HOMOPHOBIA THROUGH THE FIRST AMENDMENT: A CRITIQUE OF *FAIR v. RUMSFELD*

*Caitlin Daniel-McCarter**

A society that discriminates on the basis of sexual orientation—or that tolerates discrimination by its members— is not a JUST *society.*[1]

INTRODUCTION

On March 6, 2006, the United States Supreme Court issued a unanimous opinion[2] upholding the Solomon Amendment in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc. (FAIR).*[3] FAIR, an association of law schools, law students, and law professors, challenged the constitutionality of the Solomon Amendment, which conditions crucial federal funding for law schools and universities on whether the schools allow military recruiters to come to their campuses.[4] The U.S. military discriminates against "out" gay, lesbian, bisexual, and transgendered candidates for employment, and thus, the Solomon Amendment forces law schools to choose between federal dollars and continuing their commitment to the non-discrimination policies they have uniformly adopted as members of the Association of American Law Schools (AALS).[5] FAIR argued that the Amendment infringed upon its First Amendment rights to expressive association, expressive conduct, and freedom from government-compelled speech.

Despite the glaring First Amendment issues in this case, Chief Justice Roberts, writing for the Court, upheld the constitutionality

* CUNY School of Law, J.D. Candidate 2007. The Author would like to thank Professors Ruthann Robson and Andrea McArdle for their generosity and constructive feedback, Jessica Reed and Lily Goetz for their tireless companionship, her mom, dad, Nancy, and Monica for their love, and Katy Howe and Sheena for never failing to make her smile.

1 Memorandum from Robert C. Clark, Dean, Harvard Law School to the Harvard Law Community on Changes to the School's Military Recruiting Policy (Aug. 26, 2002) (emphasis added), *available at* http://www.law.harvard.edu/news/2002/08/26_military.php.

2 126 S. Ct. 1297, 1313 (2006). Justice Alito took no part in the decision. *Id.*

3 This article will use the acronym "FAIR" to refer to the case and the plaintiffs.

4 10 U.S.C. § 983 (2000).

5 The Association of American Law Schools (AALS) is a non-profit association of 166 law schools founded in 1990 with the purpose of improving the legal profession through education. ASS'N OF AM. LAW SCH., 2005 HANDBOOK 34 (2005).

of the Solomon Amendment by carefully downplaying First Amendment precedent and overemphasizing irrelevant cases. The decision in *FAIR* is a shocking example of the Court's approval of unrestrained military power. Inexplicably, the Court was able to reach its unanimous decision without the government having offered even a shred of factual evidence that the Solomon Amendment is an effective method of recruitment, which would have proven that the means chosen were in some way tailored to the government interest. From the Court's decision in *FAIR*, it appears that government regulations can pass constitutional muster when the government simply holds up the flag of military power. As Justice Antonin Scalia posited during oral arguments, "Judicial deference is at its apogee when [Congress acts] to raise and support armies . . . [a]nd that's precisely what we have here."[6]

This Note explores and critiques the Supreme Court opinion in *FAIR*. In Part I, it discusses the historical background of the case, including the development of the military's "Don't Ask, Don't Tell" policy, AALS' non-discrimination policy, and the passage of the Solomon Amendment. Part II discusses *FAIR* in detail, including the district court's decision, the legal reasoning supporting the circuit court's opinion, and the Supreme Court's opinion. Part III outlines the doctrinal flaws in the Court's conclusion and reasoning, specificially its reliance on irrelevant and outdated caselaw and its downplaying of important and relevant precedent. Finally, Part IV outlines how, paradoxically, one of the flaws in the Court's opinion may actually be beneficial to the continued mission of FAIR.

I. HISTORICAL PERSPECTIVE: WHAT'S THE BIG DEAL?

The First Amendment issues in *FAIR* arose out of conflicting policies between law schools and the federal government. The Solomon Amendment requires universities and law schools to provide access to military recruiters. Further, the U.S. military's "Don't Ask, Don't Tell" policy excludes openly homosexual people from serving in the military. AALS members have a longstanding commitment to anti-discrimination within their own institutions and by potential future employers who wish to interview on their campuses. This section examines these conflicting policies that led to FAIR's First Amendment challenge to the Solomon Amendment.

---

[6] Transcript of Oral Argument at 44, *FAIR*, 126 S. Ct. 1297 (No. 04-1152) (Scalia, J., quoting Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

A. *"Don't Ask, Don't Tell"*

The law now known as "Don't Ask, Don't Tell" was codified in 1993 during President Bill Clinton's first months in office. As its name implies, "Don't Ask, Don't Tell" requires those who are "homosexual" to either keep their sexuality to themselves or be discharged from the military.[7] During his 1992 campaign for presidency, Clinton promised to change the existing discriminatory military law[8] to allow lesbian, gay, and bisexual Americans to serve openly in the military.[9] Once in office, however, Clinton explained that he could not completely eliminate discrimination on the basis of sexual orientation in the military because the Department of Defense and Congress were unwilling to support this "drastic" move.[10] On January 29, 1993, in a presidential news conference, Clinton announced that a compromise between gay activists and conservatives had to be made.[11]

Broadly, "Don't Ask, Don't Tell" does three things. First, ser-

---

7 10 U.S.C. § 654 (2000).

8 10 U.S.C. § 925 (2000).

> (a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense. (b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

Id. This law was originally enacted in 1956. Act of Aug. 10, 1956, ch. 1041, 70A Stat. 74. Under it, gays were barred outright from the military and prosecuted if found to have committed sodomy. Of course, many gays served without disclosing to anyone that they were gay. Thus, "Don't Ask, Don't Tell" did not really change the law and actually has proved to be extremely dangerous for the men and women serving who identify as, or are suspected of being, gay.

9 Jeffrey Schmalz, *A Delicate Balance: The Gay Vote; Gay Rights and AIDS Emerging As Divisive Issues in Campaign*, N.Y. TIMES, Aug. 20, 1992, at A1.

10 The President's News Conference: Gays in the Military, 29 WEEKLY COMP. PRES. DOC. 108, 109 (Jan. 29, 1993).

11 *Id.* To determine the best way to go about allowing gays in the military, Clinton ordered the Department of Defense and a private research group to each conduct a study. *Id.* Both studies determined that total inclusion of out gays would be detrimental to the military. The study conducted by the Department of Defense firmly concluded that "all homosexuality is incompatible with military service." OFFICE OF THE SEC'Y OF DEF., SUMMARY REPORT OF THE MILITARY WORKING GROUP 7 (1993). The Military Working Group's (MWG) report included several findings of note. First, it found that there is "no right to serve" in the military and that "(u)ltimately, the military's mission is to fight and win the nation's wars." *Id.* at 1. Second, combat effectiveness would be greatly harmed by the inclusion of gays because their presence would invade heterosexual soldiers' privacy, polarize and fragment units, and effectively destroy the bonding that is essential to effective combat. *Id.* at 5-6. Further, the MWG found that since the homosexual lifestyle has been "clearly documented as being unhealthy," having active homosexuals in the military could "bring an increased incidence of sexually transmitted diseases." *Id.* at 6. The MWG also predicted that inclusion of homosexuals would create problems with recruitment and retention,

vicemen and women will only be discharged if they engage in homosexual conduct. Second, they will not be asked about their sexual orientation. Finally, if servicemembers make a statement disclosing their homosexuality or engage in conduct reflective of their homosexuality, they will be discharged.[12] "Don't Ask, Don't

---

since the military image would be "tarnished in the eyes of much of the population" from which the military recruits. *Id.* at 7.

Meanwhile, the Senate was holding debates and taking testimony in preparation for the President's proposed legislation. 139 CONG. REC. S7603 (daily ed. June 22, 1993), *available at* http://dont.stanford.edu/regulations/HomosexualityDebate.html. The Senate Committee's conclusions closely mirrored those of the Military Working Group. It too asserted that "homosexuality is incompatible with military life, for practical reasons and for experiential reasons," and that unit cohesion would be greatly compromised by the admission of homosexuals. *Id.* The Senate Committee made it clear that "it is foolish to think that gays will not be attracted to men sometime[s]." *Id.* at S7604. In fact, it outlined all of the possible problems that it foresaw with allowing gays in the military, from discomfort in the shower (assuming, of course, that the gay person will be comfortable showering in front of heterosexuals), to sleeping arrangements (assuming that gays will sleep soundly instead of fearing for their safety), and how the "close quarters" of a ship or other confined space could prove to be too much for a gay soldier to restrain his sexual desire. *Id.* at S7604-05. The Senate Committee then turned to religion. "Homosexuality is against many religions, the act of sodomy, against the principles of many religions . . . and if the Army openly allowed homosexuals in their ranks, that would damage our public interests." *Id.* at S7606. It stressed that the most successful recruitment rates were from areas of the country where these religious traditions were strong. *Id.* Therefore, including homosexuals in the military could lead to falling recruitment rates due to conflicts between the moral beliefs of gay and straight servicemembers. *Id.* Thus, there was overwhelming animus in the formation of "Don't Ask, Don't Tell" aside from the animus inherent in the statute.

[12] § 654.

> (b) POLICY.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations: (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that – (A) such conduct is a departure from the member's usual and customary behavior; (B) such conduct, under all the circumstances, is unlikely to recur; (C) such conduct was not accomplished by use of force, coercion, or intimidation; (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and (E) the member does not have a propensity or intent to engage in homosexual acts. (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. (3) That the mem-

Tell" essentially gives gay servicemembers the "choice" of remaining in the closet or risking discharge for homosexual conduct.[13] It is the only law in the United States that blatantly authorizes firing someone for his or her sexual orientation.[14]

The results of "Don't Ask, Don't Tell" have been drastic and have led to increased rates of discharge, sexual harassment, assaults, and even murder.[15] The most recent deadly attack occurred at Fort Campbell in Kentucky and highlights the destructive effects of the suspicion and secrecy resulting from "Don't Ask, Don't Tell." On July 5, 1999, fellow soldiers of Barry Winchell, a Private in the 101st Airborne Division, murdered him in his sleep because they suspected he was gay.[16] The Department of Defense reported that 80% of servicemembers have heard derogatory anti-gay remarks in 2003, and 37% said that they witnessed or experienced targeted incidents of anti-gay harassment.[17] Further, since the law was codified, discharge rates under "Don't Ask, Don't Tell" have continued to rise from 617 in 1994 to 1273 in 2001.[18] In fact, the U.S. armed forces have discharged over 10,000 servicemembers due to "Don't Ask, Don't Tell" since its enactment, costing the Department of Defense approximately $281 million dollars.[19]

Finally, the regulations that accompany "Don't Ask, Don't Tell" are so harsh that many activists call them "witch hunts."[20] They are essentially guidelines for determining whether soldiers are homosexual and explaining how to discharge them if they are found to be gay.[21] Several memoranda within the Department of

---

ber has married or attempted to marry a person known to be of the same biological sex.

Id.

13 *Id.*

14 *See* SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE TENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" 13 (2004).

15 *See generally id.*

16 Servicemembers Legal Def. Network, Historical Timeline of "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" (2004), http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1451.pdf.

17 SERVICEMEMBERS LEGAL DEF. NETWORK, *supra* note 14, at 7.

18 *Id.* at 1.

19 *Id.* at 2 (see graph).

20 *Id.*

21 DEP'T OF DEF. DIRECTIVE NO. 1332.14, ENLISTED ADMINISTRATIVE SEPARATIONS 68 (1993). The Guidelines for Fact-Finding Inquiries into Homosexual Conduct, found at Attachment 4 to Enclosure 3 (E3.A4.3), give the following "Bases for Conducting Inquiries:"

1. A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information

Defense have further outlined how the servicemembers' commander is supposed to go about investigating sexuality. One such memo from Richard A. Peterson, Deputy Chief of the Judge Advocate General's (JAG) General Law Division, instructed investigators to question "parents, siblings, school counselors, and close friends of suspected gay servicemembers."[22] As if the regulations were not degrading enough, they conclude by stating that after being suspected of being homosexual, "the Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."[23] This effectively shifts the burden to the servicemember to prove that he or she is "innocent."

---

exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspicion.

2. A basis for discharge exists if: (a) The member has engaged in a homosexual act; (b) The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or (c) The member has married or attempted to marry a person of the same sex.

3. Credible information does not exist, for example, when: (a) The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, to support that suspicion; or (b) The only information is the opinions of others that a member is homosexual; or (c) The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or (d) The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

4. Credible information exists, for example, when: (a) A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or (b) A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity to engage in homosexual acts; or (c) A reliable person states that he or she observed behavior that amounts to a nonverbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

Id. (internal numbering simplified).

[22] Servicemembers Legal Def. Network, *supra* note 16.

[23] DEP'T OF DEF. DIRECTIVE NO. 1332.14, *supra* note 21, at 71. The relevant section is E3.A4.4.6.

B. Law Schools Object to Discrimination

Law school members of FAIR did not want military recruiters on their campuses for two reasons. First, the military's "Don't Ask, Don't Tell" policy discriminates against gays. Second, law schools that are members of the AALS have a policy of excluding employers that cannot commit to hiring their students on a non-discriminatory basis.[24] The issue in *FAIR* was not that the law schools wanted to change the discriminatory policies of the military. Rather, the law schools simply argued that the military's "Don't Ask, Don't Tell" policy forced them to house military recruiters in violation of their AALS non-discrimination policies and thus violated their First Amendment rights to expressive association.[25]

To become a member of the AALS, each law school must pay a membership fee and show that it is able to comply with the requirements of membership.[26] The current core values of membership include scholarship, academic freedom, diversity of viewpoints, and the selection of a student body based on intellectual ability and personal potential "through a fair and non-discriminatory process designed to produce a diverse student body and a broadly rep-

---

24 *See* ASS'N OF AM. LAW SCH., *supra* note 5, at 33-4 (AALS Bylaws § 6-3).

25 FAIR v. Rumsfeld, 390 F.3d 219, 230 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

26 ASS'N OF AM. LAW SCH., *supra* note 5, at 26 (AALS Bylaws § 2-2).

> (a) Applications for membership shall be addressed to the Executive Director accompanied by evidence that the applicant has fulfilled and is capable in the future of fulfilling the obligations of membership as reflected in these bylaws (including the requirements and approved policies they embody), and the regulations promulgating thereunder. The Executive Committee shall examine the application and report at the Annual Meeting of the Association whether or not the applicant has qualified. The application for membership shall be filed at the time and in the form specified by the Executive Committee. (b) In determining whether a school fulfills and can continue to fulfill the obligations of membership, the controlling issue is the overall quality of the school measured against the standards of quality articulated in the Requirements of Article 6. The statements of Approved Association Policy and the Regulations are designed to provide guidance in making this assessment. They are not meant to be taken as implying that formal compliance with their specific terms is necessarily equivalent to satisfaction of the qualitative requirements, or that departure from any of their specific terms is automatically demonstrative of qualitative failure. (c) A law school making application for membership shall pay to the Association an application fee to defray the indirect expenses of the Association in an amount established by the Executive Committee and such direct expenses incurred in connection with the application as are specified by the Executive Committee.

Id.

resentative legal profession."[27]

Most pertinent to this case is the AALS's strict non-discrimination policy regarding admission and treatment of both students and graduates in creating an equal opportunity to obtain employment. All AALS member schools must ensure that their students will not be discriminated against by employers on the basis of race, color, religion, national origin, sex, age, disability, or sexual orientation.[28] The AALS non-discrimination bylaws further state: "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."[29] To ensure law schools comply with this agreement, the AALS requires employers that recruit at law schools to provide a written agreement that they do not discriminate on the basis of any of the grounds prohibited by the AALS.[30]

---

[27] *Id.* at 33 (AALS Bylaws § 6-1).

> (b) The Association values and expects its member schools to value: (i) a faculty composed primarily of full-time teachers/scholars who constitute a self-governing intellectual community engaged in the creation and dissemination of knowledge about law, legal processes, and legal systems, and who are devoted to fostering justice and public service in the legal community; (ii) scholarship, academic freedom, and diversity of viewpoints; (iii) a rigorous academic program built upon strong teaching in the context of a dynamic curriculum that is both broad and deep; (iv) a diverse faculty and staff hired, promoted, and retained based on meeting and supporting high standards of teaching and scholarship and in accordance with principles of non-discrimination; and (v) selection of students based upon intellectual ability and personal potential for success in the study and practice of law, though a fair and non-discriminatory process designed to produce a diverse student body and a broadly representative legal profession.

Id.

[28] *Id.* at 34 (AALS Bylaws § 6-3(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, disability, or sexual orientation." *Id.* The AALS elected to include sexual orientation as a protected class in its non-discrimination policies in 1990 by a unanimous vote of its House of Representatives. Brief for the Association of American Law Schools as Amicus Curiae Supporting Respondents at 4–5, Rumsfeld v. FAIR, 126 S. Ct. 1297 (2006) (No. 04-1152) [hereinafter AALS Amicus Brief]. This decision stemmed from student activism that began in the 1970s and law schools' resulting expansion of protection on the basis of sexual orientation. *Id.* at 5-6.

[29] Ass'n of Am. Law Sch., *supra* note 5, at 34 (AALS Bylaws § 6-3).

[30] Association of American Law Schools, Regulation 6.19, *available at* http://www.law.georgetown.edu/solomon/reg.html.

> 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

The AALS currently has 166 members, meaning virtually every law school in the country includes sexual orientation as a protected class in its non-discrimination policies.[31] Further, the AALS has strongly opposed military recruitment on law school campuses because of the military's administrative ban on homosexual servicemembers.[32] The AALS initially barred military recruiters from recruiting on law school campuses. This action provoked a backlash from many conservative members of Congress and led to passage of the Solomon Amendment.[33] Thus, when Congress enacted the Solomon Amendment, law schools were forced to choose between complying with the policy of the AALS by not allowing military recruiters on their campuses and risking the loss of federal funding or complying with the Solomon Amendment and risking disassociation with the AALS.

C. *The Solomon Amendment: Congress Strikes Back*

The Solomon Amendment penalizes institutions of higher education for not providing military recruiters[34] with access that is

---

> 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).

Id.

31 ASS'N OF AM. LAW SCH., *supra* note 5, at 1 (out of 187 ABA-accredited law schools nationwide, 166 are AALS members). Twenty-five additional schools pay fees but are not formally admitted members. *See* AALS Member Schools, http://www.aals.org/about_memberschools.php (last visited Oct. 25, 2006).

32 AALS Amicus Brief, *supra* note 28, at 6–7.

33 CHAI RACHEL FELDBLUM & MICHAEL BOUCAI, DUE JUSTICE: AMELIORATION FOR LAW SCHOOL COMPLIANCE WITH THE SOLOMON AMENDMENT, A HANDBOOK FOR LAW SCHOOLS 4–5 (2003), *available at* http://www.law.georgetown.edu/Solomon/documents/handbook.pdf.

34 There is a specific type of military recruiting in law schools. Military recruitment of law students is for service in the Judge Advocate General Corps (JAG Corps), the military's judicial system. Men and women enlisted in JAG Corps practice military law, criminal prosecution, and international law. Judge Advocate General Corps, http://jagcnet.army.mil/ (last visited Sept. 20, 2006). The service obligation for JAG Corps is at least three years, unless the servicemember received a Reserve Officers' Training Corps (ROTC) scholarship, in which case the service obligation is at least four years. The U.S. Army Judge Advocate General's Corps Frequently Asked Questions, http://jagcnet.army.mil/ (follow "JAGC Recruiting (JARO)" hyperlink; then follow "Frequently Asked Questions") (last visited Sept. 20, 2006). In addition, applicants must be United States citizens between the ages of 21 and 42, must be physically fit and meet the Army weight standards, and must also "possess a high moral character and leadership potential," as well as other admission requirements for military service such as compliance with the military's "Don't Ask, Don't Tell" policy. *Id.* Fi-

"equal in quality and scope" to that which other employers are provided by discontinuing all federal funding from the Central Intelligence Agency; the National Nuclear Security Administration of the Department of Energy; and the Departments of Defense, Education, Health and Human Services, Homeland Security, Labor, and Transportation; and under the Related Agencies Appropriations Act.[35]

The Solomon Amendment was a response to the decisions of many educational institutions to exclude military recruiters from their campuses in the early nineties because of the military's historical commitment to institutionalized homophobia. Only twenty days after the highly politicized New York Court of Appeals decision in *Lloyd v. Grella*,[36] U.S. Representative Gerald Solomon[37] introduced the Solomon Amendment to the 1995 National Defense Authorization Act.[38] In the debates on the House floor that followed, it was clear that the bill stemmed from a perceived, rather than actual, negative effect of universities' non-discrimination policies on military recruitment.[39] More specifically, the bill was

---

nally, before entering active duty, each officer must be a graduate of an ABA-approved law school and a member in good standing of the bar. *Id.*

35 10 U.S.C. § 983 (2000).

36 634 N.E.2d 171 (N.Y. 1994). In *Lloyd v. Grella*, the Court of Appeals held that a New York school board's resolution to bar any employers, including the military, who discriminate on the basis of sexual orientation was enforceable and did not conflict with New York State legislation that requires schools to provide access to military recruiters on the same basis as other employers. *Id.* at 175.

37 Gerald Solomon was a "hot-tempered former Marine who was a leading conservative voice in the U.S. House of Representatives for two decades before retiring in 1998." Will Dunham, *Former Rep. Solomon, Ardent Conservative, Dies*, Reuters, Oct. 27, 2001. Representative Solomon was also well-known for being the chief sponsor of an unsuccessful amendment to the U.S. Constitution to prohibit the burning of the American flag. *Id.* After his death in 2001, U.S. Senators Charles E. Schumer and Hillary Rodham Clinton, both from New York, introduced a Senate resolution, which was approved, to rename the Saratoga National Cemetery after Representative Solomon. Press Release, Office of Senator Charles E. Schumer, Senate Passes Resolution to Honor Former Representative Gerald Solomon (Dec. 21, 2001), *available at* http://schumer.senate.gov/SchumerWebsite/pressroom/press_release. This was only the third time that a national burial site has been named after an individual, the other two being named after President Abraham Lincoln in Illinois and President Zachary Taylor in Kentucky. *Id.* In light of the case at hand, it also seems important to mention that Solomon was the founder of the Gerald B. H. Solomon Freedom Foundation, a charitable organization that gives scholarships to top-ranking Boy and Girl Scouts who wish to attend college. Legislative Bulletin, Republican Study Committee (Mar. 5, 2002), http://www.house.gov/burton/RSC.

38 Pub. L. No. 103-337 § 558, 108 Stat. 2663, 2776 (1994).

39 *See* FAIR v. Rumsfeld, 390 F.3d 219, 235, 245 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006). Statutory mandates to welcome military recruiters are not new to higher education. Congress enacted legislation in the 1970s that prohibited the use of federal funding for institutions of higher education institutions that had policies barring

spawned by a distaste for educational institutions involved in activism.[40] In his introductory statements, Representative Solomon made it clear that he was personally offended by the military bans, especially those in his home state, and that he felt his amendment was a solution to the problem.[41] He concluded: "We can begin today by telling 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 rights [sic]. But do not expect Federal dollars to support your interference with our military recruiters."[42] Richard Pombo, the bill's co-sponsor, infamously stated:

> [T]hese colleges and universities need to know that their starry-eyed idealism comes with a price. If they are too good—or too righteous—to treat our Nation's military with the respect it deserves . . . then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America . . . . I urge my colleagues to support the Solomon amendment, and send a message over the wall of the ivory tower of higher education.[43]

Several representatives responded negatively. One Representative stated, "The beauty of . . . our political system is . . . to provide people with that kind of freedom, that ability on the basis of conscience to take a stance that may be contradictory to what is a Federal policy at a given time. That is what we are promoting all over the world; it is called democracy."[44] Surprisingly, the Department of Defense was also opposed to the Solomon Amendment when it was first enacted.[45] Representative Schroeder made it clear

---

military recruiters from campus. Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972); *see also* 140 CONG. REC. H3862 (1994) (statement of Rep. McNulty). These laws were a strategic way of balancing President Nixon's decision to end the draft and transfer the military into an all-volunteer force. The President's Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1369, 1372 (July 19, 1993). The Department of Defense had feared that without an aggressive recruiting campaign, a volunteer military would not be strong enough in times of war. *Id.*

40 140 CONG. REC. H3863 (1994) (statement of Rep. Rohrabacher).

41 *Id.* at H3861 (statement of Rep. Solomon).

42 *Id.*

43 *Id.* at H3863 (statement of Rep. Pombo).

44 *Id.* at H3862 (statement of Rep. Dellums).

45 *Id.* at H3864 (statement of Rep. Solomon). It is important to note that the Department of Defense did not argue that the Solomon Amendment would present a problem with recruitment at the time the legislation was proposed, even though that was one of their strongest arguments in *FAIR*. *Id.* at H3863 (statement of Rep. Underwood); *see also* Rumsfeld v. FAIR, 126 S. Ct. 1297, 1311 (2006). To clarify the issue of recruitment of legal service in the military, while Judge Advocates can be assigned to

that the Department of Defense opposed the Amendment because its enforcement would require a level of effort for which the Department was not staffed, and it would jeopardize the military's research efforts by denying funding to university research specifically designated to advance military technological development.[46] The denial of those research funds would actually cost the federal government "hundreds of millions of dollars in lost technological research."[47] Finally, the Department of Defense opposed the Solomon Amendment because existing legislation[48] already allowed the Department to discontinue funding to educational institutions that deny military recruiters for non-discrimination reasons, the key difference being that the Department could make an exception if discontinuing funding would harm military research.[49]

Nonetheless, the Amendment was approved by a vote of 271 to 126[50] and went into effect in 1996.[51] Since then, the law has been amended several times. The original version only denied funding from the Department of Defense for schools that had policies preventing military recruiters' entry to campuses or access to students and student directory information.[52] In 1997, the law was

---

combat areas in times of war, they are rarely involved in combat and almost exclusively perform legal duties. The U.S. Army Judge Advocate General's Corps Frequently Asked Questions, *supra* note 34, at 4. Further, the JAG Corps does not currently have a deficit in recruitment and in fact, the JAG Corps selection process is very competitive. *Id.* A selection board of experienced Judge Advocates is responsible for reviewing all applications and then making recommendations of the best-qualified applicants for service. *Id.* at 2. Further, there are currently approximately only 1600 Judge Advocates. *Id.* at 1. Comparatively, in the year 2001 alone, there were 1273 servicemembers discharged due to "Don't Ask, Don't Tell." Servicemembers Legal Defense Network, *supra* note 16.

46 140 CONG. REC. at H3864 (statement of Rep. Schroeder).

47 *Id.*

48 Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972). This legislation, however, was rarely invoked. FAIR v. Rumsfeld, 390 F.3d 219, 226 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

49 140 CONG. REC. H3864 (statement of Rep. Schroeder).

50 *Id.* at H3865.

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

52 *Id.*

> (a) DENIAL OF FUNDS.—(1) No funds available to the Department of Defense may be provided by grant or contract to any institution of higher education that has a policy of denying, or which effectively prevents, the Secretary of Defense from obtaining for military recruiting purposes (A) entry to campuses or access to students on campuses; or (B) access to directory information pertaining to students. (2) Students referred to in paragraph (1) are individuals who are 17 years of age or older.

amended to expand the penalty from the loss of only Department of Defense money to funding from the Departments of Transportation, Labor, Health and Human Services, and Education.[53] In 1999, Department of Defense regulations were changed to penalize an entire university with the loss of Defense federal funding if only a "subelement" of the university had violated the Solomon Amendment, such as its law school.[54] This new regulation only applied to Department of Defense funding.[55] Congress amended the statute itself in 1999 by allowing for exceptions if the schools ceased the offensive policy or practice or if the institution had a longstanding tradition of pacifism that was based on historical religious affiliation.[56] Congress revised the Solomon Amendment a second time in 1999 to provide that it no longer applied to direct student aid.[57]

Id.

[53] Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208 § 514, 110 Stat. 3009-1, 3009-270 (1996).

> Denial of Funds for Preventing Military Recruiting on Campus—(b) None of the funds made available in this or any other Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act for any fiscal year may be provided by contract or by grant (including a grant of funds to be available for student aid) to a covered educational entity if the Secretary of Defense determines that the covered educational entity has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents – (1) entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of Federal military recruiting; or (2) access by military recruiters for purposes of Federal military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at the covered educational entity: (A) student names, addresses and telephone listings; and (B) if known, student ages, level of education, and majors.

Id.

[54] 32 C.F.R. § 216.3(b)(1) (2005).

[55] *Id.*

[56] National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65 § 549, 113 Stat. 512, 610 (1999) (codified in 10 U.S.C. § 983(c)).

> (c) EXCEPTIONS – the limitation established in subsection (a) or (b) shall not apply to a covered educational entity if the Secretary of Defense determines that – (1) the covered educational entity has ceased the policy or practice described in such subsection; or (2) the institution of higher education involved has a longstanding policy of pacifism based on historical religious affiliation.

Id.

[57] Pub. L. No. 106-79 § 8120, 113 Stat. 1214, 1260 (1999) (codified at 10 U.S.C. § 983(d)(2)).

> During the current fiscal year and hereafter, any Federal grant of funds to an institution of higher education to be available solely for student financial assistance or related administrative costs may be used for the purpose which the grant was made without regard to any provision to

Before 2001, universities and colleges permitted military recruiters access to their campuses in accordance with the Solomon Amendment, but many only allowed the military recruiters to conduct interviews in offices other than career services, such as the office of ROTC studies. Following the tragic events of September 11, 2001, however, the Department of Defense adopted an informal policy that required military recruiters to have access and treatment equal to that afforded to other employers.[58] The Department of Defense communicated this to schools it felt were in violation of the Solomon Amendment in warning letters.[59]

During the course of *FAIR*'s appeal, both of these informal regulations were codified in the 2005 Ronald W. Reagan National Defense Authorization Act.[60] Now, under the latest version of the Solomon Amendment, subelements (such as law schools) *and* their parent institutions are penalized for preventing military recruiters on their campuses "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer."[61] In addition, the latest version of the Solo-

---

> the contrary in [other Solomon Amendment provisions at either 10 U.S.C. § 503 or 10 U.S.C. § 983].

Id.

58 FAIR v. Rumsfeld, 390 F.3d 219, 227 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

59 *Id.* For example, Yale Law School received a letter from the Department of Defense's Acting Deputy Secretary that stated, among other things, that "DOD requires that there not be a substantial disparity in the treatment of military recruiters as compared to other potential employers." *Id.* Further, the letter intimated that failure to comply with the new informal policy would result in the entire University system losing all of its federal funding, as opposed to just the Department of Defense funding. *Id.*

60 Pub. L. No. 108-375 §552, 118 Stat. 1811, 1911 (2004) (codified at 10 U.S.C. § 983).

61 10 U.S.C. § 983(b)(1) (2000).

> (b) No funds described in subsection (d)(1) may be provided by contract or by a grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that the institution (or any subelement of that institution) has a policy or practice (regardless of when implemented) that either prohibits, or in effect prevents – (1) the Secretary of a military department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided in any other employer; or (2) access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution): (A) Names, addresses, and telephone listings. (B) Date and place of birth, levels of education, academic majors, de-

mon Amendment targets funding from a broader array of federal departments.[62] Thus, law schools are now required to provide equal treatment to recruiters as they would to any other employer, and the stakes for not doing so have been raised considerably.[63]

Based on the coercive effects of the Department of Defense's recent amendments to the Solomon Amendment, the AALS was forced to change its non-discrimination policy to create an exception for military recruitment in exchange for ameliorative efforts by the law schools.[64] The AALS made its opposition to the Solo-

---

grees received, and the most recent educational institution enrolled in by the student.

Id.

62 10 U.S.C. § 983(d) (2000).

(d) COVERED FUNDS—(1) Except as provided in paragraph (2), the limitations established in subsections (a) and (b) apply to the following: (A) Any funds made available for the Department of Defense. (B) Any funds made available for any department or agency for which regular appropriations are made in a Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act. (C) Any funds made available for the Department of Homeland Security. (D) Any funds made available for the National Nuclear Security Administration of the Department of Energy. (E) Any funds made available for the Department of Transportation. (F) Any funds made available for the Central Intelligence Agency. (2) Any Federal funding specified in paragraph (1) that is provided in an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance, may be used for the purpose for which the funding is provided.

Id.

63 *See* Memorandum from Robert C. Clark, *supra* note 1. Harvard Law School's policy change is a salient example of the dilemma faced by law schools as a result of the most recent amendment. The Law School itself only receives a minimal amount of federal funding, but its parent institution, Harvard University, receives approximately $323 million from the federal government, comprising 16% of its operating budget. *Id.* Therefore, after 1999, the Department of Defense regulations pursuant to the Solomon Amendment would penalize both Harvard Law School and Harvard University for failure to comply with the amendment, even if the Law School was the only subelement of the University to deny military recruitment on its campus.

64 Memorandum from Carl Monk, Executive Director of Association of American Law Schools on Military Recruiting at Law Schools to the Deans of Member and Fee-Paid Law Schools (Aug. 13, 1997), *available at* http://www.aals.org/deansmemos/97-46.html; *see also* Memorandum from Carl Monk on Executive Committee Policy Regarding Solomon Amendment to the Deans of Member and Fee-Paid Law Schools (Jan. 24, 2000), http://www.aals.org/deansmemos/00-2.html. The ameliorative efforts on the part of law schools require that every AALS member's students are informed each year that the military discriminates on a basis that is not permitted by either the school or the AALS's commitment to non-discrimination and that the military is only being allowed to conduct interviews because of the threat of loss of funds. *Id.* The AALS offers many suggestions of proactive ameliorative acts such as forums and panels to discuss the military's policy, support of student-led protests, and sending sexual minorities to Lesbian, Gay, Bisexual and Transgendered (LGBT)-specific

mon Amendment clear once again when it submitted an *amicus* brief to the Supreme Court in support of FAIR.[65] In that case, the law schools asserted that the Solomon Amendment violated their right to expressive association, their freedom from government-compelled speech, and their right to expressive conduct. The Supreme Court did not agree.

II. THE CASE: FROM THE DISTRICT COURT TO THE SUPREME COURT

In their complaint filed September 2003 in the United States District Court of New Jersey, the named plaintiffs—FAIR;[66] the So-

networking events. *Id.* The AALS then evaluates the ameliorative acts taken by each law school and balances them with the school's other efforts to support a hospitable environment such as whether there is an LGBT student organization or there are openly lesbian and gay faculty and staff present. *Id.* Further, the ameliorative efforts also require that law schools show that they did not simply perform *ad hoc* activities, rely on the students to supply *student-driven* activities, or only perform *pro forma* activities that would be unlikely to have a significant impact on the environment of the law school. *Id.* (emphasis in original). It should be noted that this is a clear-cut way in which the Solomon Amendment has interfered with the message of law schools as well as the law schools' policies. See FELDBLUM & BOUCAI, *supra* note 33, at 7.

65 AALS Amicus Brief, *supra* note 28, at 1.

> Only rarely does the AALS seek to become involved in litigation as amicus curiae, and then only in matters involving issues with far-reaching impact on fundamental aspects of legal education. The issue presented in this case is, without question, such an issue. AALS is deeply troubled by the provisions of federal law challenged here, which conflict with the core values of AALS policy and the nondiscrimination obligations of AALS member law schools.

Id.

66 FAIR is an association of law schools, law faculties, and other academic institutions who vote by majority to join. FAIR's mission is "to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education." FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 275 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006). FAIR's membership was initially kept secret for fear of retaliation by the military, but currently, twenty-four of its members are willing to be publicly named. They are George Washington University Law School, Golden Gate University School of Law, New York Law School, New York University School of Law, Vermont Law School; the united faculties of Stanford Law School and Washington University School of Law; and the faculties of the Capital University Law School, Chicago-Kent College of Law, City University of New York (CUNY) Law School, DePaul University College of Law, University of the District of Colombia David A. Clarke School of Law, Fordham University School of Law, Georgetown University Law Center, Hofstra University School of Law, John Marshall School of Law, University of Minnesota Law School, Pace University School of Law, University of Puerto Rico School of Law, Roger Williams University Ralph R. Papitto School of Law, University of San Francisco School of Law, Suffolk University Law School, and Whittier Law School. SolomonResponse.Org, FAIR Participating Law Schools, http://www.law.georgetown.edu/solomon/participating_schools.html (last visited Sept. 13, 2006).

ciety for American Law Teachers, Inc. (SALT);[67] law Professors Erwin Chemerinsky[68] and Sylvia Law;[69] and law students Pam Nickisher, Leslie Fischer, Ph.D., and Michael Blauschild[70]—asked the court to enjoin enforcement of the Solomon Amendment, which, they asserted, violated their First Amendment rights to expressive association, expressive conduct, and their freedom from compelled speech. The defendants in the case were the Department of Defense, which implements the Solomon Amendment, and those federal departments that distributed billions of dollars of funding each year to institutions of higher education covered by the Amendment.[71]

The district court denied plaintiffs' motion for a preliminary injunction,[72] finding that the plaintiffs did not demonstrate a reasonable likelihood of success on their claims that the Solomon Amendment infringed on their First Amendment right to expressive association and impermissibly compelled their speech.[73] On

---

67 *FAIR*, 291 F. Supp. 2d at 275. SALT is a New York corporation with almost 900 law faculty members committed "to making the legal profession more inclusive and to extending the power of the law to underserved individuals and communities." *Id.*

68 *Id.* at 275-76. Erwin Chemerinsky is a law professor at the Duke University Law School.

69 *Id.* at 276. Sylvia Law is a law professor at New York University Law School.

70 *Id.* All three were students attending Rutgers University School of Law at the time the suit was filed.

71 *Id.* at 276. The defendants were: Donald Rumsfeld as head of the Department of Defense in his capacity as the United States Secretary of Defense, Rod Paige as head of the Department of Education in his capacity as the United States Secretary of Education, Elaine Chao as head of the Department of Labor in her capacity as the United States Secretary of Labor, Tommy Thompson as head of the Department of Health and Human Services in his capacity as the United States Secretary of Health and Human Services, Norman Mineta as the head of the Department of Transportation in his capacity as the United States Secretary of Transportation, and Tom Ridge as the head of the Department of Homeland Security in his capacity as the United States Secretary of Homeland Security. A number of these defendants are no longer serving in these offices. The White House, President Bush's Cabinet, http://www.whitehouse.gov/government/cabinet.html (last visited Nov. 8, 2006).

72 *FAIR*, 291 F. Supp. 2d at 275. To obtain a preliminary injunction, the plaintiff must establish "(1) a reasonable likelihood of success on the merits, (2) irreparable harm absent the injunction, (3) that the harm absent the injunction outweighs the harm to the Government of granting it, and (4) that the injunction serves the public interest." FAIR v. Rumsfeld, 390 F.3d 219, 228 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006) (citing Tenafly Eruv Ass'n v. Borough of Tenafly, 309 F.3d 144, 157 (3d Cir. 2002)).

73 *FAIR*, 291 F. Supp. 2d at 275. FAIR's standing was contested by the government originally. *Id.* at 284. The main standing concern was that FAIR's membership had been kept secret due to fear of retaliation, but after several law schools were willing to be publicly named, the district court granted standing. *Id.* at 289. The court also held that the plaintiffs were unlikely to prevail on their other claims of viewpoint discrimination and unconstitutional vagueness, an issue that became moot when, dur-

appeal, the Third Circuit reversed on three grounds. First, it found that the law schools were "expressive associations" whose First Amendment right to disseminate their chosen message was impaired by being financially forced to include military recruiters on their campuses.[74] Second, it held that the law schools' right to free speech was violated when the schools were compelled to assist military recruiters.[75] Finally, it held that FAIR should also prevail under the less strict framework of the *O'Brien* expressive conduct test.[76] The following sections describe the district and circuit courts' differing approaches to the relevant doctrine.

A. The Dale *Test for Expressive Association*

Both courts analyzed FAIR's claim under the doctrine of expressive association, applying the three-part analysis from *Boy Scouts of America v. Dale*,[77] which considers whether the group making the claim is engaged in expressive association; whether the governmental action at issue significantly affected the group's ability to advocate public or private viewpoints; and whether the government's interest justifies the burden imposed on the group's associational expression.[78]

The district court recognized that a group only has to engage in some form of expression to be considered an expressive association; therefore, plaintiffs claiming a violation of the right to expressive association are essentially given the benefit of the doubt regarding the first prong of the *Dale* analysis.[79] It found that because the schools had adopted "official policies with respect to sexual orientation," they qualified as expressive associations.[80] The circuit court agreed that law schools are expressive associations.[81]

---

ing the appeal, the Department of Defense codified its vague informal policies so that law schools now have to assist military recruiters in a "manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer." *FAIR*, 390 F.3d at 228 (citing 10 U.S.C. § 983(b)).

74 *FAIR*, 390 F.3d at 230.

75 *Id.*

76 *Id.*

77 530 U.S. 640 (2000) (holding that an anti-discrimination law preventing the Boy Scouts Association from excluding an openly gay scout violated the Boy Scouts' First Amendment right to freedom of expressive association).

78 *FAIR*, 291 F. Supp. 2d at 231 (citing *Dale*, 530 U.S. at 648–68).

79 *Id.* at 303. This conclusion was based on the wide discretion afforded to the Boy Scouts in *Dale*.

80 *Id.* at 304.

81 *FAIR*, 390 F.3d at 231. Before discussing the merits of the case, the court discussed the applicability of the unconstitutional conditions doctrine, which FAIR raised in its brief. Put simply, under the unconstitutional conditions doctrine, the

However, the district and circuit courts differed in their applications of the second and third prongs of the *Dale* expressive association analysis: whether the governmental action at issue significantly affected the group's ability to advocate public or private viewpoints, and whether the government's interest justifies the burden imposed on the group's associational expression.

The district court reasoned that a state anti-discrimination law in *Dale* would have forced the Boy Scouts to accept a gay rights activist not just as a member, but as an assistant scoutmaster.[82] The Solomon Amendment, however, does not force law schools to make the military recruiters members; instead, they are merely "periodic visitors."[83] Further, the "ameliorative efforts" provision that the AALS adopted to combat the Solomon Amendment made it clear to members of the association that the military are not members of the law school; their message is not included in the association's message; and the association outright disagrees with the military.[84] Thus, the district court found that the government's actions did not significantly affect the group's ability to promote its viewpoint.

The circuit court did not agree and held that the Solomon Amendment significantly affected the law schools' ability to express their viewpoint that discrimination on the basis of sexual orientation is wrong.[85] It reasoned that in *Dale*, the Court interpreted "sig-

---

government "may not deny a benefit to a person on a basis that infringes on his constitutionally protected interests—especially his interest in freedom of speech." *Id.* at 229 (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972)). Thus, the government cannot create a penalty "to produce a result which [it] could not command directly." *Id.* (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958); citing Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819 (1995); FCC v. League of Women Voters, 468 U.S. 364 (1984)). The court noted that in this case, it was not dealing with a spending program as in *Rust v. Sullivan.* 500 U.S. 173 (1991) (holding that federal funding for a women's health program that specifically excluded facilities that performed abortions did not violate the First Amendment). *Id.* Rather, the case involved a penalty resulting in the loss of funds. *FAIR*, 390 F.3d at 229 n.9. The court also noted that neither party made the argument that there are two possible constructions of the Solomon Amendment. *Id.* at 229 n.8. If there had been such an argument, then the statute would be presumed constitutional. However, when there is only one interpretation of a statute proposed, there is no presumption of constitutionality, especially when the statute may infringe a party's First Amendment rights. *Id.* (citing ACORN v. City of Frontenac, 714 F.2d 813, 817 (8th Cir. 1983)). Based on this interpretation of the law, the Third Circuit held that if the Solomon Amendment was found to be a violation of the plaintiffs' First Amendment rights, it would be an unconstitutional condition. *Id.*

82 *FAIR*, 291 F. Supp. at 305.

83 *Id.*

84 *Id.* at 306.

85 *FAIR*, 390 F.3d at 231.

nificantly affected" to mean "the forced inclusion of an unwanted person in a group."[86] The court found that military recruiters were more than simply "periodic visitors" because the Solomon Amendment mandates that the law schools actively assist the recruiters in order to avoid financial penalty.[87] This active assistance includes publishing and posting announcements of recruiting sessions as well as oral descriptions of the employer.[88] The circuit court also held that the district court should have given deference to FAIR to determine what is a substantial impairment of their expression, as it did with the Boy Scouts in *Dale*.[89]

Because the circuit court found that the Solomon Amendment "substantially affects" the law schools' ability to express their viewpoint, it found that the government's interest did not justify the burden imposed on the group's associational expression under the *Dale* strict scrutiny analysis.[90] The court presumed that the government had a compelling interest in the recruitment of talented military lawyers but held that the Solomon Amendment is tailored too broadly. The court reasoned that the military has many alternative means of recruitment, some of which might be more beneficial, citing as examples loan repayment programs or television and radio ads.[91] The court added that the government "failed to offer a shred of evidence that the Solomon Amendment materially enhances its stated goal"[92] and that the military might actually be harmed by the negativity around JAG recruitment at law schools due to the Amendment itself.[93] Thus, the court held that the means chosen were not narrowly tailored to achieve the government's compelling interest.[94]

B. Compelled Speech

The plaintiffs also argued that the Solomon Amendment unconstitutionally compelled their speech. The Supreme Court has found three categories of compelled speech to be unconstitutional:

---

86 *Id.*
87 *Id.*
88 *Id.* at 236–37.
89 *Id.* at 233 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 653 (2000)).
90 *Id.* at 235. Strict scrutiny requires that there is a compelling state interest and that the means chosen are narrowly tailored, meaning they are "carefully tailored to achieve those means." *Id.* at 234 (quoting Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989)).
91 *Id.*
92 *Id.*
93 *Id.*
94 *Id.*

government action that forces a private speaker to propagate a particular message chosen by a government;[95] government action that forces a private speaker to accommodate or include another private speaker's message;[96] and government action that forces an individual to subsidize or contribute to an organization that engages in speech the individual opposes.[97] FAIR argued that the Solomon Amendment requires compliance with all three of these forms of compelled speech.[98]

The district court, relying heavily on *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[99] found that there is nothing in the Solomon Amendment that requires law schools to speak on behalf of the military's recruiters, at least not in the "linguistic or verbal sense."[100] In *Hurley*, the Supreme Court held that a local anti-discrimination ordinance was unconstitutional as applied to forcing Boston's St. Patrick's Day parade to include a gay, lesbian, and bisexual (GLIB) contingent. The district court in *FAIR* reasoned that while in *Hurley* the GLIB organization's purpose was to march in the parade "in order to express as a message its members' pride as openly gay, lesbian, and bisexual individuals of Irish heritage,"[101] the military recruiters in FAIR are "not seeking access to campuses and students with the primary purpose of expressing the message that disapproval of openly gay conduct within the armed forces is morally correct or justifiable."[102] In addition, since law schools are able to disclaim the military's message as not their own, the court found that the Solomon Amendment does not compel speech.[103]

The circuit court, on the other hand, held that the Solomon Amendment compels law schools to propagate, accommodate, and subsidize the military's expressive message.[104] It found that recruiting is expression because oral and written communication are involved, such as "published and posted announcements of the

---

95 *Id.* at 236 (citing W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

96 *Id.* (citing Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 581 (1995); Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 12–16 (1986); and Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 258 (1974)).

97 *Id* (citing United States v. United Foods, Inc., 533 U.S. 405, 413 (2001)).

98 *Id.*

99 515 U.S. 557 (1995).

100 *FAIR*, 291 F. Supp. 2d at 306.

101 *Id.*

102 *Id.* at 307.

103 *Id.* at 309.

104 FAIR v. Rumsfeld, 390 F.3d 219, 240 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

recruiter's visit, published and oral descriptions of the employer and the jobs it is trying to fill, and the oral communication of an employer's recruiting reception and one-on-one interviews."[105] The circuit court found that even if the recruiters did not put forth an express message, their presence conveyed the message that "our organization is worth working for."[106] Rather, the law schools, not the government, should assess the value of the information presented[107] since "protection of speech is not limited to clear-cut propositions subject to assent or contradiction, but covers a broader sphere of expressive preference."[108] By mandating that law schools distribute newsletters and post notices for the recruiters, the court found that the Solomon Amendment requires law schools to "propagate the military's message."[109] Because schools have to arrange interviews and recruiting functions for the military recruiters, the Solomon Amendment forces law schools to accommodate the military's message.[110] Finally, since the Solomon Amendment effectively puts demands on the law schools' employees and resources, the schools are compelled to subsidize the military's message.[111]

Further, the circuit court took issue with the district court for its use of the disclaimer as a legitimate means of showing that the law schools do not obviously endorse the military's message, stating "the Solomon Amendment, as recently amended, does not appear to permit law schools to disclaim the military's message."[112] The court reasoned that there is no precedent in compelled speech doctrine that the making of a disclaimer lessens the constitutional violation,[113] and concluded that even if a school can make a dis-

---

105 *Id.* at 236–37.

106 *Id* (comparing military recruiting to soliciting and proselytizing, which are treated as expression).

107 *Id.* at 238 (quoting Cochran v. Veneman, 359 F.3d 263, 275 (3d Cir. 2004), *vacated,* 544 U.S. 1058 (2005)).

108 *Id.* (quoting Glickman v. Wileman Bros. & Elliot, Inc, 521 U.S. 457, 488–89 (1997)).

109 *Id.* at 240. The court compared this to the forced display of "Live Free Or Die" on the New Hampshire license plate in *Wooley v. Maynard,* 430 U.S. 705, 717 (1977); and the recitation of the pledge of allegiance in *West Va. Bd. of Educ. v. Barnette,* 319 U.S. 624, 642 (1943).

110 *Id.* The court compares this form of compelled speech to forced inclusion of gays in the parade in *Hurley.*

111 *Id.* For this, the court compared the Solomon Amendment to the mandatory assessments to support advertisements and political funds in *United States v. United Foods, Inc.,* 533 U.S. 405, 413 (2001).

112 *Id.*

113 *Id.* at 241 (citing Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 15 n.11 ("the presence of a disclaimer . . . does not suffice to eliminate the impermissible

claimer under the Solomon Amendment, it does not alleviate the compelled speech violation.[114]

C. *The* O'Brien *Test for Expressive Conduct*

Because the district court found that there was only an "incidental limitation" on the right to free expression, it applied the intermediate scrutiny test for expressive conduct as derived from *United States v. O'Brien* instead of the *Dale* strict scrutiny test.[115] The circuit court clarified the definition of expressive conduct as "some activity, though it is not speech proper and is not protected under other First Amendment grounds, [that] is crucial to public debate and warrants protection."[116] Expressive conduct is essentially an umbrella doctrine for protected First Amendment rights that do not fit into the other sections of the doctrine.[117] A government regulation impairing expressive conduct is justified "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[118]

Under this test, the district court concluded that the Solomon Amendment is within Congress's constitutional power to raise and support a military[119] and furthers the important governmental interest of ensuring the effectiveness of a volunteer military through intensive recruiting to obtain enlistments.[120] The court found that these interests were not only important, they were compelling.[121] Further, the district court determined that the governmental interest in raising and supporting a military is unrelated to the freedom of expression. It cited *O'Brien* to reject plaintiffs' claim that the

---

pressure . . . to respond to [compelled] speech"); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241, 255–58 (1974) (noting that there was no suggestion by the court that an ability to disclaim would have changed the fact that there was impermissible compelled speech); and *Wooley*, 430 U.S. at 722 (state law was still compelled speech even though there was nothing that precluded car owners from displaying their disagreement with the state motto)).

114 *Id.*

115 FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 312 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

116 *FAIR*, 390 F.3d at 243 (citing Texas v. Johnson, 491 U.S. 397, 404 (1989)).

117 *Id.* at 243-44.

118 *FAIR*, 291 F. Supp. 2d at 312 (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

119 U.S. CONST. art. I, § 8 cl. 12.

120 *FAIR*, 291 F. Supp. 2d at 312.

121 *Id.* at 313.

purpose behind the Solomon Amendment was the suppression of ideas, stating that it "is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[122] Finally, it found that the Amendment's incidental restriction on expression is "no greater than is essential . . . so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[123] The court then exclusively relied on the fact that recruitment is the chief method of connecting law students with employers.[124] The court also made it clear that law schools are not required to offer their campuses for military recruiters and are free to reject the federal funding.[125] Thus, the district court held that the Solomon Amendment does not unconstitutionally restrain the plaintiffs' First Amendment rights and denied the plaintiffs' motion for a preliminary injunction.[126]

The circuit court also applied the *O'Brien* intermediate scrutiny test for expressive conduct, but it found that the Solomon Amendment would not survive even a lower level of scrutiny if it were applicable.[127] The circuit court assumed, arguendo, that the district court was correct in finding that the Solomon Amendment was unrelated to the suppression of ideas and presumed that the United States had a vital interest in having a system for acquiring talented military lawyers.[128] However, the court noted that the government did not submit any evidence that the Solomon Amendment actually furthers a compelling government interest.[129] Instead, the military argued that the idea that inclusion of military recruiters furthers this interest is "self-evident" and based on "common sense."[130] The circuit court made it clear that there is no precedent of "common sense" to justify a violation of First Amendment rights, pointing out that the Department of Defense was initially opposed to the Solomon Amendment because its

---

122 *Id.* at 314 (citing *O'Brien*, 391 U.S. at 383).

123 *Id.* at 313 (citing United States v. Albertini, 472 U.S. 675, 689 (1985)).

124 *Id.*

125 *Id.*

126 *Id.* at 322.

127 FAIR v. Rumsfeld, 390 F.3d 219, 243–44 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006). Since the court already determined that the law schools are protected by the doctrines of expressive association and compelled speech, it noted that it simply applied this doctrine for the sake of completeness. *Id.*

128 *Id.* at 245.

129 *Id.*

130 *Id.*

"common sense" told them that this amendment would actually have the effect of harming military defense research.[131] For this reason, the court found that the Solomon Amendment did not pass constitutional muster even under the lower *O'Brien* standard.[132]

D. The Supreme Court Opinion

On March 6, 2006, the Supreme Court unanimously[133] reversed the Third Circuit and upheld the constitutionality of the Solomon Amendment.[134] In one of the first opinions by Chief Justice Roberts, the Court used an unprecedented analysis to reach its conclusion and left no part of the Third Circuit opinion intact. First, it determined whether the Solomon Amendment actually forces law schools to include military recruiters.[135] Then, the Court applied select First Amendment doctrine to the Solomon Amendment, but prefaced its analysis with a reminder of Congress's Article I power to "raise and support Armies" and to "provide and maintain a Navy."[136] It found that military recruiting does not compel speech and that law schools are free to speak out against the military's "Don't Ask, Don't Tell" policy.[137] Next, the Court distinguished the Solomon Amendment from expressive conduct doctrine and spared it from the *O'Brien* analysis.[138] In lieu of an expressive conduct analysis, it applied a more relaxed standard of review to the already lower standard presented by *O'Brien*.[139] Finally, the Court reasoned that the Solomon Amendment does not infringe on law schools' right to expressive association.[140]

Chief Justice Roberts opened the opinion by accepting the

---

131 *Id.* at 245–46.

132 *Id.* Dissenting Judge Aldisert had two main issues with the majority opinion. First, he argued that the government would win a basic balance of interest test because the interest of protecting the national security of the United States outweighed the law schools' interest in expressive association and academic freedom rights, citing the current conflicts in Iraq and Afghanistan. *Id.* at 254. Second, he argued that there is nothing expressive about the activity of recruiting on law school campuses because the military does not recruit with the purpose of spreading a message about gays; rather, it recruits to hire employees just like every other employer. *Id.* at 258.

133 126 S. Ct. 1297, 1313 (2006). Justice Alito took no part in the decision. *Id.*

134 *Id.*

135 *Id.* at 1305–06.

136 *Id.* at 1306 (quoting U.S. CONST., art. I, § 8, cl. 1, 12–13).

137 *Id.* at 1308–09.

138 *Id.* at 1310–11.

139 *Id.* at 1311.

140 *Id.* at 1312–13.

government's explanation for the adoption of the Solomon Amendment: "When law schools began restricting the access of military recruiters to their students because of disagreement with the Government's policy on homosexuals in the military, Congress responded by enacting the Solomon Amendment."[141] The Court used strong words to describe the Amendment by stating that it "*forces* institutions to choose between enforcing their nondiscrimination policy against military recruiters in this way and continuing to receive special federal funding."[142]

The Court painted a distorted picture of the Third Circuit's decision in its review of the procedural history. It stated that the Third Circuit first found that the Solomon Amendment violated the unconstitutional conditions doctrine because it forced law schools to choose between First Amendment rights or federal funding for its university, even though the Third Circuit did not rest its holding on the unconstitutional conditions doctrine.[143] The Supreme Court mentioned only one other reason the Third Circuit enjoined enforcement of the Solomon Amendment: it found *O'Brien* did not apply to the Solomon Amendment.[144] However, the Third Circuit applied *O'Brien* and found the Solomon Amendment unconstitutional even under the lower scrutiny of that test.[145] The Supreme Court did not mention the other portion of the reasoning the Third Circuit used to reach its conclusion, specifically, the doctrines of expressive association[146] and compelled speech.[147]

The first issue that the Court addressed is what the Solomon Amendment requires of law schools.[148] Perhaps the most perplexing aspect of this analysis is that the Court conceded that the government and FAIR agreed on the meaning of the statute:[149] The statute's meaning, plainly stated, is that "[i]n order for a law school and its university to receive federal funding, the law school must offer military recruiters the same access to its campus and students that it provides to the nonmilitary recruiter receiving the most

---

141 *Id.* at 1302.

142 *Id.* at 1303 (emphasis added).

143 *Id.* at 1304. *See* FAIR v. Rumsfeld, 390 F.3d 219, 229 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

144 *FAIR*, 126 S. Ct. at 1304.

145 *Id. See* FAIR v. Rumsfeld, 390 F.3d 219, 244–46 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

146 *See* FAIR, 390 F.3d at 236.

147 *See id.* at 240. Although the Court did not address these two doctrines in its review of the procedural history, it did address them in later sections of the opinion.

148 Rumsfeld v. FAIR, 126 S. Ct. at 1305.

149 *Id.* at 1304.

favorable access."[150] The Court concluded that the statute requires the Secretary of Defense to compare the military's "access to campuses" and "access to students" to "the access to campuses and to students that is provided to *any other employer*."[151] Because the congressional record clearly supported the interpretation that the Amendment focuses on the result of a school's recruiting policy rather than its content, the Court concluded that the government and FAIR correctly interpreted the meaning of the Solomon Amendment.[152]

Next, the Court analyzed the significance of judicial deference on military issues. The Court made it clear that the statute is an exercise of Congress's Article I power to "provide for the common defence" and to "raise and support Armies."[153] It argued that this case was about the "broad and sweeping" authority to require access to campuses for the purpose of military recruiting.[154] Relying on *Rostker v. Goldberg*,[155] the Court stated that although Congress can exceed its military authority and violate the First Amendment, the purpose of the legislation must be considered when determining its constitutionality.[156] Quoting *Rostker*, the Court stated that "judicial deference . . . is at its apogee" when Congress legislates under its authority to raise and support its armies.[157] While Congress could have legislated directly to mandate recruiting, the Court noted that Congress chose to impose military recruitment indirectly through its Spending Clause power.[158] It reasoned that "[t]he Solomon Amendment gives universities a choice: Either al-

150 *Id.* The Court questioned this interpretation based on several *amicus* briefs submitted by law professors. *Id.* at 1305. The Court pointed out that the *amici* it is referring to are Brief for William Alford et al. as Amici Curae Supporting Respondents, Rumsfeld v. FAIR, 126 S. Ct. 1297 (2006) (No. 04-1152); Brief for 56 Columbia Law School Faculty Members as Amici Curae Supporting Respondents, Rumsfeld v. FAIR, 126 S. Ct. 1297 (2006) (No. 04-1152). These *amici* argue that the Solomon Amendment allows for the exclusion of military recruiters so long as the school also excluded any other employer that violates its nondiscrimination policy. *Id.*

151 *Id.* at 1305 (emphasis in original).

152 *Id.* at 1306.

153 *Id.* (quoting U.S. CONST. art. I, § 8, cl. 1).

154 *Id.* (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

155 453 U.S. 57 (1981). In *Rostker*, the Court considered whether Military Selective Service Act violated the Due Process Clause of the Fifth Amendment because it excluded women from combat service. *Id.* at 59. The Court held that women and men were not similarly situated for the purposes of the draft and that, for this reason, Congress's decision to only require men to register did not violate the Fifth Amendment. *Id.* at 78–79.

156 *FAIR*, 126 S. Ct. at 1306.

157 *Id.* (quoting *Rostker*, 453 U.S. at 70).

158 *Id.*

low military recruiters the same access to students afforded any other recruiter or forgo certain federal funds."[159] Because Congress could have directly ordered the essence of the Solomon Amendment without conditioning it on funding, the Court reasoned that "Congress' power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds."[160] The Court cited *Grove City College v. Bell*[161] as precedent for recognizing that Congress can regulate more broadly when it provides the option to decline funding.[162] Without further analysis, the Court concluded that "[b]ecause the First Amendment would not prevent Congress from directly imposing the Solomon Amendment's access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds."[163] The Court cited the 1958 case of *Speiser v. Randall*[164] to show a funding condition cannot be unconstitutional if it could be directly imposed and remain constitutional.[165]

After addressing the unconstitutional conditions doctrine, the Court proceeded to the First Amendment analysis. In opening this section, the Court stated, "The Solomon Amendment neither limits what law schools may say nor requires them to say anything . . . the Solomon Amendment regulates conduct, not speech."[166] The Court then reviewed the opinion of the Third Circuit. It stated that the Third Circuit concluded that there were three ways in which the Solomon Amendment violated the First Amendment, but claimed it based its holding in part on a violation of the schools' right to expressive conduct, omitting entirely the Third

---

159 *Id.*

160 *Id.*

161 465 U.S. 555 (1984).

162 *Rumsfeld*, 126 S. Ct. at 1306 (citing *Grove City Coll.*, 465 U.S. at 575). The Court, in referencing *Grove City Coll.*, stated:

> [W]e rejected a private college's claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment. We thought this argument 'warrant[ed] only brief consideration' because 'Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. We concluded that no First Amendment violation had occurred—without reviewing the substance of the First Amendment claims—because Grove City could decline the government's funds."

Id. (citations omitted).

163 *Id.*

164 357 U.S. 513 (1958).

165 *FAIR*, 126 S. Ct. at 1307.

166 *Id.*

Circuit's holding on expressive association.[167]

In a subsection of the opinion, the Court distinguished the issue in *FAIR* from existing compelled speech precedent, dividing compelled speech doctrine into two categories. The first category encompassed cases in which an individual must personally speak the government's message,[168] such as *West Virginia State Board of Education v. Barnette*[169] and *Wooley v. Maynard*,[170] which held unconstitutional, respectively, a state law requiring schoolchildren to recite the Pledge of Allegiance while saluting the flag and a statute requiring New Hampshire motorists to display the state motto "Live Free or Die" on their license plates.[171] The Court concluded that what the Solomon Amendment requires of FAIR is a "far cry" from the compelled speech in *Barnett* and *Wooley*, reasoning that the Solomon Amendment does not dictate the content of the speech that is to be compelled. Rather, the Solomon Amendment may compel an element of speech, like sending e-mails and posting bulletins about JAG recruiting, which is "plainly incidental to the Solomon Amendment's regulation of conduct."[172] Quoting the 1949 case of *Giboney v. Empire Storage & Ice Co.*,[173] the Court reasoned that it is not a violation of free speech to make some sort of conduct illegal "merely because the conduct was in part initiated, evidenced, or carried out by means of language, either written, spoken, or printed."[174] The Court analogized to a law prohibiting employers from discriminating in employment on the basis of race, reasoning that such a law would only incidentally require the employer to remove a sign that read "White Applicants Only" and therefore would not compel the employer's speech.[175] The Court stated that by attempting to analogize the nature of the speech in *FAIR* to that in *Barnette* and *Wooley*, FAIR trivialized the freedoms in those cases.[176]

Continuing its compelled-speech analysis, the Court determined that the issue did not fall into a separate category of compelled speech cases that deal with the government's ability to

---

167 *Id.* The Court did address expressive association doctrine later in the opinion; *see Id.* at 1312-13.

168 *FAIR*, 126 S. Ct. at 1308.

169 319 U.S. 624 (1943).

170 430 U.S. 705 (1977).

171 *FAIR*, 126 S. Ct. at 1308.

172 *Id.*

173 336 U.S. 490 (1949).

174 *FAIR*, 126 S. Ct. at 1308 (quoting *Giboney*, 336 U.S. at 502).

175 *Id.*

176 *Id.*

"force one speaker to host or accommodate another speaker's message."[177] The Court suggested the cases of *Hurley v. Irish-American Gay Lesbian & Bisexual Group of Boston*,[178] *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[179] and *Miami Herald Publishing Co. v. Tornillo*[180] to support this distinction. However, the Court also distinguished *FAIR* from this line of precedent, concluding that "the compelled-speech violation in each of our prior cases . . . resulted from the fact that the complaining speaker's own message was affected by the speech it was forced to accommodate."[181] First, the Court reasoned that *Hurley*, which held that a state law forcing a parade to include lesbian and gay marchers violated the First Amendment, was fundamentally about the *expressive nature* of the parade and the right of a speaker to determine the content of his message.[182] Next, the Court argued that its holdings in *Miami Herald* and *Pacific Gas* covered cases where compelled speech interfered with the speakers' desired message by, respectively, compelling a newspaper to print a reply and allowing a utility company to include its newsletter in its billing envelopes.[183] The Supreme Court maintained, however, that accommodating the military's speech as the Solomon Amendment requires does not affect the law school's speech because the schools *are not speaking* when they host interviews and recruiting receptions.[184] The Court stated, "Unlike a parade organizer's choice of parade contingents, a law school's decision to allow recruiters on campus is not inherently expressive."[185] Further, "accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school."[186] The Court invoked *PruneYard Shopping Center v. Robbins*[187] to reject the law schools' argument that, as a result of the Solomon Amendment, they could be viewed as sending the message that they agree with the military's "Don't Ask, Don't Tell" policy.[188] The Court explained that, in *PruneYard*, it had upheld a

177 *Id.* at 1309.
178 515 U.S. 557 (1995).
179 475 U.S. 1 (1986) (plurality opinion).
180 418 U.S. 241 (1974).
181 *FAIR*, 126 S. Ct. at 1309.
182 *Id.*
183 *Id.*
184 *Id.*
185 *Id.* at 1309–10.
186 *Id.* at 1310.
187 447 U.S. 74 (1980).
188 *FAIR*, 126 S. Ct. at 1310.

state law that required a shopping center owner to allow "certain expressive activities by others on his property" because it was unlikely that the owner of the shopping center would be associated with those engaging in expressive activities; he was free to disassociate himself from those views.[189] The Court also cited *Board of Education of Westside Community Schools v. Mergens*,[190] which held that a federal law requiring high schools to allow student religious groups did not violate the Establishment Clause because the high school students could appreciate the difference between speech sponsored by the school and speech that the school must allow under law but to which it does not subscribe.[191] The Court reasoned that if high school students can tell the difference between their school's speech and students' speech, then "surely students have not lost that ability by the time they get to law school."[192] The Court concluded that because FAIR was not restricted from speaking out against the military's policies, the law schools could not claim that their message would be confused with the military's message.[193]

In the final section of the case, the Court considered the expressive conduct argument and briefly addressed expressive association. First, the Court noted that in deciding *O'Brien*, it did not hold that conduct can be labeled as protected "speech" whenever the person engaging in conduct is intending to express an idea.[194] Instead, in the subsequent decision of *Texas v. Johnson*,[195] the Court clarified that First Amendment protection only attaches to conduct that is "inherently expressive."[196] Applying this rule to *FAIR*, the Court reasoned, "The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it."[197]

The Court further argued that the Third Circuit erred when it held that the Solomon Amendment did not pass constitutional muster under *O'Brien* because the government failed to show how

189 *Id.* (quoting *PruneYard*, 447 U.S. at 88).

190 496 U.S. 226 (1990).

191 *Id.*

192 *FAIR*, 126 S. Ct. at 1310.

193 *Id.*

194 *FAIR*, 126 S. Ct. at 1310 (citing United States v. O'Brien, 391 U.S. 367, 376 (1968)).

195 491 U.S. 397, 403 (1989). In *Johnson*, the Court held that burning the American flag was inherently expressive in nature and thus, was protected by the First Amendment. *Id.* at 420.

196 *FAIR*, 126 S. Ct. at 1310.

197 *Id.* at 1311.

the Solomon Amendment was tailored in any way to further the government's interest.[198] Quoting *United States v. Albertini*,[199] the Court stated that "an incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[200] Thus, the Court effectively lowered the level of scrutiny from intermediate to rational-basis review by deeming the burden imposed by the Solomon Amendment to be "incidental." The Court determined that the Solomon Amendment satisfied this lower standard because there is a substantial government interest in raising and supporting the armed forces, and this objective would be achieved less effectively if the military could not recruit on the same terms as other employers.[201] The Court did not cite any proof that the military would operate less effectively, but rather stated, "It suffices that the means chosen by Congress add to the effectiveness of military recruitment."[202] Finally, the Court concluded that "even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under *O'Brien*."[203]

In the last few paragraphs of the opinion, the Court addressed the doctrine of expressive association. The Court first reviewed the holding in *Dale*.[204] Next, the Court stated, "The Solomon Amendment, however, does not similarly affect a law school's associational rights."[205] The Court's main distinction was that, unlike in *Dale*, the law schools are not forced to include the recruiters as part of their group.[206] Instead, it argued that the recruiters are by definition outsiders who come to campus with the limited purpose of hiring students.[207] Quoting *Dale*'s use of *Roberts v. United States*

198 *Id.*

199 472 U.S. 675 (1985).

200 *FAIR*, 126 S. Ct. at 1311 (quoting *Albertini*, 472 U.S. at 689).

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.* at 1312 (citing Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000)). *Dale* found a non-discrimination law unconstitutional because the Boy Scouts of America was an expressive association and forcing it to include an openly gay scoutmaster would significantly affect its ability to advocate its viewpoints; the state's interest did not justify the burden it imposed on the group's expressive association. *Dale*, 530 U.S. at 656.

205 *FAIR*, 126 S. Ct. at 1312.

206 *Id.*

207 *Id.*

Jaycees,[208] the Court said that a speaker cannot "erect a shield" against laws requiring access "simply by asserting" that mere association "would impair its message."[209] Further, the Court confirmed that the Solomon Amendment does not have a similar effect to the non-discrimination law in *Dale* because "[s]tudents and faculty are free to associate to voice their disapproval of the military's message . . . ."[210] Thus, the Court concluded that "[a] military recruiter's *mere presence* on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."[211]

For these reasons, the Court concluded that the Third Circuit incorrectly held the Solomon Amendment unconstitutional. It therefore reversed its judgment granting a preliminary injunction and remanded the case.[212]

III. Analysis: Pay No Attention to the Man Behind the Curtain

The Supreme Court's opinion in *FAIR*, one of the first opinions written by Chief Justice John Roberts, sounds good despite numerous flaws in the Court's reasoning and use of caselaw. It flows well and seems concise and logical—if the reader is not familiar with the applicable doctrine. Once one becomes acquainted with First Amendment doctrine, it becomes clear very quickly that the Court has quietly brushed aside important precedent and relied instead on irrelevant and dormant cases. In the end, rather than applaud the Court for its skilled legal reasoning, the reader should wonder why not even one single judge dissented in indignation. This final section of this Note will take a closer look at flaws in the Supreme Court's opinion in *FAIR*.

A. *Irrelevant and Outdated Caselaw*

In the beginning of its analysis, the Court discussed the "broad and sweeping" authority of Congress to raise and support the military, a power expressly granted by the Constitution.[213] In addition to *O'Brien*, the Court cited the 1981 case of *Rostker v. Goldberg*[214] to conclude that, while Congress is subject to constitutional limita-

208 468 U.S. 609 (1984).
209 *FAIR*, 126 S. Ct. at 1312 (quoting *Dale*, 530 U.S. at 653).
210 *Id.* at 1313.
211 *Id.* (emphasis added).
212 *Id.*
213 *Id.* at 1306 (citing United States v. O'Brien, 391 U.S. 367, 377 (1968)).
214 453 U.S. 57 (1981).

tions even with legislation involving the military, "the fact that legislation that raises armies is subject to the First Amendment constraints does not mean that we ignore the purpose of this legislation when determining its constitutionality."[215]

It is nothing less than misleading that the Court used *Rostker* for its analysis of First Amendment rights under Congress' military powers because *Rostker* did not address the First Amendment at all. In *Rostker*, the Supreme Court considered the issue of whether the Military Selective Service Act "violates the Fifth Amendment to the United States Constitution in authorizing the President to require the registration of males and not females."[216] The issue arose after President Carter briefly reinstated the draft in early 1980, but Congress only allocated enough funding to register males.[217] Justice Rehnquist, writing for the majority, held that even though Congress remains subject to the limitations of the Due Process Clause when acting in the area of military affairs, the statute was constitutional.[218] The Court reasoned that since women were not eligible for combat, not registering women for the draft was closely related to the government interest of efficiency.[219] While *Rostker* discussed Congress' power in relation to the Due Process Clause of the Fifth Amendment, it neither rested on First Amendment doctrine nor created First Amendment precedent.

Further, in the discussion of military power and funding conditions in *FAIR*, the Court also relied on *Grove City College v. Bell*,[220] which "rejected a private college's claim that conditioning federal funds on its compliance with Title IX of the Education Amendments of 1972 violated the First Amendment."[221] The *Grove City College* Court reasoned that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."[222] The *FAIR* Court used *Grove City College* to conclude that Congress' power to regulate military recruiting under the Solomon Amendment is arguably greater because "universities are free to decline the federal

---

215 *FAIR*, 126 S. Ct. at 1306. Further, the Court relies on *Rostker* for its claim that "judicial deference . . . is at its apogee" when Congress legislates under its constitutional authority to raise and support its armies." *Id.* (citing Rostker v. Goldberg, 453 U.S. 57, 70 (1981)).

216 *Rostker*, 453 U.S. at 59.

217 *Id.* at 60–61.

218 *Id.* at 67.

219 *Id.* at 78–79.

220 465 U.S. 555 (1984).

221 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1306 (2006).

222 *Id.* (quoting *Grove City Coll.*, 465 U.S. at 575–76).

funds."[223]

The use of *Grove City College* reflects the Court's disingenuous analysis and discount of the magnitude of the federal funding at stake for law schools and their parent institutions. In *Grove City College*, a private college refused to execute an Assurance of Compliance with Title IX,[224] which prohibits discrimination on the basis of sex in any education program or activity that receives federal financial assistance.[225] First, the Court asked whether Title IX applied to Grove City College since the college did not accept any direct assistance but enrolled students who received federal grants for education purposes.[226] The Court held that the financial assistance received by Grove City students was included in the government aid money under Title IX.[227]

Next, it asked whether federal financial assistance to students could be terminated because the College refused to assure compliance with Title IX.[228] In its analysis, the Court made clear that "the economic effect of student aid is far different from the effect of non-earmarked grants to institutions themselves since the former, unlike the latter, increases both an institution's resources and its obligations."[229] The Court ultimately concluded that the government may condition federal financial student assistance on the assurance that the institution will conduct the aid program or activity in accordance with Title IX.[230]

Third, the Court asked whether the application of Title IX to Grove City College infringed on the First Amendment rights of either the College or its students.[231] It is from this section that Chief Justice Roberts extracted the language used in *FAIR*. The First Amendment section of the analysis in *Grove City College* is only one paragraph long and the Court simply concluded that by requiring Grove City College to comply with Title IX as a condition for student assistance, the federal government did not impermissibly restrain the First Amendment rights of the College and its students.[232] Instead, the Court focused on the *reasonableness* of the

---

223 *Id.*
224 *Grove City Coll.*, 465 U.S. at 559.
225 20 U.S.C. § 1681(a) (2000).
226 *Grove City Coll.*, 465 U.S. at 558.
227 *Id.* at 563.
228 *Id.* at 558–59.
229 *Id.* at 573.
230 *Id.* at 575.
231 *Id.* at 575–76.
232 *Id.*

condition placed upon the College and its students.[233]

While the Court in *Grove City College* found that compliance with federal laws prohibiting discrimination on the basis of sex is a reasonable condition to attach to financial assistance,[234] the Court in *FAIR* did not even address the reasonableness of the Solomon Amendment's conditions.[235] The Amendment does not merely terminate financial aid funds when a school fails to comply with its terms, but rather discontinues *all federal funding* from the Departments of Defense, Labor, Health and Human Services, Education, Homeland Security, Transportation, the National Nuclear Security Administration, and the Central Intelligence Agency for *both the law school and its parent institution.*[236] This hardly leaves law schools with a choice of whether or not to comply with the Solomon Amendment if they wish to keep their doors open.[237] Thus, while *Grove City College* may permit federal funding to be conditioned on compliance with a commitment to nondiscrimination, it certainly did not allow for gross, disabling, and all-around *unreasonable* conditions such as those presented in *FAIR.*

The *FAIR* Court then quoted the 1949 case of *Giboney v. Empire Storage & Ice Co.*[238] in its discussion of compelled speech. The Court reasoned that the compelled speech to which the plaintiffs point is "plainly incidental" to the Solomon Amendment and its regulation of their conduct.[239] To support this assertion, it quoted *Giboney*: "It has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[240]

Giboney is about the power of a state to apply its anti-trade restraint law to labor union activities. Specifically, an ice and coal drivers' union sought better wage and working conditions for their

---

233 *Id.*

234 *Id.*

235 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1307 (2006) ("This case does not require us to determine when a condition placed on university funding goes beyond the 'reasonable' choice offered in *Grove City* . . . .").

236 10 U.S.C. § 983 (2000).

237 *See* Brief for the Respondent at 36, Rumsfeld v. FAIR, 126 S. Ct. 1297 (2006) (No. 04-1152). As an example of the detrimental effects of the Solomon Amendment, Harvard Law School would face minimal loss for lack of compliance because it does not use a great deal of federal funding. However, the parent institution, which is also penalized under the Amendment, would lose approximately $323 million from the federal government. Memorandum from Robert C. Clark, *supra* note 1.

238 336 U.S. 490 (1949).

239 *FAIR*, 126 S. Ct. at 1308.

240 *Id.* (quoting *Giboney*, 336 U.S. at 502).

unionized ice peddlers.[241] To achieve this, the union wanted the company, Empire, to agree to stop selling ice to non-union peddlers. Empire would not do this, and since 85% of its truck drivers were in the union, Empire lost about 85% of its business.[242] Empire obtained an injunction against picketing outside of its business, and the union brought an action against Empire claiming First and Fourteenth Amendment violations of freedom of speech. The Court found in favor of Empire because the state of Missouri's interest in enforcing its antitrust laws outweighed the union's interest in attempting to regulate trade.[243]

Giboney has very little to do with compelled speech. The use of this case to support the conclusion that the government-compelled speech caused by the Solomon Amendment is "plainly incidental" is not only unclear—because the case does not discuss compelled speech—but is also insincere because the case has very little precedential value on this subject.

Justice Roberts's next ruse was his use of *PruneYard Shopping Center v. Robbins*[244] to support the assertion that the law schools' compliance with the Solomon Amendment will not send the message that they agree with the military's "Don't Ask, Don't Tell" policy.[245] Roberts reasoned that the Court rejected a similar argument in *PruneYard*, where it upheld a law protecting "certain expressive activities" at a shopping center because there was little likelihood that the views of "those engaged in the expressive conduct would be identified with the owner" and that the shopping center's owner "remained free to disassociate himself from those views."[246]

PruneYard was a privately owned shopping center in California that had a policy to exclude anyone engaged "in any publicly expressive activity, including the circulating of petitions, that is not directly related to . . . commercial purposes."[247] The issue in this case was whether the owner could constitutionally exclude from his property a group of high school students who set up a card table, distributed pamphlets, and asked people to sign a petition opposing a United Nations resolution.[248] The Supreme Court affirmed

---

241 *Giboney*, 336 U.S. at 492.
242 *Id.* at 493.
243 *Id.* at 504.
244 447 U.S. 74 (1980).
245 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1310 (2006).
246 *Id.*
247 *PruneYard*, 447 U.S. at 77.
248 *Id.*

the California Supreme Court's decision that a "handful of additional orderly persons soliciting signatures . . . under reasonable regulations . . . would not markedly dilute defendant's property rights."[249]

The *PruneYard* Court distinguished *Barnette* and *Wooley*, the compelled speech cases that struck down laws requiring schoolchildren to recite the Pledge of Allegiance and New Hampshire motorists to display "Live Free or Die" on their license plates, respectively. Unlike in *Wooley*, the government in *PruneYard* was not requiring a message to be displayed on private property.[250] Because the state was not involved in the message, and because the views expressed were those of members of the public who could enter the property at any time, the Court reasoned that PruneYard could simply post signs in the area where the speakers and handbillers stood that separated PruneYard from their message.[251] The *PruneYard* Court distinguished *Barnette* because PruneYard was not compelled by the government to recite a political government message word-for-word with a signed acceptance, as in *Barnette*.[252] *PruneYard*'s holding fundamentally rested on the fact that the students, who were argued to have compelled the speech of the property owner, were not government actors. In *FAIR*, that is certainly not the case.

The Supreme Court's decision in *FAIR* ignored the subsequent precedent that discussed *PruneYard*. In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*,[253] for example, the Supreme Court held that when the California Public Utilities Commission ordered Pacific Gas to place a third party's newsletter in its billing envelopes, it unconstitutionally forced Pacific Gas to alter its speech.[254] What the *FAIR* Court did not disclose in its opinion is that *Pacific Gas* specifically distinguished *PruneYard* in its reasoning.[255] *Pacific Gas* observed that "notably absent from *PruneYard* was any concern that access to this area might affect the shopping center owner's exercise of his right to speak: the owner did not even allege that he objected to the content of the pamphlets; nor was the access right content-based."[256] The Court in *Pacific Gas*

---

249 *Id.* at 78.
250 *Id.* at 87.
251 *Id.*
252 *Id.* at 88.
253 475 U.S. 1 (1986).
254 *Id.* at 20–21.
255 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1309–10 (2006); *see Pacific Gas*, 475 U.S. at 12.
256 *Pacific Gas*, 475 U.S. at 12.

concluded that *PruneYard* does not undercut the proposition that forced associations that burden protected speech are impermissible.[257] The *FAIR* Court relied on *PruneYard* even though government speech wasn't at issue and the case has since been distinguished by others holding that forced associations violate the First Amendment.[258]

The Court further misapplied caselaw when it cited *United States v. Albertini*[259] to dispute the Third Circuit's conclusion that the government failed to establish that the Solomon Amendment's burden on speech is no greater than essential to further its interest in military recruiting.[260] Quoting *Albertini*, the Court in *FAIR* reasoned that "an incidental burden on speech is no greater than is essential and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."[261] While the facts of this case appear to make *Albertini* relevant because it deals with the First Amendment and the military, its application to *FAIR* is a stretch to say the least.

The First Amendment issue in *Albertini* was whether Albertini's presence and political protest at an Air Force base during an open house was protected by the First Amendment.[262] Nine years prior to the open house, Albertini received a written order from a commanding officer ordering him not to reenter the Air Force base under the authority of 18 U.S.C. § 1382[263] because he had obtained access to secret Air Force documents and destroyed these documents by pouring blood on them.[264] The Court held that Al-

---

257 *Id.*

258 *FAIR*, 126 S. Ct. at 1310; *see generally* PruneYard Shopping Ctr v. Robbins, 447 U.S. 74 (1980).

259 472 U.S. 675 (1985).

260 *FAIR*, 126 S. Ct. at 1311.

261 *Id.* (quoting *Albertini*, 472 U.S. at 689).

262 *Albertini*, 472 U.S. at 679. The respondent also made arguments under the Due Process clause and raised an issue regarding written permission to enter the military base. *Id.*

263 The statute provides that:

> [W]hoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard Reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or . . . whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer in command or charge thereof . . . shall be fined not more than $500 or imprisoned not more than six months, or both.

18 U.S.C. § 1382 (2000).

264 *Albertini*, 472 U.S. at 677.

bertini's First Amendment rights had not been violated for two reasons. First, he was distinguished from the general public during the open house, having previously been barred from the base.[265] Second, the military satisfied the *O'Brien* test by showing that there was an important government interest in ensuring the security of military installations.[266]

While the Court in *Albertini* applied the *O'Brien* test and weighed in favor of the military, there are several key reasons why it did so and why *Albertini* is vastly different from *FAIR*. First, the *Albertini* Court made it clear that the critical fact of the case was that Albertini had previously destroyed military documents and was entering the same military base again after being ordered not to do so. The Court reasoned that "there is no generalized constitutional right to make political speeches or distribute leaflets on military bases, even if they are generally open to the public."[267] Further, the content-neutral analysis rested on the fact that 18 U.S.C. § 1382 "serves a significant Government interest by barring entry to a military base by persons whose previous conduct demonstrates that they are a threat to security."[268]

FAIR was significantly different from *Albertini*. *FAIR* did not involve anything like a direct national security threat on military bases. Rather, the compelled speech in *FAIR* was a government mandate that law schools either disregard their non-discrimination policies and allow the military to recruit on their campuses or lose badly needed federal funding. Further, the government in *FAIR* did not offer a shred of evidence showing that the Solomon Amendment was even rationally related to an important government interest. Instead, it argued that the relationship between the Amendment and the need to "raise and support armies" was *common sense*.[269] In *Albertini*, the government interest was national security, and the means chosen were to ban those like Albertini who had already breached national security from military bases unless they obtained written permission to reenter.[270]

---

265 *Id.* at 687.

266 *Id.* at 687–88.

267 *Id.* at 685 (citing Flower v. United States, 407 U.S. 197, 830 (1972) (per curiam)).

268 *Id.* at 687.

269 FAIR v. Rumsfeld, 390 F.3d 219, 245 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

270 *Albertini*, 472 U.S. at 689.

B. *Minimized Precedent*

In *FAIR*'s troubled procedural history, the district court, the dissenting circuit court judge, and the Supreme Court found that *Boy Scouts of America v. Dale* did not apply in this case. The district court found that one of the key differences between *Dale* and *FAIR* was that the Solomon Amendment did not require FAIR to accept military recruiters as *members* of their law schools, but simply as "periodic visitor[s]."[271] The Supreme Court supported this assertion by reasoning that recruiters are "outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the school's expressive association."[272] As outlined below, there is nothing in *Dale* to indicate that the precedent it set would not apply to the law schools.

Boy Scouts of America v. Dale articulated a new test for determining when a group's right to expressive association has been violated.[273] First, the court "must determine whether the group engages in expressive association."[274] Second, the court must decide whether the government's mandate to allow the offensive person within the association would significantly burden the association's message or speech.[275] Finally, the court must weigh this burden against the government interest.[276]

James Dale joined the Boy Scouts as a small child in 1978 and achieved the rank of Eagle Scout in 1988, one of the Scouts' highest honors.[277] Dale was then granted adult membership in the Boy Scouts and went to college.[278] While attending college, he came out as gay and attended several seminars about the psychological and health needs of gay and lesbian teens.[279] In 1990, he appeared in the local newspaper identified as the co-president of the Lesbian/Gay Alliance.[280] Shortly thereafter, Dale received a letter from the Boy Scouts revoking his adult membership.[281] He was later told that his membership was rescinded because the Boy

271 FAIR v. Rumsfeld, 291 F. Supp. 2d 269, 305 (D.N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

272 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1312 (2006).

273 530 U.S. 640, 648–68 (2000).

274 *Id.* (internal quotation omitted).

275 *Id.* at 653.

276 *Id.* at 656.

277 *Id.* at 644.

278 *Id.*

279 *Id.* at 644–45.

280 *Id.* at 645.

281 *Id.*

Scouts "forbid[s] membership to homosexuals."[282] Claiming violation of New Jersey's public accommodations laws, Dale commenced legal action against the Boy Scouts.[283] The Supreme Court held that the New Jersey law prohibiting discrimination on the basis of sexual orientation in public accommodations could not compel the Boy Scouts to include Dale in their association because doing so would violate their right to expressive association.[284]

Contrary to the district court's claims, *Dale* does not limit expressive association to situations where a group is forced to include someone as a member. Surely no one is asserting that the military recruiters seek to become members of the law school communities; after all, their recruitment visits are only periodic. Rather, FAIR asserts that military presence on their campuses diminishes their ability to express their commitment to non-discrimination on the basis of sexual orientation.

The reasoning in *Dale* fully supports FAIR's claim because it does not require that expressive association apply only when an organization is forced to include someone whose speech conflicts with their message; rather it supports the notion that the *mere presence* of a speaker with an antithetical message is enough.[285] The *Dale* Court asserted that "Dale's *presence* in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior."[286] In addition, the Court in *Dale* afforded the Boy Scouts deference as to both its expressive message and what would impair that message.[287]

Similarly, the view that mere presence interferes with the message of an association was used to exclude the gay, lesbian, and bisexual alliance from marching in Boston's Irish heritage parade in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*.[288] In *Hurley*, the Court found that "a contingent marching be-

---

282 *Id.*

283 *Id.*

284 *Id.* at 661.

285 *Id.* at 653. Although *Dale* on its facts arguably required more than mere presence, since the included person was an assistant scoutmaster, the Court's analysis did not ascribe particular importance to the role Mr. Dale played in the organization.

286 *Id.* (emphasis added).

287 Erwin Chermerinsky & Catherine Fisk, *The Expressive Interests of Associations*, 9 WM. & MARY BILL RTS. J. 595, 600–603 (2001). Note that in *Dale*, the Boy Scouts had not made any statements prior to litigation expressing their discriminatory message, unlike FAIR's statements of non-discrimination in the AALS regulations and handbook, and that the *Dale* Court deferred to the Boy Scouts' view of what would impair their discriminatory message. *Id.*

288 515 U.S. 557 (1995).

hind the organization's banner would at least bear witness to the fact that some Irish are gay, lesbian, or bisexual, and the *presence* of the organized marchers would suggest their view that people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals."[289] Regardless of the reason why the parade organizers did not agree with their message, the Court concluded that "it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control."[290]

In *Hurley*, the parade organizers did not assert that the nondiscrimination laws would force them to include the GLIB as *members* of their organization. Rather, they argued that the mere *presence* of the GLIB suggested that their association agreed with the views that the GLIB represented regarding sexual orientation.[291] *Dale* followed this precedent. Thus, the right to expressive association does not rest solely on the freedom from forced membership of persons whose personalities or messages are antithetical to those of the association. The right also restricts the mere presence of persons when that presence suggests an idea or opinion contrary to that held by the expressive organizations. And, as *Hurley* indicated, the presence need only last a few hours a year, which is often the case of military recruiters on law school campuses.

The Supreme Court addresses both *Hurley* and *Dale* minimally in *FAIR* presumably because, in both cases, gays were the group being excluded rather than the military.[292] And, as the Court constantly reminds us, Congress's power in regards to the military is "broad and sweeping."[293] Interestingly, the Court also separated *Hurley* and *Dale*, as if the precedent they set was unrelated, by not discussing them as a pair with similar facts, rationales, and holdings.[294]

---

289 *Id.* at 574–75 (emphasis added).

290 *Id.*

291 *Id.*

292 The contrast of the facts in *Dale*, *Hurley*, and *FAIR* is ironic to say the least. Both *Hurley* and *Dale* make room for the exclusion of LGBT people from a parade and the Boy Scouts, respectively, because of the First Amendment rights of those seeking to exclude LGBTs from their spaces of expression. On the other hand, the Court's holding in *FAIR* finds it impermissible for law schools to exclude the military from physically entering their campuses for recruiting purposes, and thus, from entering their spaces of expression. Of course, the reason FAIR seeks to exclude the military is not because they disagree with the military per se; but rather because of the military's policy that discriminates against LGBTs.

293 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1306 (2006) (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

294 *See id.* at 1309 (*Hurley*), 1312 (*Dale*).

The court of appeals relied heavily on *Dale* in concluding that FAIR's right to expressive association was unconstitutionally compromised by the Solomon Amendment.[295] The Supreme Court, however, found that the Solomon Amendment does not affect a law school's association rights in the way the public accommodations law in New Jersey affected the Boy Scouts' right to discriminate against Dale.[296] Much like the district court, the Court reasoned, "[a] military recruiter's mere presence on campus does not violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."[297] Because the Court both minimally addressed and failed to relate *Hurley* and *Dale*, it did not address the express holding in *Hurley*, where the Court concluded presence alone warrants First Amendment protection.[298]

The Court's lack of analysis of *Hurley* and *Dale* is troubling. These two cases represented some of the most recent precedent pertaining to the same issues faced by FAIR. However, by choosing to discuss neither case in full nor together, the Court was able to insinuate that they are inapplicable.

IV. The (Relatively) Bright Side

The Solomon Amendment at its inception was driven by animus towards political activism by institutions of higher education against the military's discriminatory policies. Gerald Solomon himself stood on the House floor and introduced the bill by saying, "We can begin today by telling recipients of Federal money at colleges and universities that if you do not like the Armed Forces, if you do not like its policies . . . do not expect Federal dollars to support your interference with our military recruiters."[299] Thus, it was clear from the beginning that the real problem sparking the Solomon Amendment was not a lack of sufficient military recruiting on campuses, especially because the Department of Defense did not support the bill when it was first introduced for fear of the negative effects on research.[300] Rather, the Solomon Amendment

---

295 FAIR v. Rumsfeld, 390 F.3d 219, 230-35 (3d Cir. 2004), *rev'd*, 126 S. Ct. 1297 (2006).

296 *FAIR*, 126 S. Ct. at 1312–13.

297 *Id.* at 1313.

298 *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557, 580–581 (1995).

299 140 Cong. Rec. H3860-03 (1994).

300 *Id.*

was born with the purpose of silencing dissent from universities and their members regarding discriminatory military policies.

Since the Amendment's inception, organizations like the AALS have come up with "ameliorative efforts" to protest JAG's presence on their campuses without actually restricting JAG from entering.[301] However, after the 2005 revision to the Solomon Amendment was passed—mandating that schools provide military recruiters with access to their campuses "in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer" at the risk of both law schools and their parent institutions of losing millions of federal dollars[302]—many were concerned that even "ameliorative efforts" such as protests and speakers would be antithetical to the "equal in quality and scope" requirement since other employers did not receive such treatment.

The Supreme Court's decision in *FAIR* makes it clear that schools will not be penalized under the Solomon Amendment for voicing their opposition to it or military policies. In fact, the Court's opinion rests on the fact that universities are free to dissent in ways other than barring recruiters from their campuses. It reasoned that "students and faculty are free to associate to voice their disapproval of the military's message," and thus the Solomon Amendment does not violate a law school's First Amendment rights.[303]

So, even though FAIR lost the case on all three grounds—the right to expressive association, the freedom from government-compelled speech, and the right to expressive conduct—at least law schools can still loudly and publicly dissent from the military's presence on their campuses. While that right seems paltry in comparison, it is, at least, something.

CONCLUSION: WHAT NEXT?

The Supreme Court's decision in *FAIR* symbolizes the direction our judicial system is heading with regard to the First Amendment, anti-discrimination laws, and the power of the military. While there is a glimmer of hope in the fact that the Court did not outlaw law schools' ameliorative efforts against the military's policy

---

301 Memorandum from Carl Monk on Executive Committee Policy Regarding Solomon Amendment to the Deans of Member and Fee-Paid Law Schools (Jan. 24, 2000), http://www.aals.org/deansmemos/00-2.html.

302 10 U.S.C.A. § 983 (Supp. 2005).

303 Rumsfeld v. FAIR, 126 S. Ct. 1297, 1313 (2006).

of discrimination, the case leaves one to wonder: *What next?* If the Court can escape the effects of stare decisis, what does this mean for other constitutional rights at risk in the coming years? In an increasingly militarized America, how will the First Amendment ultimately survive? The Court's opinion drastically departs from the classic notion of free speech—that even speech outnumbered by opposition must be protected.[304] As the Court reasoned in *Dale*, "the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view."[305]

[304] *Compare FAIR*, 126 S. Ct. 1297, *with* Boy Scouts of Am. v. Dale, 530 U.S. 640, 660 (2000).

[305] *Dale*, 530 U.S. at 660.