis similar to the one undertaken here could extend Solomon's vitality.

B. Conflicting Deference

Although it appears likely that when the Supreme Court applies its own expressive association precedent to Solomon it will hold Solomon constitutional on that basis, the Court's decision may also signal what degree of judicial deference it intends to accord either the academy or the military in future. These two bodies have both traditionally been accorded wide latitude in the internal practices which govern their unique spheres, and a decision on Solomon could force the Court to consider which deference should be accorded more weight. It is impossible to predict which difference will prevail, but it is worth considering the history and extent of the deference that has been traditionally been accorded to each by the courts.

1. Military Deference

The Supreme Court has long used a more lenient standard than would apply to other government action to review decisions and regulations that affect the constitutional rights of members of the armed services.¹⁷⁹ The Court has justified what has come to be known as the doctrine of military deference on the basis that military effectiveness in war necessitates latitude in military policies both in peacetime and in time of war. This deference is based on three main premises: (1) Congress is vested with the particular power to regulate the military; (2) the military is a "separate society" which requires a degree of autonomy in its regulations; and (3) the courts have limited competence in evaluating what is

179. For a comprehensive history of judicial deference to the military, beginning in the nineteenth century tenets of non-interference, see John F. O'Connor, *The Origins and Application of the Military Deference Doctrine*, 35 GA. L. REV. 161 (2000).

necessary to maintain an effective fighting force.¹⁸⁰

Cases in which the Court has deferred to the military's judgment have traditionally involved legal challenges to internal military regulations or the constitutional rights afforded to servicemembers subject to courts-martial or military justice proceedings.¹⁸¹ Where limits have been placed on a member of the military's constitutional rights, the Court has repeatedly said that it is not willing to substitute its judgment for that of the Congress where the challenged policy has a rational basis in preserving order within the ranks or promoting military discipline.

With such firm roots in deferring to the military's judgment on matters affecting the regulation of members of the military, the problem with the government's claim that Solomon is necessary for military recruiting is that it requires a degree of latitude outside of that unique sphere in which the military departments have been thought to exercise special ability. The government does have a very pressing need for talented military lawyers, but that does not mean it should be given free rein in deciding when its needs should overcome the decisions of civilian institutions.

In most military deference cases, it is servicemembers who suffer the costs involved. If, in this case, however, the Court defers to Congress and the military and subjects Solomon to lenient review, it will be civilians whose First Amendment rights are adversely affected. Allowing the doctrine of military deference to limit review of violations of the constitutional rights of civilians, outside of military installations or operations, could be perceived as a substantial widening of deference to the military.¹⁸² By deferring to the DoD's judgment where Solomon is concerned, the Court would go well beyond the respect heretofore given to the military's decisions on what is necessary for national security.

180. See Kelly E. Henriksen, *Gays, the Military, and Judicial Deference: When the Courts Must Reclaim Equal Protection as their Area of Expertise*, 9 ADMIN. L.J. AM. U. 1273, 1277-79 (1996).

181. See, e.g., *Parker v. Levy*, 417 U.S. 733 (1974) (challenging military criminal statutes on due process grounds); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (challenging military promotion and discharge procedures); *Greer v. Spock*, 424 U.S. 828 (1976) (challenging military regulations as violations of First Amendment free speech protection); *Middendorf v. Henry*, 425 U.S. 25 (1976) (challenging courts-martial convictions on Fifth and Sixth Amendment grounds); *Goldman v. Weinberger*, 475 U.S. 503 (1986) (challenging military regulations forbidding the yarmulke from being worn in uniform as violating First Amendment freedom of religion); *Weiss v. United States*, 510 U.S. 163 (1994) (challenging appointment of military judges to hear courts-martial).

182. The case that comes closest to deferring to a judgment of military necessity in recruiting such as the one in Solomon is *Rostker v. Goldberg*, 453 U.S. 57 (1981). In *Rostker*, the Court rejected an equal protection challenge to the Military Selective Service Act, which required males and not females to register for the possibility of being drafted into military service. Despite the impact on civilians, the Court held that Congress was entitled to great deference where matters of national security, military necessity, and mobilization of personnel were concerned. *Id.* at 64-69. Although the Court upheld the ability of military commanders to restrict the public speaking rights of civilians in *Greer v. Spock*, 424 U.S. 828 (1976), it did so when the plaintiffs sought to engage in political speech and distribute campaign materials on a military reservation in violation of regulations that were applied without regard to viewpoint.

2. Academic Deference

At the same time, the Court must approach the constitutionality of Solomon in light of a precedent of deference to colleges and universities in decisions relating to academic judgment.¹⁸³ Although a substantial component of this doctrine is the right of individual faculty members to make decisions on core academic functions and exercise a degree of autonomy within their classrooms,¹⁸⁴ challenges to Solomon depend on deference to decisions by institutions concerning how students will be taught and what lessons are necessary to fulfill an institution's educational mission. This facet of deference recognizes both the unique role that those institutions play in our society and courts' particular lack of expertise in determining how best to educate students.¹⁸⁵ When academic institutions are exercising judgment related to matters with which they have a special competence, courts will typically review challenges to those decisions for indications of "arbitrary and capricious" conduct on the part of the governing body or a "substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment."¹⁸⁶ That is, so long as the institution is within an area that academics are particularly competent to address, a court will interfere only where it appears that no judgment was actually used. In allowing colleges and universities greater latitude in determining what is necessary to successfully fulfill their unique mission, the Supreme Court has provided a degree of deference comparable to that enjoyed by the military.¹⁸⁷

Colleges and universities enjoy the greatest latitude in their judgments concerning what should be taught, who should teach it, and who should be admitted to study. In terms of what should be taught, the Court has been unwilling to overrule institutional support for a broad range of messages simply because some individuals find those messages offensive.¹⁸⁸ Additionally, the Supreme Court has been unwilling to overrule academic institutions' decisions in the employment context when challenges are brought by faculty whose teaching

183. See Byrne, *supra* note 38, at 142 ("Constitutional academic freedom provides colleges and universities breathing space to make educational and scholarly policy without political interference.")

184. The Court has traditionally given considerable autonomy to individual professors as long as they are exercising their professional judgment in academic matters as evidenced by its decisions in *Ewing* and *Horwitz*. "Considerations of profound importance counsel restrained judicial review of the substance of academic decisions." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985).

185. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978) ("Courts are particularly ill-equipped to evaluate academic performance.")

186. *Ewing*, 474 U.S. at 227–29.

187. See *Grutter v. Bollinger*, 539 U.S. 306, 328 (2003):

Our scrutiny of the interest asserted by the Law School is no less strict for taking into account complex educational judgments in an area that lies primarily within the expertise of the university. Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.

188. See *Bd. of Regents of the Univ. of Wis. v. Southworth*, 529 U.S. 217 (2000) (upholding the right of state university to charge mandatory student activities fee used to support student extracurricular speech where funds are distributed in viewpoint-neutral manner).

contracts are not renewed. Without an explicit or implicit provision which guarantees continuing employment, professors' claims that they are being dismissed for political or ideological reasons have not been well received.¹⁸⁹ Courts have generally said that they will not substitute their judgment of a professor's teaching and scholarly abilities for that of the institution, thus limiting the ability of individuals to challenge their inability to obtain employment.¹⁹⁰

Courts have traditionally considered themselves to be unsuited to evaluating who should be taught, both in terms of individual academic qualifications and in the optimal mix of student body diversity to facilitate learning. Where the institution is making a good faith decision on who is academically qualified to be admitted to college or university programs,¹⁹¹ which students are no longer worthy of continued enrollment,¹⁹² and, to a lesser extent, when disciplinary dismissals are warranted,¹⁹³ the Court has not relished having to second-guess those judgments. As cases such as *Bakke*¹⁹⁴ and *Gratz*¹⁹⁵ illustrate, when the Court finds fault with institutional decisions, it is generally not in the overarching policies themselves, but in the manner in which they were carried out.

If the Court were to defer to the law school on what is necessary to maintain their academic integrity with respect to employment interviews conducted by the military, it would be expanding previous notions of what is the particular purview

189. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564 (1972) (holding that untenured professor had no right to hearing prior to college's failing to re-hire him for the following year); *Perry v. Sindermann*, 408 U.S. 593 (1972) (holding that untenured professor with no contractual provision for continued employment could not allege a due process violation when he was dismissed without notice or hearing).

190. See Harry F. Tepker, Jr., *Title VII, Equal Employment Opportunity, and Academic Autonomy: Toward a Principled Deference*, 16 U.C. DAVIS L. REV. 1047 (1983) (arguing that a policy of deference to higher educational institutions' decisions on political, philosophical, or academic policies should not be a license to discriminate in employment). *But see* Jeffrey I. Slonim, *Employment Discrimination in Higher Education: A Survey of the Case Law from 2001*, 29 J.C. & U.L. 327 (illustrating how colleges and universities are increasingly having to litigate substantive employment decisions).

191. See, e.g., *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (allowing institutions to consider students' racial or ethnic group as one factor contributing to the individual's suitability for admittance to medical school); *Grutter v. Bollinger*, 539 U.S. 306 (2003) (holding that a law school's educational judgment that racial diversity is an essential component of higher education is entitled to deference in application of strict scrutiny for racial preferences).

192. See, e.g., *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985) (holding that decision to dismiss medical student without opportunity to re-take examination, which was made with deliberation and in consideration of his entire academic record, did not violate the student's right to due process); *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78 (1978) (holding that student's substantive due process was protected when she was dismissed from medical school after being made aware of deficiencies in her clinical performance).

193. For a discussion of the different approaches courts have taken to disciplinary decisions as opposed to purely academic ones, see Fernand N. Dutille, *Disciplinary Versus Academic Sanctions in Higher Education: A Doomed Dichotomy?*, 29 J.C. & U.L. 619 (2003).

194. *Bakke*, 438 U.S. 265.

195. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (holding that university's policy of giving preference to minority applicants was not narrowly tailored to achieve a compelling state interest in diversity).

of the administrators of colleges and universities. Their judgment has traditionally been at its height when they are making decisions affecting the education of students, and the presence of military recruiters simply does not fit into that tradition. Employers, by their very purpose, are different from a speaker invited to give a talk on campus or a professor hired to deliver lectures. Solomon does not seek to influence what is taught in the classroom, nor who is admitted to an institution (in either the capacity of faculty or student), and therefore operates outside the traditional bounds of educators' special competence. If the Court grants law schools wide latitude in their view that the symbolism of banning the military from campus is essential to the mission of educating students, it will be interpreting "the four essential freedoms of a university" in an entirely new fashion.¹⁹⁶

By asserting a claim to deference in their judgment that Solomon impedes their educational mission, law schools would also break with the traditional goal of the doctrine, which is to keep students and faculty "free to examine all options, no matter how unpopular or unorthodox . . ." and to foster "that robust exchange of ideas which discovers truth."¹⁹⁷ Here, far from presenting unorthodox sentiments, the institutions' position is intended to close off unpopular sentiments on college and university campuses, and to dictate what students will hear while there. Rather than using academic freedom to expose students to as many different viewpoints as possible and to allow them to reach their own conclusions, the plaintiffs in Solomon challenges seek to limit the government's ability to add to the discussion. It is one thing to say that academic institutions know best how to foster students' academic development and another to say that they must be protected from the mere presence of a distasteful employer.

In light of the fact that both the military and academia have traditionally been recognized as having a special sphere that courts are hesitant to intrude upon, it remains to be seen which interest trumps the other when they are in conflict, or even if they are applicable in a challenge to Solomon. Both institutions are recognized for the unique mission they have in American society, and courts have been willing to give them wide latitude in exercising judgments concerning how best to carry out their respective roles. Predicting the outcome of such dueling deference is further complicated by the fact that Solomon seems to have placed both institutions at the boundary of any previous understanding of the deference they are entitled to by the courts. The Court's decision on Solomon could thus have a far-reaching impact than on more than the law of expressive association alone.

CONCLUSION

Law schools that have felt stifled by the requirements of Solomon since its enactment may finally be vindicated by the results of recent challenges and of those still pending. The path leading to this point is pitted with ironies. The military, which now argues that Solomon is a vital part of recruiting for the

196. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

197. *Tepker*, *supra* note 190, at 1048 n.5 (quoting *Kunda v. Muhlenberg Coll.* 621 F.2d 532, 547-48 (3d Cir. 1980)).

national defense, originally opposed its enactment. Colleges and universities, which have traditionally required the academic freedom to present varying viewpoints to students, argue that the military's view has no place on campus until it changes its employment policies. And most recently, the Third Circuit has employed two cases which effectively limited rights of homosexual persons to vindicate the rights of homosexuals on college campuses.

When the Supreme Court considers the constitutionality of Solomon, perhaps in light of some of these ironies, it will be weighing not only the future of expressive association but of the latitude that will be accorded to two institutions that have traditionally enjoyed great freedom in the decisions they make regarding their unique missions. By striking down the Act and its requirement of equal access to campus for military recruiters, the Third Circuit may have misinterpreted the Supreme Court's expressive association precedent and misjudged the extent to which the Court is willing to defer to judgments of military necessity, especially in times of war. If so, there is reason to believe that for those who oppose the military's policies, on campus and otherwise, vindication may be short-lived. If Solomon's reign is truly at an end, only time will tell.

EPILOGUE

As this article was going to press, the Supreme Court granted certiorari in *FAIR v. Rumsfeld*,¹⁹⁸ in which Solomon's fate will be determined. The case is expected to be heard in the Court's October 2005 term.

198. No. 04-1152, 2005 WL 483339 (May 2, 2005).