

FREE SPEECH AND THE MILITARY RECRUITER: REAFFIRMING THE MARKETPLACE OF IDEAS

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[Editor's Note: The military's "Don't Ask, Don't Tell" policy was repealed during the editing of this Article. However, Major Kels's discussion of the First Amendment, not the military's policy, is the heart of the Article. His analysis remains relevant in spite of the repeal and will no doubt apply to future First Amendment conflicts between conduct and expression.]

*"Access, yes, but be respectful of speech."*¹

I. INTRODUCTION

In October 2009, President Barack Obama promised to "end 'don't ask, don't tell.'"² Three months later, the President reiterated in the State of the Union address his intention "to finally repeal the law that denies gay Americans the right to serve the country they love because of who they are."³ According to the Secretary of Defense, "[t]he question before us is not whether the military prepares to make this change, but how we best prepare for it. We have received our orders from the Commander in Chief and we are moving out accordingly."⁴

For fifteen years, the debate over the status of homosexuals in the armed forces has been linked to the controversy over the status of military recruiters and Reserve Officer Training Corps (ROTC) detachments on college and law school campuses. The first iteration of the Solomon Amendment, denying certain Department of Defense (DOD) funds to institutions of higher education

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¹ Transcript of Oral Argument at 28, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (No. 04-1152), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-1152.pdf [hereinafter Transcript of Oral Argument].

² President Barack H. Obama, Remarks at the Human Rights Campaign Annual Dinner (Oct. 10, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-human-rights-campaign-dinner>.

³ President Barack H. Obama, Address Before Joint Session of the Congress on the State of the Union (Jan. 27, 2010), available at www.gpoaccess.gov/presdocs/2010/DCPD-201000055.pdf.

⁴ Robert M. Gates, Sec'y of Def., *Statement on "Don't Ask, Don't Tell"* (Feb. 2, 2010) (statement of Robert M. Gates, Sec'y of Def.), <http://www.defense.gov/Speeches/Speech.aspx?SpeechID=1419>.

that effectively prohibited access by DOD recruiters, was included in the Defense authorization bill⁵ the year after Congress passed the current prohibition on homosexual conduct in the military.⁶

How recent revisions to the “Don’t Ask, Don’t Tell” regulations,⁷ not to mention the apparent impermanence of the law itself,⁸ will impact the reception that military recruiters receive on university campuses is a matter that will no doubt play out as the next chapter of the debate unfolds. No matter the end result of the efforts to repeal the homosexual policy, the litigation that ensued over the related issue of making certain federal funding contingent on military

⁵ National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

⁶ National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571, 107 Stat. 1547, 1670 (1993).

⁷ Memorandum from the Sec’y of Def. to the Sec’ys of the Military Dep’ts, (Mar. 25, 2010), available at <http://www.scribd.com/doc/29167347/Defense-Department-Don-t-Ask-Don-t-Tell-Changes> (scroll down to Enclosure 3).

⁸ On Sep. 21, 2010, the Senate failed to reach the sixty votes needed to overcome a filibuster and begin debate on an annual defense appropriations bill which included a provision repealing the “Don’t Ask, Don’t Tell” policy. See David M. Herszenhorn, *Senators Vote to Block Debate on Military Bill*, N.Y. TIMES, Sep. 22, 2010, at A1. Two recent federal district court rulings within the Ninth Circuit have garnered headlines for their opposition to “Don’t Ask, Don’t Tell.” On Sep. 24, 2010, Judge Ronald B. Leighton issued a memorandum opinion ordering an Air Force flight nurse reinstated to her position in the Reserves and finding that her discharge in 2006 for homosexual conduct had violated her Fifth Amendment substantive due process rights. *Witt v. U.S. Dep’t of the Air Force*, No. 06-5195, slip op. at 13 (W.D. Wash. Sep. 24, 2010). The Ninth Circuit had earlier remanded to the district court, directing that Maj. Witt’s case be reviewed using a standard beyond mere rational basis scrutiny. *Witt v. U.S. Dep’t of the Air Force*, 527 F.3d 806, 821-22 (9th Cir. 2008). On Oct. 12, 2010, Judge Virginia A. Phillips enjoined the Department of Defense from enforcing 10 U.S.C. § 654 (“Don’t Ask, Don’t Tell”) as a violation of the First and Fifth Amendments. *Log Cabin Republicans v. United States*, No. 04-08425, slip op. at 85 (C.D. Cal. Oct. 12, 2010). In response, Defense Secretary Robert Gates objected, “I feel very strongly that this is an action that needs to be taken by the Congress and that it is an action that requires careful preparation and a lot of training.” Adam Entous, *Gates Says Gay Policy Is Job for Congress*, WALL ST. J., Oct. 14, 2010, at A7. On Oct. 14, 2010, the Justice Department moved to stay Judge Phillips’ injunction pending an appeal. See Amanda Bronstad, *Government Asks for Stay of Injunction Against ‘Don’t Ask,’* NAT’L L.J., Oct. 14, 2010, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202473407818&slreturn=1&hblogin=1>. When asked about the homosexual policy during a youth townhall meeting the same day, President Obama stated;

Now, we recently had a . . . district court case that said, ‘[D]on’t [A]sk, [D]on’t [T]ell’ is unconstitutional. I agree with the basic principle that anybody who wants to serve in our armed forces and make sacrifices on our behalf, on behalf of our national security, anybody should be able to serve. And they shouldn’t have to lie about who they are in order to serve. And so we are moving in the direction of ending this policy. It has to be done in a way that is orderly, because we are involved in a war right now. But this is not a question of whether the policy will end. This policy will end and it will end on my watch. But I do have an obligation to make sure that I am following some of the rules. I can’t simply ignore laws that are out there. I’ve got to work to make sure that they are changed.

Transcript of Obama’s Youth Townhall, REAL CLEAR POLITICS (Oct. 14, 2010), http://www.realclearpolitics.com/articles/2010/10/14/transcript_of_obamas_youth_townhall107594.html.

In 2009, the Supreme Court sided with the Obama Administration in declining to hear a direct constitutional challenge to “Don’t Ask, Don’t Tell.” *Cook v. Gates*, 528 F.3d 42, 48, 65 (1st Cir. 2008), cert. denied sub nom. *Pietrangolo v. Gates*, 129 S. Ct. 2763, 2763 (2009).

access to potential recruits provided valuable lessons, the relevance of which may well outlast the controversy that sparked the confrontation.⁹ These lessons are important both for the conduct of recruiters in their interactions with students, faculty, and administration, and for the concept of free speech itself.¹⁰

On the same day the Supreme Court issued its decision¹¹ upholding the constitutionality of the Solomon Amendment,¹² the disappointed respondents defiantly pointed the way forward. “The Supreme Court’s opinion,” wrote Professor Chai R. Feldblum of the Georgetown University Law Center, “is a call to arms to law school administrations across the country to vocally demonstrate their opposition to the military’s ‘Don’t Ask, Don’t Tell’ policy.”¹³

E. Joshua Rosenkranz, the attorney who represented the law schools before the Supreme Court, described the ruling as a “galvanizing moment for the law school community.”¹⁴ In an e-mail to Harvard University’s daily student newspaper, Rosenkranz forecast an ominous scene for military recruiters on law school campuses. “You will see signs posted over interview rooms that say, ‘Warning: Discriminating employer inside.’ You will see scarlet letters put on military recruiting literature. You will see schools organizing protests to jeer at recruiters who have a policy of discriminating against the school’s own students.”¹⁵

Professor Kent Greenfield of Boston College Law School, founder and president of the Forum for Academic and Institutional Rights, Inc. (FAIR)¹⁶—the lead plaintiff in the Solomon Amendment case¹⁷—issued an open letter to FAIR members imploring them not to “go along silently. The Court now

⁹ See Tobias Barrington Wolff, *‘Don’t Ask, Don’t Tell’ Harms the Constitution, but So Does This Cure*, L.A. TIMES, May 15, 2005, at M5.

¹⁰ See generally Anita J. Fitch, *The Solomon Amendment: A War on Campus*, ARMY LAW., May 2006, at 12, 19 (“Judge advocates must be prepared to contend with continued hostility towards the DOD’s policy on homosexual conduct and yet still be able to maintain their military bearing and professional courtesy at all times.”).

¹¹ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 47 (2006).

¹² 10 U.S.C. § 983 (2006).

¹³ *Welcome to SolomonResponse.com*, SOLOMONRESPONSE.ORG, <http://www.law.georgetown.edu/solomon> (last visited Jan. 11, 2011).

¹⁴ Javier C. Hernandez, *High Court: Schools Must Allow Recruiters*, HARV. CRIMSON, Mar. 7, 2006, available at <http://www.thecrimson.com/article/2006/3/7/high-court-schools-must-allow-recruiters/>.

¹⁵ *Id.*

¹⁶ Chief Justice John G. Roberts, Jr. described FAIR as “an association of law schools and law faculties” whose “declared mission is ‘to promote academic freedom, support educational institutions in opposing discrimination and vindicate the rights of institutions of higher education.’” *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 52. FAIR claims to represent “36 law schools and law faculties.” *Forum for Academic and Institutional Rights*, SOLOMONRESPONSE.ORG, <http://www.law.georgetown.edu/solomon/joinFAIR.html> (last visited Jan. 11, 2011).

¹⁷ The other named plaintiffs included the Society of American Law Teachers, Inc. (SALT), the Coalition for Equality, the Rutgers Gay and Lesbian Caucus, Ms. Pam Nickisher, Ms. Leslie Fischer, Mr. Michael Blauschild, Prof. Erwin Chemerinsky, and Prof. Sylvia Law. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 52 n.2. In addition to Secretary of Defense Donald H. Rumsfeld, the named defendants included the secretaries of the other government departments with funds potentially affected by the Solomon Amendment; i.e., Education, Labor, Health and Human Services, Transportation, and Homeland Security. *Id.* at 54 n.3.

insists that our remedy is protest, and the protests that will follow this opinion should not be from students only, or professors only. Institutions can be protestors as well, and they should be.”¹⁸

Some might be tempted to dismiss these visceral reactions to the Solomon Amendment decision as either sour grapes or vain attempts to find a “silver lining”¹⁹ in a thorough 8-0²⁰ trouncing at the hands of the conspicuously unified Justices,²¹ but the distraught plaintiffs actually were highlighting an important aspect of the Court’s opinion. Indeed, Chief Justice John G. Roberts went out of his way in authoring the opinion to acknowledge the continued freedom of law schools “to express whatever views they may have on the military’s congressionally mandated employment policy, all the while retaining eligibility for federal funds.”²² In deciding unanimously, the Justices offered a powerful reaffirmation of a free-speech principle rooted in Thomas Jefferson’s first inaugural address, expounded in John Stuart Mill’s 1859 treatise, *On Liberty*, and given the imprimatur of a peculiarly American legal doctrine in the early twentieth century jurisprudence of Justices Oliver Wendell Holmes Jr. and Louis D. Brandeis: the best test of an idea’s truth is to subject it to competition in the wider marketplace.²³ The oft-cited corollary to this principle, as expressed by Justice Stephen G. Breyer during oral argument in the Solomon Amendment case, is that “the remedy for speech you don’t like, is not less speech, it is more speech.”²⁴

How did a case about law schools’ opposition to the military’s congressionally mandated homosexual policy become a test of free speech, harkening back to the most fundamental tenets of First Amendment jurisprudence? The answer lies in the way the plaintiffs chose to challenge the constitutionality of the Solomon Amendment, and how the government elected to defend it. In relevant part, the Solomon Amendment denies specified funds to institutions of higher education that prohibit or prevent national defense agencies from accessing their campuses or student bodies for military recruiting purposes to the same extent as is afforded any other employer. The government viewed the law as a funding condition attached to an equal-access requirement. The law schools perceived it as a direct affront to their expressive right to choose their own members, so as to speak with one voice as a community of shared values. Whether the Solomon Amendment was properly classified as a law controlling

¹⁸ Letter from Kent Greenfield, President, FAIR, to FAIR members (Mar. 21, 2006), <http://www.law.georgetown.edu/solomon/documents/greenfieldLetter.pdf>.

¹⁹ Hernandez, *supra* note 14 (quoting interview with Kent Greenfield).

²⁰ Justice Samuel A. Alito, Jr.’s Senate confirmation hearing had not yet commenced when oral argument in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* was heard before the Court on December 6, 2005.

²¹ Not only were there no Justices dissenting from Chief Justice Roberts’ majority opinion; there were no concurring opinions either, with all the other Justices (except Justice Alito, *supra* note 20) unqualifiedly joining Roberts’ opinion. See *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 47.

²² *Id.* at 60.

²³ See ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* 80-89 (Vintage Books 1992) (1991) (discussing the contributions of Justices Oliver Wendell Holmes, Jr. and Louis D. Brandeis to First Amendment jurisprudence in the early twentieth century).

²⁴ Transcript of Oral Argument, *supra* note 1, at 43.

speech, a law regulating conduct, or a law aimed at conduct but secondarily impinging on speech would ultimately determine the level of judicial scrutiny it faced and its validity as an exercise of federal power. The goal of this Article is to explore both the genesis and aftermath of the Court's decision, and thereby understand its ramifications for legal recruiting and, more importantly, for the future of civil-military relations on law school campuses.

II. ACCESS, NOT SPEECH

From the outset of the Solomon Amendment litigation, the government was adamant that its goal was neither to curtail nor to supplant the law schools' constitutionally protected speech, but rather to secure "something that any donor would expect"²⁵: equal access. "[T]he military itself," asserted Solicitor General Paul D. Clement during oral argument, "simply does not want . . . primarily a speech activity to take place, it wants access for recruiting."²⁶ The Solicitor General likened recruiting to any "traditional commercial enterprise," an "instrumental activity" designed to hire personnel, with any attendant speech entirely "incidental" in nature.²⁷

Essential to the government's position in this regard was its contention that a law school's career-placement office does not serve as a university's epicenter of speech. Much like the military's purely instrumental recruitment process, which is constructed solely to encourage qualified applicants to seek entrance into the armed services, a given law school's career-placement office is similarly driven by a non-ideological end: to find jobs for its graduates.²⁸ "It's worth remembering," Solicitor General Clement reminded the Court, "that the recruiting office is not the heart of first-amendment activity on campus."²⁹ Clement reemphasized the point in his rebuttal argument, noting that when law schools "incidentally send an e-mail around telling the students where the military recruiters are going to be on a certain day . . . that kind of incidental speech does not implicate any compelled-speech doctrine."³⁰ FAIR argued precisely the opposite, that "[r]ecruiting is all about speech."³¹

The Court was evidently convinced by the government's argument that career placement is an economic, rather than expressive, function of professional schools. During oral argument, Justice Anthony M. Kennedy repeatedly referred to recruiting as a "proposed commercial transaction."³² As Chief Justice Roberts ultimately wrote in his unanimous majority opinion:

In this case, accommodating the military's message does not affect the law schools' speech, because the schools are not speaking when they host interviews and recruit-

²⁵ *Id.* at 3 (statement of Solicitor General Clement).

²⁶ *Id.* at 17 (statement of Solicitor General Clement).

²⁷ *Id.* (statement of Solicitor General Clement).

²⁸ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006).

²⁹ Transcript of Oral Argument, *supra* note 1, at 28 (statement of Solicitor General Clement).

³⁰ *Id.* at 61 (rebuttal argument of Solicitor General Clement).

³¹ *Id.* at 34 (statement of Rosenkranz).

³² *Id.* at 49-50 (Justice Kennedy questioning Rosenkranz).

ing receptions. Unlike a parade organizer's choice of parade contingents,³³ a law school's decision to allow recruiters on campus is not inherently expressive. Law schools facilitate recruiting to assist their students in obtaining jobs. A law school's recruiting services lack the expressive quality of a parade, a newsletter,³⁴ or the editorial page of a newspaper;³⁵ its accommodation of a military recruiter's message is not compelled speech because the accommodation does not sufficiently interfere with any message of the school.³⁶

Indeed, the Court at times seemed genuinely exasperated by the respondents' comparison between assisting military recruiters with disseminating hiring materials and forcing schoolchildren to recite the Pledge of Allegiance,³⁷ or requiring motorists to display a particular motto on their license plates.³⁸ Chief Justice Roberts termed such recruiting assistance a "far cry" from compelled speech.³⁹

Compelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah's Witness to display the motto 'Live Free or Die,' and it trivializes [those examples] to suggest that it is.⁴⁰

Whereas FAIR's attorney argued that the government "cannot convert the career-services enterprise into a value-neutral proposition," it was FAIR whom the Court suspected of falsely portraying the legal job search as "especially value-driven."⁴¹

The government was empowered to draw such a stark dichotomy between access and speech precisely because FAIR's First Amendment claim was so sweeping. "[T]here's simply no limit on Respondent's argument in this case," asserted Solicitor General Clement. "[A]ny conduct can be imbued with communicative force just by saying, 'We're opposed to this, and therefore, we're going to engage in this conduct.' That's simply not enough to generate a significant first-amendment interest."⁴² The crux of FAIR's free-speech argument was that Congress, by conditioning certain federal funds on equal access for military recruiters,⁴³ was forcing law schools to subsidize or "host the Govern-

³³ See *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 557, 566 (1995).

³⁴ See *Pac. Gas & Electric Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 10 (1986).

³⁵ See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

³⁶ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64 (2006).

³⁷ *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (declaring unconstitutional a state board of education requirement that public school students salute the flag and pledge allegiance).

³⁸ *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (declaring unconstitutional a misdemeanor statute requiring New Hampshire citizens to display the state motto on their vehicle license plates).

³⁹ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 62.

⁴⁰ *Id.*

⁴¹ Transcript of Oral Argument, *supra* note 1, at 49 (statement of Rosenkranz).

⁴² *Id.* at 63-64 (rebuttal argument of Solicitor General Clement).

⁴³ The applicable federal funds cover the Departments of Defense, Homeland Security, Transportation, Labor, Health and Human Services, and Education; the Central Intelligence Agency; and the National Nuclear Security Administration within the Department of Energy. The Solomon Amendment does not cover student financial assistance funds. *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 54 n.3; 10 U.S.C. § 983(d) (2006).

ment's message,"⁴⁴ and thereby engage in compelled speech. During oral argument, Justice David H. Souter provided a fair summary of the respondents' position.⁴⁵ "I thought . . . in determining the forum for recruiting, the university is speaking," Justice Souter posited to Rosenkranz, "[a]nd I understand the essence of [FAIR's] claim to be that its speech is being affected, either by being mixed with something it doesn't want to say or by being, in effect, forced to support . . . something it does not want to say."⁴⁶ FAIR's counsel described the Solomon Amendment as Congress's attempt "to squelch even the most symbolic elements of the law schools' resistance to disseminating the military's message."⁴⁷ The Third Circuit Court of Appeals agreed, finding that "[t]o comply with the Solomon Amendment, the law schools must affirmatively assist military recruiters in the same manner they assist other recruiters, which means they must propagate, accommodate, and subsidize the military's message."⁴⁸ The 2-1 majority of the Third Circuit pointedly concluded that "[r]ecruiting is expression."⁴⁹

The Supreme Court, however, appeared immediately wary of a First Amendment farce, doubting either that military recruiters have an expressive message to project or that career-placement offices have an expressive message to preserve. As Justice Kennedy mused, "[T]he resistance to any statute, I assume, could be justified as symbolic speech."⁵⁰ He later challenged Rosenkranz: "What you're arguing is that what is, for all intents and purposes, 'conduct' can be infused by the school, at its option, with a first amendment quality."⁵¹ Justice Antonin G. Scalia delved into the same theme. "You cannot convert a law into a law directed at . . . first amendment rights," he reasoned, "by simply saying, 'The reason I am disobeying it is to express—whatever, disaffection with the war, my objection . . . to homosexual discrimination—or anything else.'"⁵² Justice Scalia then posited to Rosenkranz, "So, you are saying that every time somebody gives as his reason for violating a law that he wants to send a message that he disagrees with that law [then] that raises a first amendment question?"⁵³

In its attempt to differentiate the conduct required by the Solomon Amendment from the compelled-speech claim asserted by FAIR, the Court engaged in a protracted effort to extract from Rosenkranz an explanation of the objectionable content in the government's message. "The Government just

⁴⁴ Transcript of Oral Argument, *supra* note 1, at 56 (statement of Rosenkranz).

⁴⁵ *Id.* at 35 (Justice Souter questioning Rosenkranz).

⁴⁶ *Id.*

⁴⁷ *Id.* at 29 (statement of Rosenkranz).

⁴⁸ *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219, 236 (3d Cir. 2004), *rev'd*, 547 U.S. 47 (2006).

⁴⁹ *Id.*

⁵⁰ Transcript of Oral Argument, *supra* note 1, at 24 (Justice Kennedy questioning Solicitor General Clement).

⁵¹ *Id.* at 33 (Justice Kennedy questioning Rosenkranz).

⁵² *Id.* at 20 (Justice Scalia questioning Solicitor General Clement).

⁵³ *Id.* at 41 (Justice Scalia questioning Rosenkranz). Professor Tobias Barrington Wolff, who opposes "Don't Ask, Don't Tell," offered a similar critique of FAIR's argument. "What the law schools are arguing for is nothing less than a 1st Amendment right to opt out of any law that has symbolic implications with which they disagree." Wolff, *supra* note 9.

says, ‘Let our recruiters in,’” proclaimed Justice Breyer, comparing the Solomon Amendment’s conditioning of funding on equal access for military recruiters with other straightforward government requirements, such as the property tax.⁵⁴ Justice John Paul Stevens chimed in, and repeated several times, “The [government’s] single message is, ‘Join the Army.’”⁵⁵ Justices Breyer and Stevens were making the point that military recruiters have little, if any, expressive message to impart, other than their clearly instrumental goal of attracting potential enlistees and officer candidates. Moreover, to the extent the “Join the Army” message could be deemed expressive at all, any legislation facilitating that message would fall clearly under Congress’s Constitutional mandate “[t]o raise and support Armies,”⁵⁶ the realm in which “‘judicial deference . . . is at its apogee.’”⁵⁷ Incredibly, FAIR’s attorney agreed with Justice Stevens. “The single message is, ‘Join the Army,’ that is correct,” Rosenkranz replied. “And the government is promoting only that one message.”⁵⁸ Justice Souter, who had given the impression throughout oral argument of being the most sympathetic to the respondents’ free speech argument, chimed in to set Rosenkranz back on course. “I thought your argument was, the single message is, ‘Join the Army, but not if you’re gay.’”⁵⁹ Rosenkranz, perhaps recognizing the error of his previous concession, readily agreed.⁶⁰ The damage, however, had already been done.

Chief Justice Roberts’s opinion cut to the heart of the matter, and presaged the Court’s final disposition, in its declaration, “[a]s a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*.”⁶¹ The Chief Justice had said as much during oral arguments, when he was the first to interrupt FAIR’s attorney. “This is conduct,” Roberts challenged Rosenkranz, “denying access to the military recruiters.”⁶² “[The Solomon Amendment],” Roberts again interjected, “doesn’t insist that [law schools]

⁵⁴ Transcript of Oral Argument, *supra* note 1, at 56 (Justice Breyer questioning Rosenkranz).

⁵⁵ *Id.* at 54 (Justice Stevens questioning Rosenkranz).

⁵⁶ U.S. CONST. art. I, § 8, cl. 12.

⁵⁷ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) (quoting *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)). Justice Scalia specifically discussed *Rostker* during oral arguments. Transcript of Oral Argument, *supra* note 1, at 44 (Justice Scalia questioning Rosenkranz).

⁵⁸ Transcript of Oral Argument, *supra* note 1, at 54 (statement of Rosenkranz).

⁵⁹ *Id.* (Justice Souter questioning Rosenkranz). Professor Harold H. Koh, then dean of Yale Law School, framed the law schools’ argument in this manner. “[The Court’s] ruling seems to require law schools to endorse the motto, ‘Join the military, but not if you are gay or lesbian,’” he said in an official statement. Andrew Mangino, *Supreme Court Rules Against Law Schools: Justices Say Military Recruiters Must Be Allowed on Campus*, YALE DAILY NEWS, Mar. 6, 2006, available at <http://www.yaledailynews.com/news/2006/mar/06/supreme-court-rules-against-law-schools/>.

⁶⁰ Transcript of Oral Argument, *supra* note 1, at 55.

⁶¹ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 60.

⁶² Transcript of Oral Argument, *supra* note 1, at 29 (Chief Justice Roberts questioning Rosenkranz).

do anything. It says that, 'If you want our money, you have to let our recruiters on campus.'"⁶³

III. SPEECH, EXPRESSIVE CONDUCT AND JUST PLAIN CONDUCT

How did FAIR end up leveraging virtually its entire case on the Supreme Court's determination as to whether or not recruiting constitutes a form of speech? Or, as Professor Peter Berkowitz sarcastically put it, "How did so many professors misunderstand the law?"⁶⁴ In short, the reason is two-fold. First, the plaintiffs' reliance on the *Boy Scouts* precedent⁶⁵ led them, at least in perception if not intent, to confuse the Solomon Amendment with the military recruiters themselves. Second, the plaintiffs' Third Circuit victory was so sweeping that it proved counterproductive, resulting in a grandiose argument before the Supreme Court that the government could undermine simply by appearing reasonable. As will be explored below, it was FAIR's broad argument, and the government's pragmatic defense, that opened the door for a unanimous reversal rooted in the historical principles of American free speech.

A. Levels of Scrutiny

When FAIR first sought to enjoin enforcement of the Solomon Amendment in 2003, the district court's denial⁶⁶ made several points that were ultimately ratified by the Supreme Court decision. The district court held that "if there is any expressive component to recruiting, it is entirely ancillary to its dominant economic purpose."⁶⁷ The court further declared, "[T]he Solomon Amendment does not compel law schools to say anything," meaning that "the law schools' actions in assisting military recruiters are insufficiently imbued with elements of communication to require the protection of the First Amendment."⁶⁸ The Solomon Amendment, in short, "targets conduct, not speech."⁶⁹

However, the district court also went on to make an important acknowledgement. Although the Solomon Amendment seeks access for recruiters rather than the imposition of government speech, it is not thereby insulated "from constitutional scrutiny."⁷⁰ The court conceded that "an expressive element can be subsumed within otherwise non-communicative conduct."⁷¹ In fact, the district court held, "[T]he conduct targeted by the Solomon Amend-

⁶³ *Id.* at 32 (Chief Justice Roberts questioning Rosenkranz).

⁶⁴ Peter Berkowitz, *U.S. Military: 8, Elite Law Schools: 0*, WKL. STANDARD, Mar. 20, 2006, at 10, available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/011/959tzkai.asp>.

⁶⁵ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 656 (2000) (holding that a New Jersey statute requiring the Boy Scouts to accept a homosexual assistant scoutmaster violated the organization's right of expressive association).

⁶⁶ *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 322 (D. N.J. 2003), *rev'd*, 390 F.3d 219 (3d Cir. 2004), *rev'd*, 547 U.S. 47 (2006).

⁶⁷ *Id.* at 308.

⁶⁸ *Id.* at 309.

⁶⁹ *Id.* at 311.

⁷⁰ *Id.*

⁷¹ *Id.*

ment . . . [includes] a communicative or expressive element.”⁷² “As such, the applicable standard of review”⁷³ was the *O’Brien*⁷⁴ test. The *O’Brien* case, which upheld the conviction of an antiwar protester for burning his draft card,⁷⁵ established a four-part test for determining “the constitutionality of a government regulation that incidentally impairs expressive conduct.”⁷⁶ As Chief Justice Earl Warren wrote on behalf of the majority, such a regulation is sufficiently justified if the following elements are met: (1) “it is within the constitutional power of the Government,” (2) “it furthers an important or substantial governmental interest,” (3) “the governmental interest is unrelated to the suppression of free expression,” and (4) “the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.”⁷⁷

The *O’Brien* test demands an important or substantial government interest, rather than a compelling one.⁷⁸ As such, its intermediate level of scrutiny “is less rigorous and more deferential than the strict standards applied in some free speech contexts, and it is more difficult to demonstrate a constitutional violation under a theory of expressive conduct than under other First Amendment doctrines.”⁷⁹ The Third Circuit, in overturning the district court’s decision affirming the constitutionality of the Solomon Amendment, noted that “demonstrating a constitutional violation under a theory of expressive conduct is significantly more burdensome” than under its preferred analyses of compelled speech and expressive association.⁸⁰ Perhaps not surprisingly, then, the district court held that the Solomon Amendment successfully passed “constitutional muster” under the *O’Brien* test.⁸¹

Ultimately, the district court rejected FAIR’s constitutional claims,⁸² thereby denying the plaintiffs’ request for a preliminary injunction barring enforcement of the Solomon Amendment. However, the court simultaneously handed FAIR a victory on non-constitutional grounds, sharply disagreeing with the DOD’s proposed interpretation that “the statute requires law schools to ‘provide military recruiters access to students that is at least equal in quality and scope to the access provided other potential employers.’”⁸³ The district

⁷² *Id.*

⁷³ *Id.*

⁷⁴ See *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

⁷⁵ *Id.* at 386.

⁷⁶ ALISON MUHLFELD, *RUMSFELD v. FAIR: THE SOLOMON AMENDMENT AND FREE SPEECH* 8 (2005), available at <http://www.hsdl.org/?view&doc=53474&coll=limited>.

⁷⁷ *O’Brien*, 391 U.S. at 377.

⁷⁸ See *id.*

⁷⁹ MUHLFELD, *supra* note 76, at 8.

⁸⁰ *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219, 244 (3d Cir. 2004), *rev’d*, 547 U.S. 47 (2006).

⁸¹ *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 312 (D.N.J. 2003), *rev’d*, 390 F.3d 219 (3d Cir. 2004), *rev’d*, 547 U.S. 47 (2006).

⁸² *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 54 (2006) (summarizing *Forum for Academic & Institutional Rights, Inc.*, 291 F. Supp. 2d at 322).

⁸³ *Forum for Academic & Institutional Rights, Inc.*, 291 F. Supp. 2d at 321 (quoting Declaration of William N. Eskridge, Jr. at 1, *Forum for Academic & Institutional Rights, Inc.*, 291 F. Supp. 2d 269 (No. 03-4433), available at <http://www.law.georgetown.edu/solomon/documents/Eskridge.pdf>).

court emphasized that its conclusion “is in no way an endorsement of the DOD’s position”; it went out of its way to express “grave reservations as to whether such an interpretation is sustainable as a matter of statutory construction.”⁸⁴ It was “in response to the district court’s concerns” that “Congress codified the DOD’s [then] informal policy”⁸⁵ of demanding equal access to law students, thus producing the Solomon Amendment’s current incarnation.⁸⁶

FAIR’s appeal of the district court’s decision reasserted its constitutional claims, arguing that the lower court had erred in determining that the Solomon Amendment was aimed at conduct, not speech.⁸⁷ The Third Circuit agreed with FAIR, in the process obliterating the district court’s *O’Brien* analysis. The appellate decision held that the district court had incorrectly selected *O’Brien* as the applicable standard. The majority opinion explained that the expressive conduct governed by *O’Brien*’s four factors “is, loosely stated, an overflow category,” only to be applied when other First Amendment protections are unavailable.⁸⁸ In this case, however, the Third Circuit held that the Solomon Amendment infringes upon “speech proper,”⁸⁹ thus making available stronger “alternative First Amendment grounds.”⁹⁰ That is, the Third Circuit invoked the doctrines of expressive association and compelled speech to apply strict scrutiny, rendering *O’Brien*’s intermediate scrutiny standard immaterial.⁹¹ As Chief Justice Roberts later wrote in summarizing the procedural posture of the case, “Unlike the District Court, the Court of Appeals did not think that the *O’Brien* analysis applied because the Solomon Amendment, in its view, regulated speech and not simply expressive conduct.”⁹² For good measure, though, the Third Circuit added, “Even under *O’Brien*, the Solomon Amendment is likely to impair expressive conduct unconstitutionally” and thereby necessitate a reversal of the district court.⁹³

B. *An Overbroad Argument?*

In effect, the appellate majority had given FAIR everything it could have possibly hoped for, which might have been what doomed its prospects before the Supreme Court. In addition to holding that a statutory requirement for law school career services offices to provide “active and equal assistance”⁹⁴ to military recruiters constitutes compelled speech,⁹⁵ and that forced campus visits by

⁸⁴ *Id.*

⁸⁵ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 54.

⁸⁶ 10 U.S.C. § 983 (2006).

⁸⁷ See Brief for Appellants at 18-26, *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433), available at <http://www.law.georgetown.edu/solomon/documents/CA3Brief.pdf> [hereinafter Third Circuit Brief for Appellants].

⁸⁸ *Forum for Academic & Institutional Rights, Inc.*, 390 F.3d at 243, *rev’d*, 547 U.S. 47 (2006).

⁸⁹ *Id.*

⁹⁰ *Id.* at 244.

⁹¹ *Id.*

⁹² *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 54-55 (2006).

⁹³ *Forum for Academic & Institutional Rights, Inc.*, 390 F.3d at 244.

⁹⁴ *Id.* at 240.

⁹⁵ *Id.*

military recruiters infringe upon the law schools' right of expressive association,⁹⁶ the Third Circuit had gone one significant step further. Namely, it treated the schools' efforts to demonstrate disagreement with the armed forces' homosexual policy by barring military recruiters from campus as not just conduct imbued with expressive elements, but rather as speech itself. Whereas wearing black armbands to protest the Vietnam War,⁹⁷ conducting sit-ins to protest racial segregation,⁹⁸ and picketing⁹⁹ were considered conduct with an expressive nature, the law schools' ban on military recruitment had been elevated to a loftier status as the very embodiment of expression.

The Third Circuit's opinion seemed not even to acknowledge the enormity of this implication. Suddenly, in light of the court's analysis, everything that took place in the context of legal recruitment appeared to be constitutionally protected speech. The logistical assistance offered by career placement offices to employers was speech on the part of universities; interviewing law students for potential hiring was speech on the part of employers; and now subjecting one employer to different conditions than others during the interview process was a form of speech as well. The Third Circuit's dissenting judge, as if anticipating the Supreme Court's reaction to the majority's sweeping decision, highlighted the central issue. "[E]ssentially my disagreement is with the all-pervasive approach that this is a case of First Amendment protection in the nude," wrote Senior Judge Ruggero J. Aldisert. "It is not."¹⁰⁰

The Supreme Court responded to the Third Circuit's rejection of the district court's *O'Brien* analysis by moving in exactly the opposite direction. The Court did not merely overturn the circuit court by applying the *O'Brien* test, as Judge Aldisert would have done;¹⁰¹ rather, it held that the law schools' conduct was not expressive enough even to warrant the application of *O'Brien*.¹⁰² Indeed, the Supreme Court and the Third Circuit appeared to agree about one thing, and only one thing: the *O'Brien* test, and its "doctrine of expressive conduct," is "a mold [the Solomon Amendment] does not fit."¹⁰³ As discussed in the previous section, Justices Kennedy and Scalia appeared wary, from the outset of oral arguments, of an attempt by FAIR to convert conduct into speech by referencing the law schools' underlying motivations.¹⁰⁴ The Third Circuit may have reinforced this suspicion by emphasizing the fact that "the law schools' resistance to the military's recruitment policy [was] motivated by their ideological opposition to exclusion based on sexual orientation."¹⁰⁵

The Supreme Court was clearly on guard against the temptation to read more expression than necessary into the Solomon Amendment's prohibition on

⁹⁶ *Id.* at 235.

⁹⁷ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969).

⁹⁸ *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

⁹⁹ *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 (1968).

¹⁰⁰ *Forum for Academic & Institutional Rights, Inc.*, 390 F.3d at 246-47.

¹⁰¹ *Id.* at 260-62.

¹⁰² *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006).

¹⁰³ *Forum for Academic & Institutional Rights, Inc.*, 390 F.3d at 243.

¹⁰⁴ *See supra* Part III.A.

¹⁰⁵ *Forum for Academic & Institutional Rights, Inc.*, 390 F.3d at 243.

“treating military recruiters differently from other recruiters.”¹⁰⁶ The Third Circuit’s conclusion that the Solomon Amendment was unconstitutional because it regulated speech itself thus encouraged FAIR to take a difficult position before a skeptical audience. Essentially, FAIR argued broadly that the statutory requirement to treat military and non-military recruiters equally constituted an impermissible restriction on the law schools’ speech because their disparate treatment of military recruiters was rooted in a deeply held conviction in the equality of all people, regardless of sexual preference. Enabled by the extensive nature of this argument, the government attempted to extract the military’s homosexual policy from the speech issue, and in so doing, show the far-reaching implications of FAIR’s position. As Solicitor General Clement told the Court, “[FAIR’s] arguments would be the same even if what was going on here was a concern about the military’s other policies.”¹⁰⁷

According to the government, the plaintiffs’ free speech claims were about much more than the military’s homosexual policy, and led ultimately to the dangerous implication that any conduct justified by reference to one’s conscience was entitled to ironclad First Amendment protection. “The free-speech interests that are articulated on the other side, would extend to any basis for criticizing the military,” Clement argued, “whether it was not liking the war in Iraq, the war in Afghanistan, or the discriminatory hiring policies.”¹⁰⁸ In his rebuttal argument, Clement continued to sound the same theme: “So, even if Congress changed ‘don’t ask, don’t tell’ tomorrow . . . presumably, the law schools would still be here protesting the military’s position on gender, or perhaps the war in Iraq, or perhaps the war in Afghanistan.”¹⁰⁹ Justice Souter asked Clement, “So, discrimination . . . or no discrimination, you’ve got a speech issue that you’re going to address[?]”¹¹⁰ Clement replied in the affirmative, explaining, “[T]he other side’s position is not limited to this narrow context, but is a much broader first-amendment claim.”¹¹¹

FAIR’s attorney did nothing to dispel the Court’s concerns about the breadth of his clients’ position, or to contradict Clement’s dire warnings. The Third Circuit’s holding had perhaps bolstered the plaintiffs’ confidence sufficiently for them to adopt a legal strategy of seeking an outright victory on broad constitutional grounds. During an exchange with Justice Stevens, Rosenkranz unabashedly confirmed the boldness of FAIR’s First Amendment claims:

J. STEVENS: May I just be sure I have one thing straight? The content of the compelled speech, as I understand it, is you’re aiding in the recruitment of the Armed Forces, right?

ROSENKRANZ: That’s correct . . . [y]our Honor.

J. STEVENS: And so, it . . . would still have been compelled speech if, 25 years ago, Congress passed a statute saying, ‘University, you must allow our people on campus to recruit,’ and they . . . for some reason, didn’t want to help. But that would have

¹⁰⁶ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 66.

¹⁰⁷ Transcript of Oral Argument, *supra* note 1, at 16 (Justice Souter questioning Solicitor General Clement).

¹⁰⁸ *Id.* at 15 (statement of Solicitor General Clement).

¹⁰⁹ *Id.* at 64 (rebuttal argument of Solicitor General Clement).

¹¹⁰ *Id.* at 16 (Justice Souter questioning Solicitor General Clement).

¹¹¹ *Id.* at 16-17 (statement of Solicitor General Clement).

been a violation of the first amendment of the school if there were no other debate, just they didn't want the Army on because they had to provide facilities that would aid recruitment.

ROSENKRANZ: Yes, your Honor . . . certainly, if it was against their conscience to do so.

J. STEVENS: Well, that be compelled speech [sic], though, in your view. That's the kind of speech we're talking about, anything that helps the military raise an army.¹¹²

Justice Scalia, too, pried a startling concession from Rosenkranz during oral argument. "Suppose that a law-school faculty could decide that it does not favor a particular war," Scalia probed, "and use that as the basis for excluding recruiters, 'By allowing this recruiter to come on campus, you are making me speak, in effect, to our students, saying, Join the Army and fight the war that we're now engaged in.'"¹¹³ Justice Scalia and Rosenkranz then bantered back and forth for a few minutes, until Justice Scalia put the question to him again: "[Y]ou would say that the same situation would apply if the university faculty does not favor the particular war . . ." Finally, Rosenkranz relented, "Yes, Your Honor."¹¹⁴

The Supreme Court's opinion swung the pendulum decisively away from the Third Circuit's inclusive definition of expression. Whereas the district court had held that the Solomon Amendment regulated expressive conduct, and the circuit court had held that the Solomon Amendment regulated speech, the Supreme Court declared that the law regulated neither. Indeed, "[h]aving rejected the view that the Solomon Amendment impermissibly regulates *speech*,"¹¹⁵ the Supreme Court went on to also reject the proposition that the conduct regulated by the Solomon Amendment is inherently expressive and thereby deserving of First Amendment protection. According to the Court, "The expressive component of a law school's actions is not created by the conduct itself but by the speech that accompanies it."¹¹⁶ Such "explanatory speech," which is provided First Amendment protection, proves necessary precisely because the law schools' goal in placing extra restrictions on military recruiters is not readily apparent to the uninformed observer.¹¹⁷ The law schools' conduct, therefore, "is not so inherently expressive that it warrants protection under *O'Brien*."¹¹⁸

In coming to this conclusion, the Court referenced its earlier concerns about falsely imbuing conduct with the characteristics of speech. "If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it."¹¹⁹ To illustrate this point, the Court used the example of a tax evader justifying his arrears by announcing an intention "to express his disapproval of the

¹¹² *Id.* at 39-40 (Justice Stevens questioning Rosenkranz).

¹¹³ *Id.* at 57-58 (Justice Scalia questioning Rosenkranz) (internal quotation marks omitted).

¹¹⁴ *Id.* at 58 (Justice Scalia questioning Rosenkranz).

¹¹⁵ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65 (2006).

¹¹⁶ *Id.* at 66.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Internal Revenue Service by refusing to pay his income taxes.”¹²⁰ Just as a principled tax evader is not entitled to have the tax code scrutinized under the *O’Brien* test simply because he has announced his principles, the Court determined that FAIR was not entitled to have the Solomon Amendment subjected to a First Amendment analysis solely because the law schools’ resistance to it was grounded in stated principles. Finally, the Court rebuffed the Third Circuit’s holding in the alternative that “the Solomon Amendment does not pass muster under *O’Brien*.”¹²¹ Instead, Chief Justice Roberts wrote that “even if the Solomon Amendment were regarded as regulating expressive conduct, it would not violate the First Amendment under *O’Brien*.”¹²² The Third Circuit was overruled both in its determination as to why *O’Brien* did not apply, as well as in its application of *O’Brien* in the alternative.

IV. CONFLATING THE RECRUITER AND THE POLICY

As discussed in the previous section, one probable effect of the Third Circuit’s characterization of recruiting as quintessential expression was that, by wholeheartedly sanctioning the law schools’ theory of the case, it encouraged FAIR to make an overly broad compelled-speech argument before the Supreme Court. Another, arguably deeper, effect of the circuit opinion was that its heavy reliance on the *Boy Scouts* case¹²³ placed the plaintiffs in an ironic position. In order to profess their opposition to the military’s discrimination against homosexuals, the law schools asserted a First Amendment right to exclude military recruiters from campus, citing as their basis the Boy Scouts’ right against the “forced inclusion”¹²⁴ of a gay assistant scoutmaster. The Third Circuit referred to the Boy Scouts’ freedom of expressive association in selecting their members as a “compelling analogy”¹²⁵ to the law schools’ right to exclude military recruiters from campus. “[J]ust as ‘Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior,’” the Third Circuit reasoned that “the presence of military recruiters ‘would, at the very least, force the law schools to send a message,’ both to students and the legal community, that the law schools ‘accept’ employment discrimination ‘as a legitimate form of behavior.’”¹²⁶

A. *The Boy Scouts Analogy and Its Limits*

From a practical standpoint, FAIR’s reliance on *Boy Scouts* for its expressive association claim was problematic in its susceptibility to numerous factual distinctions. As the district court had pointed out, military recruiters were at

¹²⁰ *Id.*

¹²¹ *Id.* at 67.

¹²² *Id.* at 67-68.

¹²³ *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000).

¹²⁴ *Id.* at 648.

¹²⁵ *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219, 232 (3rd Cir. 2004), *rev’d*, 547 U.S. 47 (2006).

¹²⁶ *Id.* at 232 (citing *Dale*, 530 U.S. at 653).

worst “unwanted periodic visitor[s],”¹²⁷ not mandated members of the law school community. The Solomon Amendment required neither the law school admissions office to accept certain students, nor the dean to hire certain faculty.¹²⁸ The Supreme Court noted that unlike scoutmasters’ relationships to the Boy Scouts organization, “[R]ecruiters are not part of the law school. Recruiters are, by definition, outsiders who come onto campus for the limited purpose of trying to hire students—not to become members of the [law] school’s expressive association. This distinction is critical.”¹²⁹ Thus, the Solomon Amendment does not affect the law schools’ associational rights by dictating whom they must accept or reject as members of their community. Although “[f]orcing a group to accept certain members may impair the ability of the group to express those views, and only those views, that it intends to express,”¹³⁰ it is unclear that the same holds true for non-members requiring only intermittent physical access. Moreover, the Court held that the Solomon Amendment did not indirectly affect the law schools’ group composition “by making group membership less desirable”¹³¹; for example, by requiring disclosure of anonymous group members¹³² or imposing penalties based on group membership.¹³³

Aside from “the transient presence of recruiters,”¹³⁴ another factual distinction between the New Jersey public accommodations law in *Boy Scouts* and the Solomon Amendment was the nature of the activity the government was seeking to regulate. As Chief Judge Aldisert wrote in his Third Circuit dissent:

[T]he fundamental goal of the relationship between adult leaders and boys in the Boy Scout movement is ‘[t]o instill values in young people,’ a goal that is pursued ‘by example’ as well as by word. As a result, compelling the BSA to appoint an adult leader who was committed to ‘advocacy of homosexual teenagers’ need for gay role models,’ struck at the heart of the organization’s goals.¹³⁵

In contrast, Judge Aldisert asserted, “Military recruiting is not intended to ‘instill values’ in anyone, nor is it meant to convey any message beyond the military’s interest in enlisting qualified men and women to serve as military lawyers and judges.”¹³⁶ Judge Aldisert called these distinctions “profound.”¹³⁷

For both FAIR and the Third Circuit majority, however, there was no distinction whatsoever. The plaintiffs’ characterization of recruiting as the very

¹²⁷ *Id.* (quoting *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 291 F. Supp. 2d 269, 304 (D. N.J. 2003), *rev’d*, 390 F.3d 219, 224 (3d Cir. 2004), *rev’d*, 547 U.S. 47, 51 (2006)) (internal quotation marks omitted).

¹²⁸ *See Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006) (quoting *Dale*, 530 U.S. at 648) (the Solomon Amendment does not force law schools to accept members it does not desire).

¹²⁹ *Id.* at 69.

¹³⁰ *Dale*, 530 U.S. at 648.

¹³¹ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 70.

¹³² *Id.* at 69 (citing *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S. 87, 101-02 (1982)).

¹³³ *Id.* (citing *Healy v. James*, 408 U.S. 169, 180-84 (1972)).

¹³⁴ *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219, 260 (3d Cir. 2004) (Aldisert, C.J., dissenting), *rev’d*, 547 U.S. 47 (2006).

¹³⁵ *Id.* at 260 (quoting *Dale*, 530 U.S. at 648).

¹³⁶ *Id.*

¹³⁷ *Id.*

essence of speech meant that the law schools' "endeavor to 'inculcate' their students with their chosen values"¹³⁸ through the career placement process was on a par with the Boy Scouts' endeavor "to 'inculcate [youth] with the Boy Scouts' values."¹³⁹ As previously discussed,¹⁴⁰ FAIR's view of the fundamentally expressive nature of recruiting was sharply at odds with the government's ultimately successful portrayal of it as "an economic activity whose expressive content is strictly secondary to its instrumental goals."¹⁴¹

B. *Speaking for Whom?*

Further undercutting FAIR's *Boy Scouts* analogy was the issue of whether military recruiters, even if they were performing an expressive function, could be reasonably viewed by students and other observers as speaking on behalf of the law schools they visited. Chief Justice Roberts challenged Rosenkranz on this point during oral argument. "I'm sorry," Roberts interjected, "but, on compelled speech, nobody thinks that [the] law school is speaking through those employers who come onto its campus for recruitment. Everybody knows that those are the employers. Nobody thinks the law school believes everything that the employers are doing or saying."¹⁴² Solicitor General Clement reiterated that objection in his rebuttal argument, adding that, "[N]o one thinks that that speech is being misattributed to the schools."¹⁴³ In contrast, Chief Justice William H. Rehnquist's 5-4 majority in *Boy Scouts* clearly felt that "[t]he presence of an avowed homosexual and gay rights activist in an assistant scoutmaster's uniform" risked sending a message that was not only contradictory to the Boy Scouts' stated values, but could also be reasonably misperceived as carrying the organization's official authorization.¹⁴⁴

The Supreme Court finally rejected FAIR's argument that "[by treating] military and nonmilitary recruiters alike in order to comply with the Solomon Amendment, they could be viewed as sending the message that they see nothing wrong with the military's policies, when they do."¹⁴⁵ Justice Breyer noted during oral arguments that, personally, he "couldn't find anything in the record that finds that student who thinks, by letting the military person in, that that school, which basically is completely against the military in this area, suddenly becomes for it."¹⁴⁶ Chief Justice Roberts wrote there was "little likelihood" that the military's homosexual policy would be identified with the law schools, or that the law schools' message would be compromised or diluted by the pres-

¹³⁸ *Id.* at 232 (majority opinion).

¹³⁹ *Id.* (quoting *Dale*, 530 U.S. at 649-50).

¹⁴⁰ See *supra* Part I.

¹⁴¹ *Forum for Academic & Institutional Rights, Inc.*, 390 F.3d at 260 (Aldisert, C.J., dissenting).

¹⁴² Transcript of Oral Argument, *supra* note 1, at 38 (Chief Justice Roberts questioning Rosenkranz).

¹⁴³ *Id.* at 61 (rebuttal argument of Solicitor General Clement).

¹⁴⁴ *Dale*, 530 U.S. at 655-56.

¹⁴⁵ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 64-65 (2006).

¹⁴⁶ Transcript of Oral Argument, *supra* note 1, at 45 (Justice Breyer questioning Rosenkranz).

ence of uniformed recruiters.¹⁴⁷ The Court's opinion then added a verbal jab, noting its prior holding that "high school students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy."¹⁴⁸ "Surely," Justice Roberts chided, "students have not lost that ability by the time they get to law school."¹⁴⁹ In response, FAIR's president, Professor Greenfield, lamented that "[t]he opinion's tone and language was purposefully glib, even belittling."¹⁵⁰

Clearly, the Court's opinion revealed thinly disguised exasperation at what it saw as FAIR's attempt "to stretch a number of First Amendment doctrines well beyond the sort of activities these doctrines protect."¹⁵¹ Indeed, the Court's analysis of FAIR's *Boy Scouts* analogy was driven by the same concern it encountered when rejecting FAIR's portrayal of recruiting as speech. "[J]ust as saying conduct is undertaken for expressive purposes cannot make it symbolic speech," the Court held that "so too a speaker cannot 'erect a shield' against laws requiring access 'simply by asserting' that mere association 'would impair its message.'"¹⁵²

FAIR's reliance on *Boy Scouts* also placed it in the precarious position of identifying military recruiters as the embodiment of the military's homosexual policy, thereby running the risk of "blam[ing] the warriors for the personnel policy"¹⁵³—or at least conflating the two.¹⁵⁴ The Supreme Court's ruling in *Boy Scouts* has been criticized by scholars for, among other things, the "pernicious" notion "that individuals are expressive in some sense on the basis of their physical presence alone."¹⁵⁵ According to this criticism, by endorsing the Boy Scouts' argument that James Dale's forced inclusion as an assistant scoutmaster would compromise the organization's ability to disseminate its message, the Court had effectively declared that "[j]ust by standing there, gay and in [the scoutmaster] uniform, [Dale] might as well have been in a parade."¹⁵⁶ Yet whatever one's opinion of the *Boy Scouts* decision, the Court there at least made an effort to emphasize the fact that plaintiff James Dale was "an avowed homosexual and gay rights activist"¹⁵⁷; that is, a vocal advocate of a cause at

¹⁴⁷ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 65.

¹⁴⁸ *Id.* (citing *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 250 (1990)).

¹⁴⁹ *Id.*

¹⁵⁰ Letter from Kent Greenfield to FAIR members, *supra* note 18.

¹⁵¹ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 70.

¹⁵² *Id.* at 69 (quoting *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000)).

¹⁵³ *Justice Talking: The Power of the Purse: Can Congress Use It to Control Speech?* (National Public Radio broadcast Dec. 5, 2005), available at http://www.justicetalking.org/transcripts/051205_solomon_transcript.pdf (Zengerle answering Greenfield).

¹⁵⁴ Retired Army Colonel and noted analyst Harry G. Summers, Jr. wrote in his book on the Vietnam War that "[b]y attacking the *executors* of U.S. Vietnam policy rather than the *makers* of that policy, the protestors were striking at the very heart of our democratic system—the civilian control of the military." Harry G. Summers, *ON STRATEGY: A CRITICAL ANALYSIS OF THE VIETNAM WAR* 28 (1995).

¹⁵⁵ Diane H. Mazur, *A Blueprint for Law School Engagement with the Military*, 1 J. NAT'L SECURITY L. & POL'Y 473, 505 (2005).

¹⁵⁶ *Id.* at 506 (citing *Dale*, 530 U.S. at 655-56).

¹⁵⁷ *Dale*, 530 U.S. at 644.

odds with the Boy Scouts' publicly expressed views, as opposed to a mere member of a group that the organization found distasteful. As Chief Justice Rehnquist wrote, Dale had served as "copresident [sic] of the Rutgers University Lesbian/Gay Alliance."¹⁵⁸ A newspaper had published an interview with Dale "about his advocacy of homosexual teenagers' need for gay role models," along with a "photograph over a caption identifying him as the copresident [sic] of the Lesbian/Gay Alliance."¹⁵⁹ The *Boy Scouts* majority was at pains to point out that the plaintiff, by his own admission, was both an activist as well as "one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.'"¹⁶⁰

In contrast, FAIR took for granted that military recruiters are personifications of the armed forces' homosexual policy, making no effort to build a factual record to show that connection. Although critics of the *Boy Scouts* doctrine might charge that labeling Dale a "gay rights activist"¹⁶¹ was only a pretext for the Court to find expression in "the mere presence of a gay person,"¹⁶² Dale's activism was, at the very least, distinguishable from his sexual preference as a factor making his status as a scoutmaster potentially expressive.¹⁶³ Military recruiters, on the other hand, are linked to the military's homosexual policy only by their identity as members of the military. As Justice Breyer noted while questioning Rosenkranz during oral arguments, "I haven't even found in the record an instance where there was a recruiter who told people that they couldn't join the military if they were gay."¹⁶⁴ In this sense, FAIR failed to either appreciate or take seriously the Court's warning in *Boy Scouts* that the legal rubric of expressive association cannot be used to defeat any equal access law by claiming that acceptance of outsiders would stifle the organization's voice.¹⁶⁵ In arguing that recruiting is expression, the law schools apparently made the correlative leap that recruiters are thereby expressive. That assumption, however, was neither substantiated on the record nor necessarily grounded in reality. According to one prominent scholarly critic of both the *Boy Scouts* decision and FAIR's reliance on it, the law schools' expressive-association claim enabled them to "see expression in the mere presence of a servicemember."¹⁶⁶

C. A Two-Front Misstep

The plaintiffs' view of recruiters as expressive in their own right proved counterproductive both as a legal strategy and as a public-relations strategy. Since the first iteration of the Solomon Amendment in 1995,¹⁶⁷ the law

¹⁵⁸ *Id.* at 645.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 653.

¹⁶¹ *Id.*

¹⁶² Mazur, *supra* note 155, at 506.

¹⁶³ *See Dale*, 530 U.S. at 653.

¹⁶⁴ Transcript of Oral Argument, *supra* note 1, at 45 (Justice Breyer questioning Rosenkranz).

¹⁶⁵ *Dale*, 530 U.S. at 653.

¹⁶⁶ Mazur, *supra* note 155, at 506-07.

¹⁶⁷ National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994).

schools' self-titled "amelioration" activities were designed to comply with the law's minimum requirements, while simultaneously registering objection to "two distinct, but deeply intertwining, sources of anger": the Solomon Amendment, as well as the underlying homosexual policy.¹⁶⁸ As Professor Diane H. Mazur has written, this protest strategy "principally focused on remedying an alleged harm caused by the very presence of the military." The amelioration activities amounted to "either (1) obscuring the military's presence from the sight of law students," or (2) where that proved unattainable, resorting to tactics that Mazur has termed "expressive rudeness."¹⁶⁹ The first goal usually involved assigning military interviewers to a physically distant location, away from the career services office. The second goal "required law schools to deny military recruiters the courtesies routinely extended to employers or other law school visitors."¹⁷⁰ According to Mazur, this strategy of expressive rudeness "focused, or even fixated, on opportunities to shame military personnel or to make their visit to the law school physically uncomfortable or inconvenient"; for example, by denying military recruiters amenities such as "parking, escorts, coffee, snacks, and lunch."¹⁷¹ For Mazur, herself both a veteran and a critic of the military's homosexual policy,¹⁷² "[S]natching coffee and sandwiches out of the hands of servicemembers [in the name of equality] . . . is distinctively unhelpful if law schools hope to maintain any influence in legal reform related to the military."¹⁷³

FAIR's focus on the expressive quality of recruiters' mere presence was equally unhelpful before the Supreme Court. The Court held that law schools' associational rights were not affected simply because they had to "associate" with military recruiters in the sense that they interact with them.¹⁷⁴ FAIR's attorney had claimed during oral arguments that the Solomon Amendment forced law schools to "host a message of an unwelcome messenger."¹⁷⁵ Rosenkranz's placement of the adjective "unwelcome" was telling, because it revealed, perhaps unwittingly, that the messengers themselves were unwelcome, not just the message. Moreover, as previously discussed,¹⁷⁶ Rosenkranz had considerable difficulty elucidating for the inquiring Justices the precise nature of the objectionable message that the recruiters were ostensibly sending. Rosenkranz's exchange with the Justices on this point reemphasized the central problem with FAIR's reliance on *Boy Scouts*—the message that the law schools objected to was seemingly the very presence of the military on their campuses. As Professor Mazur noted, the plaintiffs' expressive-association claims were framed "so broadly, or perhaps so loosely, that they easily could

¹⁶⁸ Chai Rachel Feldblum & Michael Boucai, *Letter from Chai Rachel Feldblum and Michael Boucai*, in DUE JUSTICE: AMELIORATION FOR LAW SCHOOL COMPLIANCE WITH THE SOLOMON AMENDMENT 3 (2003), available at <http://www.law.georgetown.edu/solomon/documents/handbook.pdf>.

¹⁶⁹ Mazur, *supra* note 155, at 502.

¹⁷⁰ *Id.* at 503.

¹⁷¹ *Id.*

¹⁷² *Id.* at 476.

¹⁷³ *Id.* at 503-04.

¹⁷⁴ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 69 (2006).

¹⁷⁵ Transcript of Oral Argument, *supra* note 1, at 42 (statement of Rosenkranz).

¹⁷⁶ See *supra* text accompanying notes 54-60.

accommodate an expressive right to shun the military in a literally physical sense, over and above any expressive right to be free of the government's compulsion to propagate, accommodate, and subsidize the military's message."¹⁷⁷ The Court resisted this broad claim of associational rights, holding that the "mere presence" of a military recruiter on campus was not enough to "violate a law school's right to associate, regardless of how repugnant the law school considers the recruiter's message."¹⁷⁸ The recruiter's message, according to FAIR, emanated not from anything that the recruiter said or did, but rather was delivered by the recruiter's presence itself.

D. *Misdirected Blame*

Faulting the plaintiffs for misplacing their opposition to the homosexual policy onto the servicemembers themselves is more than simply a matter of reiterating the civics lesson that the military is not a legislative policymaker.¹⁷⁹ Certainly, there can be little dispute that the ultimate fate of "Don't Ask, Don't Tell" is "not an issue for the military leadership to decide" because "[t]he American people have spoken on this subject through . . . their elected officials."¹⁸⁰ As such, "only Congress can repeal the 'Don't Ask, Don't Tell' statute."¹⁸¹ Thus, one argument floated by several *amici*¹⁸² in support of FAIR—namely, that the law schools were treating the military equally by applying the same non-discrimination standards to all employers—was immediately undercut by the obvious fact that "unlike any other employer, the military's policy is a result of a congressional mandate."¹⁸³

Of course, the legislative underpinnings of "Don't Ask, Don't Tell" should neither obscure the fact that military leaders were in many ways at the forefront of the 1993 debate, nor absolve such leaders from having to face tough questions about the need for and efficacy of the policy. Indeed, it is instructive in this regard that the current drive to repeal the law, in addition to being pushed by elected officials, is apparently supported by the current Chairman of the Joint Chiefs of Staff.¹⁸⁴ Not coincidentally, an essay advocating repeal was awarded the 2009 Secretary of Defense National Security Essay Competition

¹⁷⁷ Mazur, *supra* note 155, at 504-5.

¹⁷⁸ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 70.

¹⁷⁹ It is, of course, true that "the homosexual policy is ultimately a matter decided *not* by military commanders but by *civilian* leaders." Charles J. Dunlap, Jr., *Welcome to the Junta: The Erosion of Civilian Control of the U.S. Military*, 29 WAKE FOREST L. REV. 341, 365 (1994).

¹⁸⁰ *Department of Defense Authorization for Appropriations for Fiscal Year 2011, and to Receive Testimony Relating to the "Don't Ask, Don't Tell" Policy: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 59 (2010) [hereinafter *Department of Defense Authorization*] (statement of Admiral Mullen, Chairman of the Joint Chiefs of Staff).

¹⁸¹ News Transcript, Robert M. Gates, Sec'y of Def., DOD News Briefing (Mar. 25, 2010), available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4592>.

¹⁸² *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 55-56.

¹⁸³ Transcript of Oral Argument, *supra* note 1, at 5 (statement of Solicitor General Clement).

¹⁸⁴ See *Department of Defense Authorization*, *supra* note 180, at 59.

prize.¹⁸⁵ General John M. Shalikashvili, a former Chairman, recalled the different atmosphere in the 1990s:

When I was Chairman of the Joint Chiefs of Staff, I supported the current [homosexual] policy because I believed that implementing a change in the rules at that time would have been too burdensome for our troops and commanders. I still believe that to have been true. The concern among many in the military was that given the long-standing view that homosexuality was incompatible with service, letting people who were openly gay serve would lower morale, harm recruitment and undermine unit cohesion.¹⁸⁶

The current “Don’t Ask, Don’t Tell” policy¹⁸⁷ was largely the result of a political compromise reached between President Bill Clinton and congressional critics of his plan to lift the ban on gay servicemembers, led by Senator Samuel A. Nunn, Jr. (D-GA).¹⁸⁸ The congressional resistance might not have been possible without the testimony of high-profile flag officers before the Senate¹⁸⁹ and House¹⁹⁰ Armed Services Committees that the presence of openly gay troops would degrade military effectiveness.¹⁹¹ As Chairman of the Joint Chiefs, Gen. Colin L. Powell harnessed his unparalleled popularity and prestige to oppose President Clinton’s proposals to lift the ban on homosexuals in the military.¹⁹² The *New York Times* called Gen. Powell’s resistance “disruptive,”¹⁹³ and at least one prominent military historian opined that Powell had crossed the line into impropriety.¹⁹⁴ Powell, like Shalikashvili,¹⁹⁵ has since expressed the

¹⁸⁵ Om Prakash, *The Efficacy of ‘Don’t Ask, Don’t Tell,’* JOINT FORCES Q., 4th Quarter 2009 at 88.

¹⁸⁶ John M. Shalikashvili, Op-Ed., *Second Thoughts on Gays in the Military*, N.Y. TIMES, Jan. 2, 2007, at A17.

¹⁸⁷ 10 U.S.C. § 654 (2006).

¹⁸⁸ “[T]he policy concerning gays in the military is the product of a collaborative effort between the executive branch and Congress.” Dunlap, *supra* note 179, at 369.

¹⁸⁹ See *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the S. Comm. on Armed Servs.*, 103d Cong. 595-96, 708, 798 (1994).

¹⁹⁰ *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the H. Comm. on Armed Servs.*, 103d Cong. 142-43, 152-53, 347, 350 (1993).

¹⁹¹ Mazur, *supra* note 155, at 517. For a military lawyer’s defense of the homosexual exclusion policy, see generally MELISSA WELLS-PETRY, EXCLUSION: HOMOSEXUALS AND THE RIGHT TO SERVE (1993).

¹⁹² Dunlap, *supra* note 179, at 376-77.

¹⁹³ *A Chairman for Changing Times*, N.Y. TIMES, Aug. 14, 1993, at 18.

¹⁹⁴ Russell F. Weigley, *The American Military and the Principle of Civilian Control from McClellan to Powell*, 57 J. MIL. HIST., Oct. 1993, at 27, 30-31. General Peter Pace, as Chairman of the Joint Chiefs, fueled controversy by remarking that he supports the ban on openly gay servicemembers as a matter of morality rather than on the more oft-cited grounds of unit cohesion. “I believe homosexual acts between two individuals are immoral and that we should not condone immoral acts,” Gen. Pace told reporters. “As an individual, I would not want [acceptance of homosexual conduct] to be our policy, just like I would not want it to be our policy that if we were to find out that so-and-so was sleeping with somebody else’s wife, that we would just look the other way, which we do not.” Pauline Jelinek, *Pace Expresses Regret Over Gay Remark*, WASH. POST (Mar. 13, 2007, 5:18 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2007/03/13/AR2007031300185.html>.

¹⁹⁵ General Shalikashvili garnered headlines in early 2007 by publicly supporting “the eventual and inevitable lifting of the ban.” Originally a proponent of the policy, Gen. Shalikashvili wrote, “I now believe that if gay men and lesbians served openly in the United

view that the law is ripe for reconsideration.¹⁹⁶ Other top officers of that era still maintain that open homosexuality in the ranks might prove detrimental to unit cohesion.¹⁹⁷

In a similar vein, it would arguably be disingenuous for the DOD to respond to critics of the Solomon Amendment by shouldering Congress with complete responsibility for that law. For better or worse, the DOD through two presidential administrations played a significant role in the evolution of the increasingly restrictive Solomon Amendment between 1994 and 2005; so much so, in fact, that the law's current iteration is a codification of the DOD's preexisting policy. The congressional practice of leveraging federal education dollars on universities' openness to recruiters certainly did not begin with the Solomon Amendment.¹⁹⁸ In fact, during the initial House debate over the Solomon Amendment, Representative Patricia S. Schroeder (D-CO) expressed "strong opposition" to the legislation, in part because the DOD itself found the amendment "duplicative" of already-existing statutory safeguards.¹⁹⁹

Whatever its original position on the necessity of Representative Gerald B.H. Solomon's (R-NY) proposed amendment, however, the DOD later became an advocate of strengthening the legislation once it was in place. On January 13, 2000, an interim rule appeared in the *Federal Register* amending the Defense Federal Acquisition Regulation Supplement (DFARS)

to prohibit DOD from providing funds by contract or grant to an institution of higher education (including any sub-element of that institution) if the Secretary of Defense determines that the institution (or any sub-element of the institution) has a policy or practice that prohibits, or in effect prevents . . . military recruiting on campus.²⁰⁰

The interim rule was published prior to affording the public an opportunity to comment due to a determination of "urgent and compelling reasons" by the

States military, they would not undermine the efficacy of the armed forces." Shalikashvili, *supra* note 186.

¹⁹⁶ Stephanie Condon, *Colin Powell Favors Repealing "Don't Ask, Don't Tell,"* CBS NEWS (Feb. 3, 2010, 2:33 PM), http://www.cbsnews.com/8301-503544_162-6170668-503544.html. Especially in light of former President George W. Bush's determination "that we need to [sic] increase in the permanent size of both the United States Army and the United States Marines," any personnel policy that deemed certain segments of the population effectively ineligible for military service was probably bound to invite reconsideration and additional scrutiny. President George W. Bush, Press Conference by the President (Dec. 20, 2006), available at <http://georgewbush-whitehouse.archives.gov/news/releases/2006/12/20061220-1.html>.

¹⁹⁷ Merrill A. McPeak, Op-Ed, *Don't Ask, Don't Tell, Don't Change*, N.Y. TIMES, Mar. 4 2010, at A27.

¹⁹⁸ The National Aeronautics and Space Administration Authorization Act of 1969 denied NASA funds to universities that barred military recruiters. Pub. L. No. 90-373, § (h), 82 Stat. 280, 281-82 (1968). The Armed Forces Appropriation Authorizations in 1971 and 1973 similarly enabled the DOD to cut off certain funding to noncompliant universities. Pub. L. No. 91-441, § 510, 84 Stat. 905-06 (1970); Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972); *see also* United States v. City of Philadelphia, 798 F.2d 81, 86 (3d Cir. 1986).

¹⁹⁹ 140 CONG. REC. H3864 (1994) (statement of Rep. Schroeder); *see also* Forum for Academic and Institutional Rights, Inc. v. Rumsfeld, 390 F.3d 219, 226 (3d Cir. 2004).

²⁰⁰ Defense Federal Acquisition Regulation Supplement; Institutions of Higher Education, 65 Fed. Reg. 2056, 2056 (Jan. 13, 2000)

Secretary of Defense.²⁰¹ This interim rule was formally adopted as a final regulation in 2002.²⁰²

As critics of the Solomon Amendment are quick to point out, the DOD regulations “exponentially toughened the law by interpreting it to require revocation of federal grants to an entire university if only one of the university’s subdivisions (its law school, for example) runs afoul of the law.”²⁰³ Whereas a university subdivision that interfered with military recruiting risked losing “funding from all of the federal agencies identified in the statute,” only DOD funds would be withheld “from the offending subelement’s [sic] parent institution”²⁰⁴ as well. When it came to raising the stakes in the debate over the Solomon Amendment, the DOD was clearly out in front.

After the terrorist attacks of September 11, 2001, “the DOD began applying an informal policy of requiring not only access to campuses, but treatment equal to that accorded other recruiters.”²⁰⁵ This policy broke an uneasy truce, one that had quieted the Solomon Amendment debate since 1999, whereby law schools avoided Solomon’s wrath by allowing military recruiters physical access to the university (although not necessarily the law school) campus,²⁰⁶ while simultaneously employing the aforementioned “ameliorative measures” to deny judge advocates the services, assistance, or cooperation of the law schools’ career placement offices.²⁰⁷ The DOD’s informal policy of requiring not just access, but equal access, shook up the tenuous status quo and undoubtedly helped fuel the Solomon litigation. In addition to FAIR’s case, professors and students at both the University of Pennsylvania Law School²⁰⁸ and Yale Law School²⁰⁹ brought suits against the DOD in 2003 and 2004. Not until the district court in *FAIR* found the DOD’s informal policy to be an untenable interpretation of the existing statute²¹⁰ did Congress amend “the Solomon

²⁰¹ *Id.*

²⁰² Defense Federal Acquisition Regulation Supplement; Institutions of Higher Education, 67 Fed. Reg. 49253 (July 30, 2002).

²⁰³ *The Solomon Amendment*, SOLOMONRESPONSE.ORG, <http://www.law.georgetown.edu/solomon/solomon.html> (last visited Jan. 11, 2011).

²⁰⁴ *Forum for Academic and Institutional Rights, Inc.*, 390 F.3d at 226.

²⁰⁵ *Id.* at 227.

²⁰⁶ See, e.g., E-mail from Jo-Ann Verrier, Assistant Dean for Career Planning and Placement, Univ. of P Law School, to LAW-JD2003@LISTS.UPENN.edu (Aug. 28, 2001, 14:59 EST) (on file with author) (“The Law School’s career planning and placement services are available only to employers whose standards and practice conform to [the Law School’s nondiscrimination] policy. The University—as opposed to the Law School itself—has for years allowed military recruiters in light of the fact that any discrimination in which the military engages is, at this point, ‘lawful’ under the public laws of the United States. Accordingly, the University’s Career Office handles military recruiting for law students, providing full access to those opportunities for our students while allowing the Law School to continue to uphold its own policy.”).

²⁰⁷ See *Forum for Academic and Institutional Rights, Inc.*, 390 F.3d at 227.

²⁰⁸ *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, at *1-*2 (E.D. Pa. Aug. 19, 2004).

²⁰⁹ *Burt v. Rumsfeld*, 354 F. Supp. 2d 156 (D. Conn. 2005), *rev’d sub nom.* *Burt v. Gates*, 502 F.3d 183 (2d Cir. 2007); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004) (dismissed as moot in light of *Burt*).

²¹⁰ *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 321 (D. N.J. 2003), *rev’d*, 390 F.3d 219, 224 (3d Cir. 2004), *rev’d*, 547 U.S. 47, 51 (2006).

Amendment to codify the DOD's informal policy" as part of the 2005 National Defense Authorization Act.²¹¹ Thus, to criticize the plaintiffs in the Solomon litigation for finding odious "expression in the mere presence of a servicemember"²¹² is not to deny either the DOD's participation or the armed forces' role in the promulgation of both "Don't Ask, Don't Tell" and the Solomon Amendment. FAIR had at least a reasonable argument that the civilian and military leadership within the DOD was complicit in helping Congress develop policies that the law schools found objectionable.

E. *An Expressive Policy*

However, such a concession does not necessarily translate into a valid argument that recruiters are expressive extensions of law and policy. The real substance of FAIR's claims about expression was not that recruiters are expressive—a notion that the Supreme Court recognized and rejected as a canard from the outset—but rather that "the Solomon Amendment itself" is expressive.²¹³ In this sense, FAIR was making a distinction, once eloquently articulated by Chief Justice Earl Warren, between "the tradition of exclusive authority of the military over its uniformed personnel," which the courts are "ill-equipped" and hesitant to question, and the "attempts of our civilian Government to extend military authority into other areas," in which a court "can and should make its own judgment, at least to some degree, concerning the weight a claim of military necessity is to be given."²¹⁴ FAIR's best argument was that the Solomon Amendment was an example of the latter, not the former.

By relying on *Boy Scouts* in their legal strategy, though, and by exhibiting "expressive rudeness" in their amelioration tactics, the law schools blurred the key distinction between the Solomon Amendment as an expressive law and military personnel as expressive beings.²¹⁵ The Third Circuit correctly pointed out that one of the Solomon Amendment's original co-sponsors, Representative Richard W. Pombo (R-CA), made no secret of his intention to use the law to send a message to universities that their shunning of the military would come with a substantial price tag.²¹⁶ Representative Pombo's floor remarks were extremely telling in this regard:

²¹¹ *Forum for Academic and Institutional Rights, Inc.*, 390 F.3d at 228; see also Transcript of Oral Argument, *supra* note 1, at 10 (statement of Solicitor General Clement) (asserting that Congress "effectively codified and ratified [DOD's] regulatory interpretation.").

²¹² Mazur, *supra* note 155, at 506-07.

²¹³ *Id.* at 499.

²¹⁴ Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187, 191 (1962), reprinted in 60 A.F. L. REV. 1, 11, 15 (2007).

²¹⁵ Mazur, *supra* note 155, at 502. Major General Charles J. Dunlap, Jr., former Deputy Judge Advocate Gen. of the Air Force, has argued that the objection of gay rights' groups to the candidacy of Marine Corps Gen. Joseph P. Hoar to succeed Gen. Powell as Chairman of the Joint Chiefs of Staff, due to Gen. Hoar's enforcement of the homosexual personnel policy, sent "the military community a troubling message. In effect, [the activists] suggest that the defiance of the policies of civilian authorities by military commanders is appropriate. The activists imply that military officers should condition their actions not on the lawful dictates of the civilian leadership, but on their own assessment of the present—and future—political climate." Dunlap, *supra* note 179, at 365.

²¹⁶ *Forum for Academic and Institutional Rights, Inc.*, 390 F.3d at 225-26.

Some institutions of higher education in this country need to be put on notice that their policies of ambivalence or hostility towards our Nation's armed services do not go unnoticed—either by this House or by the American people.

A growing, and misguided, sense of moral superiority is creeping into the policies of colleges and universities in this country when it comes to such things as military recruiting or ROTC activities on campus. . . .

. . . It is nothing less than a backhanded slap at the honor and dignity of service in our Nation's Armed Forces; at those who have worn our Nation's uniform before; and at this Congress which has set in law military personnel standards.

These 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; to allow ROTC units to operate; or to afford our military the same recruiting opportunities offered to private corporations—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.

For our young men training to defend the freedoms of all Americans, and for all those who have proudly worn the uniform of this country, I urge my colleagues to support the Solomon amendment, and *send a message* over the wall of the ivory tower of higher education.²¹⁷

Representative Solomon, the Amendment's namesake and other co-sponsor, was equally adamant that the schools' "outrageous" and "totally hypocritical" position vis-à-vis military recruiting must incur Congress's financial reprisal.²¹⁸ At some level, the co-sponsors' intent was clearly to address what they considered to be "a sign of [academia's] deep disrespect for the military" and bring the rogue universities back into line.²¹⁹ FAIR argued as much in its brief to the Third Circuit, asserting the intent behind the legislation "was not to enhance military recruiting, but to redress a perceived insult and to command respect."²²⁰

Although Congress is certainly well within its powers to send a message via legislation, FAIR's larger point was that the Solomon Amendment was not really about military preparedness at all, and therefore not entitled to the extreme judicial deference²²¹ normally afforded to Congress when acting under its Constitutional mandate to "provide for the common Defence."²²² From FAIR's perspective, Congress was not legislating for the sake of military effectiveness, but instead using the vocabulary and context of military effectiveness to state its views "about unpatriotic universities," just as it had earlier used "Don't Ask, Don't Tell" to "make a very public statement about the inferior status of gay people in our society."²²³ Representative Solomon, in FAIR's estimation, was not being completely forthright when he claimed to be offering

²¹⁷ 140 CONG. REC. H3863 (1994) (emphasis added) (statement of Rep. Pombo).

²¹⁸ *Id.* at H3861 (statement of Rep. Solomon).

²¹⁹ Mazur, *supra* note 155, at 499.

²²⁰ Third Circuit Brief for Appellants, *supra* note 87, at 8.

²²¹ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006) (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981)).

²²² U.S. Const. art. I, § 8, cl. 1.

²²³ Mazur, *supra* note 155, at 500.

his legislation “on behalf of military preparedness,”²²⁴ and when he repeatedly emphasized the mantra, “recruiting is where readiness begins.”²²⁵ Whereas the Solomon Amendment’s proponents had accused universities of attempting to “use the military as a vehicle for social change,”²²⁶ FAIR countered that Congress was using the military as a vehicle to maintain the social status quo.²²⁷

To support its assertion that the government’s military readiness rationale was disingenuous, FAIR emphasized that the DOD at first opposed enactment of the Solomon legislation “as unnecessary, duplicative, and potentially harmful to defense research initiatives.”²²⁸ According to congressional opponents of the Solomon Amendment, the DOD at that time would have preferred the “flexibility” provided by the extant law to the rigidity of the proposed legislation.²²⁹ FAIR also emphasized that in the law school recruiting context, the various Judge Advocates General’s Corps (JAG) had no problem finding eager recruits, with or without the protective Solomon law. The plaintiffs noted in their Third Circuit brief that recruits were flocking to JAG, in spite of the fact that law school administrations were either excluding military recruiters or declining to actively assist them.²³⁰ At least in the limited context of the legal career field, this assertion was borne out by evidence of the “intense”²³¹ competition for JAG positions.²³² In FAIR’s estimation, the DOD orchestrated its

²²⁴ 140 CONG. REC. H3861 (1994) (statement of Rep. Solomon).

²²⁵ *Id.* at H3864 (statement of Rep. Solomon).

²²⁶ *Id.* at H3863 (statement of Rep. Rohrabacher).

²²⁷ The Judge Advocates General vigorously defended law school recruiting as an important national security issue. According to The Judge Advocate General of the Air Force, “If access to the national on-campus interviewing system is significantly restricted or denied, our ability to contribute to the national security of the United States will be degraded.” Declaration of Major General Jack L. Rives at 10, *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004) (No. 03-4433).

²²⁸ 140 CONG. REC. H3863 (statement of Rep. Underwood).

²²⁹ *Id.*

²³⁰ Third Circuit Brief for Appellants, *supra* note 87, at 10.

²³¹ *Id.* at 11.

²³² However, the Judge Advocates General of the Air Force and Army, as well as the top recruiting commanders of the Navy and Marine Corps, insisted that recruiting on law school campuses was vital to maintaining the best qualified applicant pool of potential judge advocate accessions. General Rives, then the Deputy Judge Advocate General of the Air Force, described on-campus interviews as “the centerpiece of AF JAG Corps recruiting.” Declaration of Maj. Gen. Rives, *supra* note 226, at 5. General Rives asserted that on-campus interviews, which cannot be adequately replaced by other recruiting methods, provide “the most efficient and effective means by which the AF JAG Corps can compete with higher paying employers and meet the strong demand for face-to-face interaction with interested applicants.” *Id.* at 6.

General Thomas J. Romig, then the Judge Advocate General of the Army, noted the importance of Army Field Screening Officers in meeting students face-to-face on law school campuses. “As a uniformed judge advocate, the Field Screening Officer performs vital recruiting duties merely by his or her presence on campus,” Maj. Gen. Romig wrote. “He or she conducts informational seminars about the JAG Corps and provides a human face to the Army.” General Romig added that curtailing on-campus recruiting at law schools would result in “a considerably smaller pool of applicants,” as well as “the accession of less talented attorneys.” The “physical presence” of uniformed judge advocates was “the key to effective JAG Corps recruiting,” and therefore not readily duplicable by other recruiting methods. Declaration of Major General Thomas J. Romig at 7, 9, *Forum for Academic and Institutional Rights, Inc.*, 390 F.3d 219 (No. 03-4433).

“crackdown” on unreceptive law schools in late 2001 not to correct a recruiting shortfall, but “despite its successes in recruiting lawyers.”²³³ The DOD’s post-2001 policy of insisting upon equal access to career services offices “was not a matter of military need, but rather was motivated by the same indignation” that prompted Congress to enact the Solomon legislation in the first place.²³⁴

In light of FAIR’s argument that the Solomon Amendment was less about military necessity than it was about sending a political message, the law schools’ choice of military recruiters as the main targets of both their ameliorative and legal strategies appears even more misguided. If the Solomon Amendment’s punitive prohibitions were an expression of Congress and the generals’ frustration with intransigent universities, then it is difficult to understand why the law schools channeled their objections to the law by focusing on military recruiters as expressive beings whose very presence sent a discriminatory message. FAIR implied, although never argued outright, that the DOD somewhat cynically manipulated the national mood after the 2001 terror attacks by suddenly executing “an about-face”²³⁵ and insisting upon treatment equal to that of non-discriminating employers. Yet other than the mere fact that military recruiters, as the individuals actually interacting with universities face-to-face, were the most accessible targets, their connection to any message that either Congress or the DOD was sending was tenuous at best. Whatever the intention of Congress or the DOD to demonstrate their power over resistant universities, the recruiters themselves were visiting schools with only one purpose: to encourage and solicit applications from recruits. FAIR’s argument that a recruiter’s ephemeral presence “affects in a significant way” a law school’s “ability to advocate” its nondiscriminatory “viewpoints”²³⁶ presumed some opposing viewpoint on the recruiter’s part; Justice Breyer attempted in vain to find evidence of this assumption anywhere on the record.²³⁷ FAIR’s insistence that Congress’s invocation of military readiness was a mere pretext for a politi-

Admiral Jeffrey L. Fowler, then Commander of the Navy Recruiting Command, deemed on-campus recruiting the “best” and “most effective tool for judge advocates to meet with prospective applicants and discuss a potential career in the JAG Corps.” Admiral Fowler maintained that “[t]here is no adequate substitute for a personal dialogue between a current Judge Advocate and an interested candidate.” Especially given the inability of the military to negotiate salaries and locations, “[t]he ability to proudly walk onto a law school campus, in uniform, and openly talk to a potential applicant is essential to our ability to highlight the many rewards and advantages of a career as a Judge Advocate.” Declaration of RDML Jeffrey L. Fowler, USN at 4-6, *Forum for Academic and Institutional Rights, Inc.*, 390 F.3d 219 (No. 03-4433).

General Walter E. Gaskin, then Commanding General of the Marine Corps Recruiting Command, described on-campus recruiting as “the preferred and most successful method of establishing initial contact” with applicants to the JAG Corps. Declaration of Brigadier Walter E. General Gaskin, U.S. Marine Corps at 4, *Forum for Academic and Institutional Rights, Inc.*, 390 F.3d 219 (No. 03-4433).

²³³ Third Circuit Brief for Appellants, *supra* note 87, at 11.

²³⁴ *Id.* at 12.

²³⁵ *Id.* at 11.

²³⁶ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (1999).

²³⁷ Transcript of Oral Argument, *supra* note 1, at 45.

cal power play²³⁸ rendered recruiters an especially ill-chosen target of vituperation.

Ironically, FAIR's ill-fated focus on recruiters helped portray the government as a victim of discrimination itself.²³⁹ In this way, a case that the law schools insisted was solely about the military's discrimination against homosexuals came to encompass as well the law schools' disparate treatment of military recruiters.²⁴⁰ In his oral argument before the Supreme Court, Solicitor General Clement insisted that the government's only interest was to secure equal access for recruiters.²⁴¹ Less favorable treatment of military recruiters by law schools, Clement argued, was not of concern to the government unless it amounted, in practical terms, to an impediment to equal access.²⁴² Unlike anti-discrimination statutes, the Solomon Amendment "gives, not a right to be free of any discrimination, but a right to equal access."²⁴³ Thus, the Solicitor General maintained that vocal disapproval of visiting military recruiters by their law school hosts was completely permissible under the Solomon Amendment, so long as the recruiters' equal access to potentially interested law students was not functionally compromised.²⁴⁴ Uniformed recruiters could be treated unequally if they were afforded an equal opportunity to do their job.²⁴⁵ Upon hearing the government's acquiescent stance toward the prospect of law

²³⁸ See Francisco Valdes, *Solomon's Shames: Law as Might and Inequality*, 23 T. MARSHALL L. REV. 351, 354-55 (1998); see also Kent Greenfield, *Imposing Inequality on Law Schools*, WASH. POST, Nov. 10, 2003, at A25 (characterizing the Solomon Amendment as "the government's attempt to use the power of the purse to reshape the academic environment and suppress educational messages in ways it could never accomplish by direct command").

²³⁹ A strikingly similar episode of misplaced hostility occurred in Berkeley, California in early 2008, when the Berkeley City Council approved a proclamation calling the three Marine recruiters stationed there "uninvited and unwelcome intruders." Citing both the military's discrimination on the basis of sexual orientation, as well as its "history of launching illegal, immoral and unprovoked wars of aggression," the City Council resolved to advise the Commandant of the Marine Corps "that the Marine recruiting office is not welcome in our city." Memorandum from Steve Freedkin, Chairperson, Peace and Justice Comm'n, to Honorable Mayor and Members of the City Council (Jan. 29, 2008), <http://www.ci.berkeley.ca.us/ContentPrint.aspx?id=11704> (follow "12. Marine Recruiting Office in Berkeley" hyperlink). Amid the inevitable backlash, including outraged politicians' threats to withhold state and federal funds from city services, the City Council backtracked, resolving to "publicly differentiate between the City's documented opposition to the unjust and illegal war in Iraq and our respect and support for those serving in the armed forces." Memorandum from Betty Olds & Laurie Capitelli, Councilmembers, Berkeley City Council, to Honorable Mayor and Members of the City Council (Feb. 12, 2008), <http://www.ci.berkeley.ca.us/ContentPrint.aspx?id=12798> (follow "26. Reiteration of Berkeley's Opposition" hyperlink); see also Jesse McKinley, *After Taking on the Marine Corps, A Tough Council Gives Some Ground*, N.Y. TIMES, Feb. 12, 2008, at A12.

²⁴⁰ See Dahlia Lithwick, *Law Schools Against Free Speech*, SLATE MAGAZINE (Dec. 6, 2005, 6:07 PM), <http://www.slate.com/id/2131643> (Lithwick applauds the Solicitor General for "a clever approach—painting the Solomon Amendment as an anti-discrimination law, as opposed to an aggressive counter-punch at anti-discrimination diehards").

²⁴¹ Transcript of Oral Argument, *supra* note 1, at 28 (statement of Solicitor General Clement).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See *id.* at 22-23.

²⁴⁵ See *id.*

schools offering ostensibly equal, but clearly hostile, access to visiting servicemembers, Chief Justice Roberts quipped, “Sort of like a separate-but-equal.”²⁴⁶

V. THE PATHS NOT TAKEN

Beyond enabling the government to enlist the issue of discrimination on its own behalf, FAIR’s overbroad First Amendment argument also allowed the Solicitor General to flip the plaintiffs’ claim on its head. If, as FAIR asserted, providing equal logistical assistance to military recruiters constituted compelled speech, and tolerating the presence of military recruiters on campus constituted compelled expressive association,²⁴⁷ then, as the government asked in response, why not have the law schools respond with their own speech rather than restrict the speech of others?²⁴⁸ In portraying JAG recruiting as “a dueling exchange of expression between law schools and the military,” FAIR unwittingly laid the groundwork for maintaining the status quo.²⁴⁹ “[T]here are two messages going on here, and they are clashing,” Rosenkranz argued before the Court. “There is the military’s message, which the schools are interpreting as, ‘Uncle Sam does not want you,’ and there is the school’s message, which is, ‘We do not abet those who discriminate. That is immoral.’”²⁵⁰ Leaving aside the Court’s doubts as to whether the military’s recruiting function actually had an expressive message at all, Rosenkranz’s position opened the door for Solicitor General Clement to rhetorically shrug his shoulders and argue that the two clashing messages could simply be allowed to clash.²⁵¹

Effectively, that is just what he did. “[T]he recipient schools remain free to criticize the military and its policies,” he reminded the Court, “and, of course, they remain free to decline Federal funds altogether.”²⁵² In fact, Clement’s faith in military recruiters to weather the storm of protests and inhospitality took the justices by surprise. “[T]he Army recruiters are not worried about being confronted with speech, they’re worried about actually not being allowed onto the same law schools,”²⁵³ the Solicitor General asserted. Justice Sandra Day O’Connor asked, “Does the Solomon Amendment pose any restrictions on the extent to which the law schools can distance themselves from the military’s views? Can there be signs up at every recruitment office, saying, ‘Our law school doesn’t agree with any discrimination against gays’?” Clement responded, “Yes, they can, Justice O’Connor.”²⁵⁴

²⁴⁶ *Id.* at 23.

²⁴⁷ Third Circuit Brief for Appellants, *supra* note 87, at 24 (“[T]he Solomon Amendment combines both [compelled speech and muddling of an association’s message].”).

²⁴⁸ See Transcript of Oral Argument, *supra* note 1, at 21 (statement of Solicitor General Clement) (“[T]here is . . . nothing in the [Solomon] Act that prevents the universities . . . from disclaiming [‘Don’t Ask, Don’t Tell’].”).

²⁴⁹ Mazur, *supra* note 155, at 498.

²⁵⁰ Transcript of Oral Argument, *supra* note 1, at 35-36.

²⁵¹ See *id.* at 25-26.

²⁵² *Id.* at 3.

²⁵³ *Id.* at 26.

²⁵⁴ *Id.* at 21.

A. *Deference to Speech*

Solicitor General Clement expansively defined the bounds of permissible protest as including virtually anything that would not compromise recruiters' physical access to law school campuses and law students. He suggested the law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize student protests."²⁵⁵ Taken aback by the latitude the government was proposing to afford protesters, Justice Kennedy inquired, "You mean, they could organize a student protest at the hiring interview rooms, so that everybody jeers when the applicant comes in the door and the school could organize that? . . . As when it's, say, a job fair, and all the employers are there . . . and the school organizes a line jeering the — both the recruiters and the applicants, that's equal access?" Clement responded, "I think that would be equal access."²⁵⁶ A stunned Justice Kennedy remarked, "I think that's an extraordinary position you're taking."²⁵⁷ In a moment of levity, Justice Scalia interjected, "You're not going to be an Army recruiter, are you?"²⁵⁸

The immediate effect of Solicitor General Clement's early concession that "the [Solomon] [A]mendment has to accommodate the First Amendment"²⁵⁹ was that Rosenkranz found himself confronting a highly skeptical panel of Justices when he followed Clement at oral arguments. As FAIR's attorney delved into the expressive nature of recruiting, Justice O'Connor countered, "But the government takes the position that the law school is entirely free to convey its message to everyone who comes. . . . So, how is the message affected in that environment?"²⁶⁰ Rosenkranz asserted, "The law schools are disseminating a message that they believe it is immoral to abet discrimination."²⁶¹ Justice O'Connor replied, "But they can say that to every student who enters the room."²⁶² Justice Breyer peppered Rosenkranz with questions along the same line: "What's wrong with the government saying, 'University, you disapprove of what we do. The remedy for such a situation is not less speech, it is more speech.'"²⁶³ Justice Kennedy expressed his frustration with the law schools for electing litigation over a pragmatic resolution.

What's happening here is the prospective employers, the recruiters, are proposing a commercial transaction. And it seems to me quite a simple matter for the law schools to have a disclaimer on all of their e-mails and advertisements that say, 'The law school does not approve—and, in fact, disapproves—of the policies of some of the employers who you will meet.' That's the end of it.²⁶⁴

In addition to making the Court's job relatively straightforward, and thereby courting a unanimous decision in the government's favor, Clement's permissive approach in the face of FAIR's sweeping First Amendment claims

²⁵⁵ *Id.* at 25.

²⁵⁶ *Id.* at 25-26.

²⁵⁷ *Id.* at 27.

²⁵⁸ *Id.* at 26.

²⁵⁹ *Id.* at 27.

²⁶⁰ *Id.* at 37.

²⁶¹ *Id.* at 38.

²⁶² *Id.*

²⁶³ *Id.* at 45.

²⁶⁴ *Id.* at 49.

had a more enduring effect as well. It encouraged the Court to explicitly acknowledge the law schools' protest rights, recognizing that "[l]aw schools remain free under the statute to express whatever views they may have on the military's congressionally mandated employment policy"²⁶⁵—or, for that matter, on any other military policy or action. An institution's eligibility for federal funds would not be compromised by its vocal animosity to the military's presence, so long as that presence was not functionally impaired.

B. Sidestepping the Conditions Debate

Had the law schools' argument been more restrained, or the government's defense more demanding, the case could have centered on a very different issue—the extent to which the government can use funding conditions to either encourage or discourage certain viewpoints and content.²⁶⁶ In its Supreme Court brief, FAIR claimed that the Solomon Amendment was “a classic case for application of the doctrine of unconstitutional conditions,”²⁶⁷ a legal principle holding that Congress may not use funding conditions to make an end-run around civil liberties by constructing a de facto requirement that it could not mandate directly.²⁶⁸ The Court had previously held that requiring veterans to sign a loyalty oath in exchange for a property tax exemption constituted just such an unconstitutional condition.²⁶⁹ In its editorial supporting the law schools' litigation, the *New York Times* similarly insisted that the federal government could not use “its power of the purse to bludgeon recipients into giving up their rights.”²⁷⁰

The government first countered that the Solomon Amendment would be “valid Spending Clause legislation,” even if that were the only authority upon which Congress relied.²⁷¹ The Solomon Amendment “is not aimed at the suppression of ideas,” and thereby does not impair civil liberties and “implicate the doctrine of unconstitutional conditions.”²⁷² Second, given the government's overall argument that the Solomon Amendment was an exercise of Congress's constitutional powers “to raise and support Armies,”²⁷³ the Solicitor General maintained that the Solomon Amendment “would be constitutional even if

²⁶⁵ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 60 (2006).

²⁶⁶ See HENRY COHEN, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT, 26-30 (2009), available at <http://www.fas.org/sgp/crs/misc/95-815.pdf>; see also Doug Linder, *Government Speech & Use of Government Dollars to Favor or Disfavor Speech Based on Its Content*, EXPLORING CONSTITUTIONAL CONFLICTS, <http://www.law.umkc.edu/faculty/projects/ftrials/conlaw/govdollars.html> (last visited Jan. 11, 2011).

²⁶⁷ Brief for the Respondents at 36, *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (No. 04-1152), available at <http://www.law.georgetown.edu/solomon/documents/briefFAIR.pdf>.

²⁶⁸ *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

²⁶⁹ *Id.* at 528.

²⁷⁰ *Law Schools, Gays and the Military*, Editorial, N.Y. TIMES, Oct. 5, 2003, at WK12, available at <http://www.nytimes.com/2003/10/05/opinion/05SUN2.html?ex=1380686400&en=95b2b16c2673438a&ei=5007&partner=USERLAND>.

²⁷¹ Brief for the Petitioners at 43, *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (No. 04-1152), available at <http://www.law.georgetown.edu/solomon/documents/GovernmentPartyBrief.pdf>.

²⁷² *Id.* at 42.

²⁷³ U.S. CONST. art. I, § 8, cl. 12.

imposed as a direct regulatory requirement.”²⁷⁴ That is, arguing about proper and improper funding conditions was unnecessary, because Congress could just as well have mandated an outright requirement for colleges and universities to permit the visitation of military recruiters.

The Supreme Court quickly disposed of FAIR’s unconstitutional conditions argument by adopting the government’s second position. Justice Scalia hinted at this possibility during oral argument, when he asked Clement why the government was defending the Solomon Amendment “principally on the basis of the Spending Clause,” as opposed to Congress’s national defense powers.²⁷⁵ Clement responded by reasserting the government’s position that “[the law] would be constitutional, even if it were a direct imposition.”²⁷⁶ Scalia, in particular, emphasized his preference for evaluating the Solomon Amendment under the rubric of national defense, noting that the law was codified under title 10 of the U.S. Code.²⁷⁷ In a prior case striking down a city commission order that conflicted with military recruiting mandates, the Third Circuit had acknowledged “the long-standing Congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters.”²⁷⁸ In light of both that policy, as well as the “general Congressional directive” to “conduct intensive recruiting campaigns,”²⁷⁹ the circuit court concluded, “Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance.”²⁸⁰

Chief Justice Roberts’s opinion confirmed that Congress’s “broad authority to legislate on matters of military recruiting” would have supported the direct imposition of an access requirement on the law schools.²⁸¹ Congress’s choice “to secure campus access for military recruiters indirectly, through its Spending Clause power,” did not prejudice its ability to do so.²⁸² In fact, the Court reasoned that “Congress’s power to regulate military recruiting under the Solomon Amendment is arguably greater because universities are free to decline the federal funds.”²⁸³ Congress’s indirect approach “does not reduce the deference” it enjoys “in the area of military affairs.”²⁸⁴

As a result, the Court largely steered clear of injecting itself into the plethora of case law addressing the constitutionality of leveraging government dollars in support of, or in objection to, the content of speech.²⁸⁵ Because the

²⁷⁴ Brief for the Petitioners, *supra* note 271, at 40.

²⁷⁵ Transcript of Oral Argument, *supra* note 1, at 12.

²⁷⁶ *Id.* at 13.

²⁷⁷ *Id.* at 12.

²⁷⁸ *United States v. City of Philadelphia*, 798 F.2d 81, 86 (3d Cir. 1986).

²⁷⁹ 10 U.S.C. § 503(a)(1) (2006).

²⁸⁰ *Philadelphia*, 798 F.2d at 86. In *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld* the Third Circuit differentiated the case from *Philadelphia*. 390 F.3d 219, 234 n.15 (3d Cir. 2004).

²⁸¹ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 58 (2006).

²⁸² *Id.*

²⁸³ *Id.* at 59.

²⁸⁴ *Id.* at 58.

²⁸⁵ See STEVEN H. SHIFFRIN & JESSE H. CHOPER, *THE FIRST AMENDMENT: CASES—COMMENTS—QUESTIONS* 390-96 (4th ed. 2006); see also COHEN, *supra* note 266, at 26-30.

Solomon Amendment was properly classified as an exercise of Congress's military-raising powers, as opposed to its general welfare-providing powers, the Court found it unnecessary to analyze the extent of "Congress' ability to place conditions on the receipt of [federal] funds"²⁸⁶ as a way of indirectly regulating matters not directly within its purview.²⁸⁷ This came as a disappointment to FAIR, which had looked hopefully to assurances in earlier government-funding cases that

[T]he university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.²⁸⁸

Thomas H. Parry, president of the Harvard Gay and Lesbian Caucus, pursued this favorable line of reasoning. "Sexual orientation may be the issue of the day," he noted, "but if the [Solomon] law is not struck down, then Congress will be free to use the power of the purse to make academic policy wherever and whenever it likes."²⁸⁹ This approach sought to frame the Solomon Amendment in the context of "[a]cademic abstention," the informal "doctrine . . . that courts should defer to colleges and universities when it comes to matters like promotions, curricula, admission policies, grading, tenure, etc."²⁹⁰ Of course, military recruiting is fairly easy to distinguish from internal academic matters that courts may feel "ill-equipped"²⁹¹ to evaluate.

Whereas FAIR hoped that Congress's decision to give universities a choice between complying with the equal access requirement or losing certain funding would open the door to a debate about the limits of conditioning federal funds, the result was quite the opposite. The Supreme Court concluded that "a funding condition cannot be unconstitutional if it could be constitutionally imposed directly."²⁹² Chief Justice Roberts emphasized this point during oral arguments by repeatedly reminding Rosenkranz that his clients would be "perfectly free" to follow their consciences and bar recruiters from campus if

²⁸⁶ *Forum for Academic & Institutional Rights, Inc.*, 547 U.S. at 59.

²⁸⁷ *See South Dakota v. Dole*, 483 U.S. 203, 206 (1987).

²⁸⁸ *Rust v. Sullivan*, 500 U.S. 173, 200 (1991).

²⁸⁹ *Money and Military Recruiting*, HARV. MAG., Nov.-Dec. 2005, at 64, 64.

²⁹⁰ Stanley Fish, *The Rise and Fall of Academic Abstention*, N.Y. TIMES OPINIONATOR (Oct. 21, 2009, 9:30 PM), <http://opinionator.blogs.nytimes.com/2009/10/12/the-rise-and-fall-of-academic-abstinence>. Professor Robert Burt of Yale Law School invoked the academic abstention argument when he stated, "[Law schools] have a special claim that we have autonomy in running our affairs because we are a university, and there's a tradition of special respect for universities, and a special protection . . . to protect students from discriminatory or demeaning behavior." Mangino, *supra* note 59, at 3; *see also* Third Circuit Brief for Appellants, *supra* note 87, at 21 ("But if academic freedom means anything, it means that the decision [to teach non-discrimination values] is the law school's to make, free from government interference."); Greenfield, *supra* note 237 ("[Law schools] would not pretend to tell the government how to run the military. The military should not be telling us how to run law schools.").

²⁹¹ *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 92 (1978).

²⁹² *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 59-60 (2006).

they resolve not to “take the money.”²⁹³ “[The Solomon Amendment] doesn’t insist that you do anything,” Roberts asserted.²⁹⁴ “It says that, ‘If you want our money, you have to let our recruiters on campus.’”²⁹⁵ Rosenkranz claimed, as part of his compelled speech argument, that if law schools permitted recruiters on campus, while still proclaiming their commitment to nondiscrimination, “[T]he answer of the students is, ‘We don’t believe you.’”²⁹⁶ Justice Roberts retorted, “The reason they don’t believe you is because you’re willing to take the money. What you’re saying is, ‘This is a message . . . we believe in strongly, but we don’t believe in it to the tune of \$100 million.’”²⁹⁷

C. Principles Versus Dollars

The money issue certainly provided fodder for cynics who pointed out that law schools professed a willingness to sacrifice for principle, but only up to a certain dollar threshold.²⁹⁸ “The law [schools] want their principle and to pay no price for standing by it,” wrote Professor Peter Berkowitz.²⁹⁹ Former Solicitor General Charles Fried suggested it was “just a little bit greedy” for the law schools “to impose their philosophy on the recruiters *and* take the government’s money.”³⁰⁰ One military legal commentator noted, “It is abundantly clear that the pursuit of money was far stronger than belief in a position,”³⁰¹ thereby “reinforcing the old adage that you can’t have your cake and eat it too.”³⁰² To be fair, such criticism was probably not completely accurate, in that some law school deans were more or less ordered by their university presidents not to risk university-wide funding.³⁰³ Nonetheless, the popular image of elite law professors caught between their principles and their pocket books was bound to stick. An opinion piece in the *Wall Street Journal*, for example, contrasted Harvard Law School’s decision to “do what the Solomon Amendment requires and hold our noses,” with Hillsdale College’s principled refusal of federal dollars for failure to provide what it perceived as discriminatory data on race and sex to government agencies.³⁰⁴

²⁹³ Transcript of Oral Argument, *supra* note 1, at 57 (Chief Justice Roberts questioning Rosenkranz).

²⁹⁴ *Id.* at 32 (Chief Justice Roberts questioning Rosenkranz).

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 38 (statement of Rosenkranz).

²⁹⁷ *Id.* at 38-39.

²⁹⁸ See, e.g., Dorothy Rabinowitz, ‘*That Others May Live*,’ WALL ST. J., Oct. 23, 2002, at A18.

²⁹⁹ Peter Berkowitz, *Lacking the Wisdom of Solomon*, NAT’L REV. ONLINE (Dec. 5, 2005, 8:27 AM), <http://www.nationalreview.com/comment/berkowitz200512050827.asp>.

³⁰⁰ *Morning Edition: Court: Colleges May Ban Military Recruiters* (National Public Radio broadcast Nov. 30, 2004), available at <http://www.npr.org/templates/story/story.php?storyId=4192004>.

³⁰¹ Matthew D. van Dalen, *Rumsfeld v. FAIR, A Free Speech Setback or Strategic Military Victory?*, 31 J. LEGAL PROF. 75, 94 (2007).

³⁰² *Id.* at 96.

³⁰³ According to Penn Law Dean Michael A. Fitts, then-Penn President Judith Rodin “has required the Law School not to apply its non-discrimination policy to military recruiters.” Memorandum from Michael A. Fitts, Dean, Univ. of Pa. Law Sch., to the Pa. Law community 2 (Mar. 20, 2003) (on file with author).

³⁰⁴ William McGurn, *How Hillsdale Beats Harvard*, WALL ST. J., Jun. 2, 2009, at A19.

For its part, FAIR called the amount of money at stake—an estimated \$400 million annually in the case of Harvard University³⁰⁵—“a fiscal gun at the University’s head.”³⁰⁶ Designed to be “harsher than the penalty Congress attaches to almost any direct command,”³⁰⁷ the Solomon Amendment was, in FAIR’s estimation, a “blunt enforcement tool”³⁰⁸ to waive at resistant universities. An amicus brief on behalf of seven top universities, authored by former Solicitor General Seth P. Waxman, similarly argued that the Solomon Amendment’s harsh funding threats were best interpreted as “a command rather than an inducement.”³⁰⁹ FAIR’s contention that the Solomon Amendment was concerned less with the “immense national importance”³¹⁰ of military readiness, as Justice Scalia opined, and more with Congress’s desire “to squelch even the most symbolic elements of the law schools’ resistance to disseminating the military’s message”³¹¹ was arguably borne out in the legislation. The National Defense Authorization Act for 2006 included not only a “sense of Congress” that schools discriminating against military recruiters “should be denied certain Federal taxpayer support,” but also a reporting requirement for the Secretary of Defense to inform Congress of the schools “that are denying equal access to military recruiters and ROTC programs.”³¹² Clearly, Congress did not add this requirement in order to laud the schools mentioned in the Secretary’s report.

D. *A Narrower Approach*

Even had FAIR succeeded in convincing the Court that Congress did not have the power to directly impose military recruiting visits on law schools, and could do so only by attaching such a requirement to the receipt of federal funds, the plaintiffs would still have had to show that the unwelcome presence of recruiters either compelled or penalized protected speech. FAIR’s case in this regard was not clear cut, largely because it relied on the uncertain premise that hosting recruiters on campus forced the schools to send an unwanted message condoning discrimination. Perhaps recognizing this difficulty, Professor Chai Feldblum, one of FAIR’s founders, remarked that from the law schools’ perspective, “this is not a slam dunk case.”³¹³ Many legal scholars sympathetic to FAIR’s underlying goals felt likewise, and expressed frustration with Rosen-

³⁰⁵ Daniel J. Hemel, *Senate Mulls Over Solomon Amendment*, HARV. CRIMSON, May 19, 2004, at 5, available at <http://www.thecrimson.com/article.aspx?ref=502627>. Another source estimated Harvard’s annual total at \$500 million. See *Recruiting Redux*, HARV. MAG., July-Aug. 2005, at 60, 60.

³⁰⁶ *Money and Military Recruiting*, supra note 289, at 62.

³⁰⁷ Brief for the Respondents, supra note 267, at 37.

³⁰⁸ *Recruiting vs. Rights*, HARV. MAG., Jan.-Feb. 2004, at 65, 65.

³⁰⁹ Brief for Columbia University et. al. as Amici Curiae in Support of Respondents at 4, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (No. 04-1152).

³¹⁰ Transcript of Oral Argument, supra note 1, at 44 (Justice Scalia questioning Rosenkranz).

³¹¹ *Id.* at 29 (statement of Rosenkranz).

³¹² National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-63, § 582, 119 Stat. 3136, 3277-78 (2006).

³¹³ Chai Feldblum, Professor, Georgetown Univ. Law Ctr., Supreme Court Institute Annual Press Briefing 15 (Sep. 19, 2005), available at http://www.law.georgetown.edu/news/documents/Transcript_SCI_Press_Brfg.051.pdf.

kranz's go-for-broke approach to the Solomon litigation. "Mr. Rosenkranz has seemed determined to secure a decision on constitutional issues at any cost," Professor Stephen B. Burbank lamented,³¹⁴ adding that he and a number of his colleagues at the University of Pennsylvania Law School (Penn) had filed their own lawsuit,³¹⁵ due in part to concerns about FAIR's litigation strategy.³¹⁶ The Penn professors' complaint alleged that the DOD's determination that their school was in violation of the Solomon Amendment "was not justified or authorized by the Act" itself.³¹⁷ They claimed that Penn had "met its obligations" under the Solomon statute.³¹⁸ Only "[i]n the alternative" did the Penn professors claim that the Solomon Amendment violated their First Amendment rights.³¹⁹

Forty Harvard Law School professors, including Dean Elena Kagan,³²⁰ who submitted a group brief in support of FAIR, also advocated the Penn plaintiffs' more cautious approach. The Harvard professors' brief, authored by former acting Solicitor General Walter E. Dellinger, III, argued that their law school's recruiting policies "[did not] violate the Solomon Amendment's 'equal access' provision because all recruiters—not just the military—face the same nondiscrimination requirement."³²¹ Therefore, the Harvard amici contended that the JAG representatives "already have access to students on the same terms as all other prospective employers."³²² "Military recruiters," the Harvard professors claimed, "are subject to *exactly the same terms and conditions of access as every other employer.*"³²³ As such, the law schools were in compliance with the Solomon Amendment because "evenhanded recruiting policies are beyond the statute's ken."³²⁴

The Penn and Harvard professors' approach was based "on a close reading of the statute in question,"³²⁵ and, more particularly, of the phrase "equal in

³¹⁴ Daniel J. Hemel, *Harvard Profs' Brief Could Still Sway Court*, HARV. CRIMSON, Dec. 8, 2005, at A1, available at <http://www.thecrimson.com/article.aspx?ref=510433>.

³¹⁵ *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Penn. Aug. 19, 2004).

³¹⁶ Hemel, *supra* note 313.

³¹⁷ Complaint at 8, *Burbank*, 2004 U.S. Dist. LEXIS 17509, available at <http://www.law.georgetown.edu/solomon/documents/UofPennFacultyComplaint.pdf>.

³¹⁸ *Burbank*, 2004 U.S. Dist. LEXIS 17509, at *6.

³¹⁹ *Id.*

³²⁰ During her Supreme Court confirmation hearings, Justice Kagan was criticized by some Republican senators for giving JAG recruiters at Harvard Law School the "runaround" by forcing them to make arrangements through the school's veterans association rather than the Office of Career Services. Justice Kagan was at pains to point out, "I respect and indeed I revere the military." See Naftali Bendavid and Nathan Koppel, *Kagan Fends Off GOP Attacks Over Stance on Military Recruiters at Harvard Law School*, WALL ST. J., Jun. 30, 2010, at A5.

³²¹ Hemel, *supra* note 314.

³²² *Money and Military Recruiting*, *supra* note 289, at 64.

³²³ Brief for Professors William Alford et al. as Amici Curiae in Support of Respondents at 2, *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47 (2006) (No. 04-1152) [hereinafter *Amicus Brief for Alford*] (emphasis omitted).

³²⁴ *Id.* at 1.

³²⁵ Hemel, *supra* note 314.

quality and scope.”³²⁶ These scholars contended that military recruiters’ access was equal in both those respects, so long as they were subject to the identical nondiscrimination policy as other employers.³²⁷ It is unclear whether this argument would have won the day had it been fully considered by the Supreme Court. First, the military often will—by necessity and by the very nature of its mission³²⁸—have personnel policies that differ from civilian employers,³²⁹ whether those rules address being “too old or too young, too fat or too thin, too tall or too short, disabled, not sufficiently educated and so on.”³³⁰ As such, the military would theoretically be an easy target for singling out for exclusion if the equality of recruiters’ physical access were judged by the uniform application of a school’s policy. Thus, the distinction drawn by the Harvard professors between “evenhanded policies that incidentally affect the military” (such as FAIR’s nondiscrimination policy) and “policies that single out military recruiters for special disfavored treatment”³³¹ may be more grounded in rhetoric than reality.

Second, as the Supreme Court pointed out in its decision, the congressional strengthening of the Solomon Amendment in 2004 was driven, at least in part, by the ongoing Solomon litigation.³³² The district court had expressed “serious reservations” regarding whether the Solomon law, as then constituted, justified the DOD’s interpretation requiring equal access for recruiters.³³³ The House Committee on Armed Services reported that the district court had determined,

[T]he Solomon Law did not give the Department of Defense a basis for asserting, as it had in the Code of Federal Regulations that implemented the Solomon Law, that universities and colleges must give military recruiters the same degree of access to campuses and students that was provided to other employers.”³³⁴

The bill to amend the Solomon Amendment, reported the committee, “would address the court’s opinion and codify the equal access standard.”³³⁵ Given this explicit legislative history, Clement noted the incongruousness of arguing

³²⁶ 10 U.S.C. § 983(b)(1) (2006).

³²⁷ Amicus Brief for Alford, *supra* note 323, at 2.

³²⁸ FAIR did not challenge the military’s homosexual policy in its litigation. *Forum for Academic & Institutional Rights, Inc. v. Rumsfeld*, 291 F. Supp. 2d 269, 298 n.8 (D. N.J. 2003), *rev’d*, 390 F.3d 219, 224 (3d Cir. 2004), *rev’d*, 547 U.S. 47, 51 (2006).

³²⁹ In response to a reporter’s question regarding article 88 of the Uniform Code of Military Justice, which criminalizes public “contemptuous words” by a commissioned officer, then Pentagon-briefer Kenneth Bacon said,

The military has specific rules that are set up to protect good order and discipline, and this is not the first time we’ve seen that military rules may be slightly different from those in the rest of the society. No one [outside the all-volunteer force] is forced to abide by these rules.

News Transcript, Kenneth H. Bacon, Assistant Sec’y of Def. (Pub. Affairs), Department of Defense News Briefing (Oct. 20, 1998), *available at* <http://www.defense.gov/Transcripts/Transcript.aspx?TranscriptID=1756>.

³³⁰ McPeak, *supra* note 197.

³³¹ Amicus Brief for Alford, *supra* note 323, at 10.

³³² *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 54 (2006).

³³³ *Forum for Academic & Institutional Rights, Inc.*, 291 F. Supp. 2d at 298 n.8.

³³⁴ H.R. REP. NO. 108-443, pt. 1, at 6 (2004).

³³⁵ *Id.*

that the Solomon Amendment “effectively accomplishes nothing.”³³⁶ As a matter of clear congressional intent, the Penn and Harvard professors’ equal-treatment argument might not have amounted to a reasonable statutory construction.

Nonetheless, this conservative approach might have been a powerful asset to FAIR, largely because it steered clear of First Amendment territory. The Harvard brief dangled this possibility before the Justices, reminding them that the professors’ narrow reading of the statute “could resolve this case without requiring this Court to venture into the constitutional tangle presented in the parties’ briefs.”³³⁷ Professor Laurence H. Tribe opined, “[A] truly restrained court would decline the invitation [to take on a constitutional question if another avenue existed for resolving the case].”³³⁸ In fact, Justice Scalia, the first to interrupt Clement during his oral argument, specifically asked about the statutory argument. “[The law schools,] I gather, would not allow other employers, who have the same policy against the hiring of homosexuals, to interview at their institutions,” Scalia said. “So, [the military is] receiving what other employers in the same situation would receive.”³³⁹ Justice Breyer appeared to express a fondness for the Harvard brief’s approach, noting, “[T]here is an amicus brief that says, ‘Go read the statute.’ . . . So, why not interpret the statute in the way that the amicus brief suggests in order to avoid a difficult constitutional question?”³⁴⁰

Initially, Solicitor General Clement countered the Harvard brief by emphasizing that the Solomon Amendment was concerned not with the equal application of policies determining access, but with equal access itself.³⁴¹ Whether the law schools could prohibit military recruiting by eliminating employer recruiting altogether was open to debate,³⁴² but the Solomon Amendment clearly regulated “the manner of access, once access is granted.”³⁴³ That is, the law does not require “any predetermined level of access.”³⁴⁴ Rather, it stipulates that granting access to other employers triggers an entitlement to the same level of access for the military.³⁴⁵

Rosenkranz, likely emboldened by the success of FAIR’s First Amendment claims before the Third Circuit, made the statutory argument moot when he “directly contradicted the Harvard professors’ claims.”³⁴⁶ Given the opportunity at oral argument to embrace the Harvard brief and the Penn litigation strategy, Rosenkranz instead disowned it:

J. BREYER: Do you agree with the Government, that the statute, as fairly interpreted, is violated when a school [that] uniformly applies to all employers the rule, ‘You can’t come in if you have the discrimination against hiring gay people’?

³³⁶ Transcript of Oral Argument, *supra* note 1, at 9.

³³⁷ Amicus Brief for Alford, *supra* note 323, at 9.

³³⁸ Hemel, *supra* note 314.

³³⁹ Transcript of Oral Argument, *supra* note 1, at 4.

³⁴⁰ *Id.* at 8.

³⁴¹ *Id.* at 10.

³⁴² *Id.*

³⁴³ *Id.* at 12.

³⁴⁴ *Id.* at 3.

³⁴⁵ *See id.* at 10.

³⁴⁶ Hemel, *supra* note 314.

ROSENKRANZ: Yes, Your Honor.³⁴⁷

Rosenkranz's strategy was to seek a large-scale victory on constitutional grounds, which he deemed worth the risk of foregoing any chance of a limited victory on statutory grounds.³⁴⁸ For those FAIR supporters more concerned with practical results than legal doctrine, Rosenkranz had just obliterated "the last, best hope" for barring military recruiters from law school campuses.³⁴⁹ "Rosenkranz killed the Harvard brief argument," lamented Professor Paul M. Secunda.³⁵⁰

Not surprisingly, the Court easily dispensed with the statutory argument in its opinion, noting, "The Government and FAIR agree on what this statute requires."³⁵¹ The Court did take note of the Harvard professors' argument, but made short work of dissecting it. "The Solomon Amendment," Roberts wrote, "does not focus on the *content* of a school's recruiting policy . . . [but rather] looks to the *result* achieved by [it]."³⁵² If applying the identical nondiscrimination policy to all employers results in a lower level of access for military recruiters, then the Solomon Amendment has not been satisfied. The main concern was not the reason for the disparate treatment of the military, but the disparate treatment itself.³⁵³ The Court also noted the legislative history of the recent revision of the Solomon Amendment, emphasizing, "[T]he Harvard argument was] rather clearly *not* what Congress had in mind in codifying the DOD policy. We refuse to interpret the Solomon Amendment in a way that negates its recent revision, and indeed would render it a largely meaningless exercise."³⁵⁴

VI. THE 'MARKETPLACE OF IDEAS'

From the law schools' perspective, Rosenkranz's bold litigation strategy produced an undesirable result in the form of a unanimous decision for the government.³⁵⁵ However, Rosenkranz's forthrightness had the benefit of enabling the Court to settle the speech-in-recruiting issue with some finality. Had the Harvard professors' statutory argument won the day, it is possible Congress would have acted to further clarify the Solomon Amendment's meaning, much as it did after the district court raised concerns regarding the DOD's interpretation of the statute. The speech issue would probably have reared its head again, merely postponing a real resolution for another day.

Indeed, regardless of one's viewpoint, the finality of any issue in the Solomon Amendment litigation is perhaps cause for a sigh of relief. The fascinating, and frustrating, aspect of the Solomon Amendment litigation is that it was, from the start, an indirect attack on the military's personnel policy, with no

³⁴⁷ Transcript of Oral Argument, *supra* note 1, at 51.

³⁴⁸ *See id.* at 29, 51.

³⁴⁹ Hemel, *supra* note 314.

³⁵⁰ *Id.*

³⁵¹ *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 55 (2006).

³⁵² *Id.* at 57.

³⁵³ *Id.*

³⁵⁴ *Id.* at 57-58.

³⁵⁵ *Id.* at 69.

hope of resolving the underlying issue, no matter which direction the courts decided to go. As Professor Joseph Zengerle, former Assistant Secretary of the Air Force, commented, “Part of our difficulty with [FAIR’s] case itself is that whatever the outcome in the Supreme Court, the statutory bar to enlisting or enrolling as servicemembers openly gay individuals will not be affected.”³⁵⁶ Solicitor General Clement pointed out in oral argument that FAIR’s assumption that the military’s homosexual policy is per se discriminatory itself begged an enormous question.³⁵⁷ Whether “Don’t Ask, Don’t Tell” is truly discriminatory toward homosexuals, or merely reflective of the military’s unique role and mission, was beyond the scope of FAIR’s chosen basis for litigation.

A. *Open Exchange*

The Solomon decision did effectively settle at least one skirmish in a wider battle—the question of using free speech rights to keep military recruiters physically off law school campuses. The contrasting litigation strategies of FAIR and the government facilitated this resolution. Indeed, Rosenkranz’s bold approach laid bare the startling breadth of the plaintiff’s First Amendment claims, revealing just how potentially restrictive of speech those claims could be if adopted by the Court. In particular, FAIR’s emphasis on “expressive association” threatened to extend that doctrine beyond even its interpretation in the *Boy Scouts* case, in so doing realizing the very fears expressed by the *Boy Scouts* dissenters.

The concept of a group’s First Amendment right to resist certain members, so as not to dilute its unified voice, is rooted in a 1984 case³⁵⁸ pitting a nonprofit organization’s gender restrictions against a Minnesota state nondiscrimination law. The Jaycees, an organization dedicated to developing leadership among young men,³⁵⁹ limited its regular voting membership to males between the ages of eighteen and thirty-five.³⁶⁰ The Court noted, “There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire.”³⁶¹ Nonetheless, the Court held that Minnesota’s compelling state interest in combating sex discrimination trumped the Jaycees’ associational rights, and found that the inclusion of women would not impede the Jaycees’ “ability to engage in [its First Amendment] protected activities or to disseminate its preferred views.”³⁶²

In her concurring opinion, Justice O’Connor’s concern was that the Court’s analysis had provided both too much protection to expressive association by failing to analyze what kind of organization the Jaycees really were, as

³⁵⁶ *Justice Talking*, *supra* note 153.

³⁵⁷ Transcript of Oral Argument, *supra* note 1, at 15.

³⁵⁸ *Roberts v. United States Jaycees*, 468 U.S. 609, 623 (1984).

³⁵⁹ According to its website, the Jaycees now accept women. See *About the Jaycees*, U.S. JUNIOR CHAMBER JAYCEES, http://www.usjaycees.org/index.php?option=com_content&task=view&id=5&Itemid=33 (last visited Jan. 11, 2011).

³⁶⁰ The Jaycees age limit has also since expanded to 41. See U.S. JUNIOR CHAMBER JAYCEES, <http://www.usjaycees.org/> (last visited Jan. 11, 2011).

³⁶¹ *Roberts*, 468 U.S. at 623.

³⁶² *Id.* at 627.

well as too little protection to this important freedom by subjecting the group's message to a stringent analysis. For O'Connor, the real litmus test should be whether or not "the association is predominantly engaged in protected expression."³⁶³ This question is vital because it goes to the root of associational rights, which derive from "the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice."³⁶⁴ The Jaycees, however, were involved in "commercial activities," such as "recruitment and selling."³⁶⁵ These activities undercut the notion that "regulation of its membership [would] necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard."³⁶⁶ According to Justice O'Connor, "An association must choose its market. Once it enters the marketplace of commerce in any substantial degree it loses the complete control over its membership that it would otherwise enjoy if it confined its affairs to the marketplace of ideas."³⁶⁷

Professional schools, and most certainly their career placement offices, are not confined to the marketplace of ideas. They are heavily invested in the marketplace of professional employment. Thus, FAIR's claim that the law schools were entitled to First Amendment protection of the associational right to define their membership is, according to Justice O'Connor's analysis in the Jaycees case, substantially compromised by the commercial nature of the activity that the schools were engaged in. Law schools are not, as a whole, predominantly engaged in advocacy on public affairs, nor, presumably, would most of their scholars, students, and staff be pleased to hear that they speak with one unified voice. The notion that admitting an iconoclastic member, let alone allowing a periodic military visitor, would dilute or alter the law schools' collective voice is highly suspect.

More importantly, a marketplace of ideas cannot thrive where contact between different elements of society is effectively cut off. Such a result would be anathema to the tradition of vigorous public debate.³⁶⁸ The freedom of expressive association—along with its corollary, the right to choose which particular ideas one will and will not be associated with—does not confer a corresponding right to physical or visual distance from individuals deemed distasteful. This does not mean we should in any way discount the pain of a student who sees a military recruiter on campus and feels uncomfortable because of the homosexual policy. It does, however, set limits on how far universities can go in "protecting gay students from direct confrontation with

³⁶³ *Id.* at 635 (O'Connor, J., concurring).

³⁶⁴ *Id.* at 633.

³⁶⁵ *Id.* at 640.

³⁶⁶ *Id.* at 635-36.

³⁶⁷ *Id.* at 636.

³⁶⁸ "Indeed, there would be no such stories [of courage] had this nation not maintained its heritage of free speech and dissent, had it not fostered honest conflicts of opinion, had it not encouraged tolerance for unpopular views." JOHN F. KENNEDY, *PROFILES IN COURAGE* 223-24 (HarperCollins Publishers Inc. 2004) (1956).

discrimination.”³⁶⁹ Using the First Amendment to keep differing viewpoints separate is an uncertain, and potentially unhealthy, exercise.³⁷⁰

This approach is also at odds with the best traditions of the schools themselves. Indeed, “by condoning the exclusion of military recruiters from campuses—billed as ‘marketplaces of ideas’—these universities legitimized censorship of ‘politically incorrect’ views.”³⁷¹ Former Harvard President Lawrence H. Summers, before reversing course under faculty pressure, initially expressed reservations about the strategy of seeking exclusion, “‘through the quintessentially adversarial act of filing a lawsuit,’” rather than dialogue.³⁷² As one Harvard undergraduate wrote:

If the University community thinks the current military’s policies are wrong-headed, why then discourage its own students from joining up and trying to improve them? It’s not as though the recent wave of corporate scandals has prompted Harvard Business School to discourage students from joining accounting firms. Quite the opposite, in fact. Usually, if Harvard thinks something in the world is wrong, it throws its academic resources behind solving the problem. Why not with the military? If “Don’t ask, don’t tell” is the wrong policy, offer solutions and assistance. Hold panels. Write reports. Don’t withhold students and don’t make signing up difficult for undergraduates.³⁷³

On issues of public importance, engagement—even, or maybe especially, when fraught with tension—is better than no conversation at all. Keeping the military off campus is no way to “meaningfully address” perceived discrimination; it only excuses academia “from actively engaging with the military,” and vice-versa.³⁷⁴ In contrast, “[c]hallenging the basic assumptions of any institution—be it a country or a college—is itself a way to improve that institution. This point applies in a special way to universities, which pride themselves on promoting dissent and Socratic questioning.”³⁷⁵

B. A Professional Caste

Artificially restricting the marketplace of ideas by excluding military representatives from campus yields troubling ramifications not only as to speech, but also as to the state of civil-military relations. As the House Armed Services Committee recognized more than thirty years ago, “[the] national interest is best served by colleges and universities which provide for the full spectrum of opportunity for various career fields, including the military field . . . by the opportunity for students to talk to all recruiting sources, including military

³⁶⁹ Joan Schaffner, *Should Law Schools Bar Student Organizations From Inviting the Military to Campus for Recruitment Purposes?*, 57 J. LEGAL EDUC. 162, 171 (2007).

³⁷⁰ Anthony Lewis has argued that Justice Oliver Wendell Holmes, Jr.’s famous dissent in *Abrams v. United States*, 250 U.S. 616, 627-31 (1919), “made legal doctrine of John Stuart Mill’s argument for the value of contrary opinions.” LEWIS, *supra* note 23, at 80.

³⁷¹ Charles J. Dunlap, Jr., *The Origins of the Military Coup of 2012*, PARAMETERS, Winter 1992-93, at 2, 19 n.70.

³⁷² *Recruiting vs. Rights*, *supra* note 308.

³⁷³ Garrett M. Graff, *Crimson, White, and Blue*, HARV. MAG., Nov.-Dec. 2002, at 72, 73.

³⁷⁴ Learned Foote, *Why Columbia Should Welcome ROTC*, WALL ST. J., Dec. 8, 2008, at A17.

³⁷⁵ Donald A. Downs, *ROTC and the Future of Liberal Education*, CHRON. HIGHER EDUC. REV., May 15, 2009, at B8.

recruiters.’”³⁷⁶ President Obama made a similar argument at Columbia University during the 2008 campaign. “I recognize that there are students here who have differences in terms of military policy,” he said. “But the notion that—young people here at Columbia or anywhere in any university—aren’t offered the choice, the option of participating in military service I think is a mistake.”³⁷⁷

Rather than facilitating interaction between the military and the academy, the law schools’ approach threatened to widen the gulf between the two. Although those institutions necessarily reflect different core outlooks—the former “duty-based” and the latter rights-based—creating too wide a disconnect is generally seen as unhealthy for both.³⁷⁸ On one side, “Exposing future officers to the intellectual virtues of civilian universities improves and broadens the military mind, which contributes to the maintenance of appropriate civilian contact and control.”³⁷⁹ On the other side, “[A]n appropriate military presence can contribute to the intellectual and moral diversity on the campus.”³⁸⁰ Indeed, if it is considered desirable to have “a well-rounded officer corps inculcated with the principles of freedom, democracy, and American values through close contact with civilians on an open college campus, and through a liberal education taught by a primarily civilian academic faculty,”³⁸¹ then an “‘out-of-sight, out of mind’” approach on the part of universities is distinctly unhelpful.³⁸²

Like ROTC programs, which have a democratizing effect on the armed services by ensuring a steady influx of junior officers from civilian schools across the country, the military’s ability to recruit at a wide variety of law schools facilitates a diverse and well-rounded cadre of judge advocates.³⁸³ “Limiting the pool” of available officers to fill JAG billets (or any other military career field, for that matter) contributes in the end to “a much more uniformly oriented military elite,” drawn from less diverse educational backgrounds.³⁸⁴ Major General Thomas J. Romig, formerly the Judge Advocate General of the Army, observed that the field-screening officer who visits law school campuses to disseminate information about military job opportunities “is often the first judge advocate whom a law student has ever met.”³⁸⁵ Enabling that student to meet a uniformed lawyer and consider military service is the key to preventing the accession of an ostensibly monolithic bloc of judge

³⁷⁶ *United States v. City of Philadelphia*, 798 F.2d 81, 87 (3d Cir. 1986).

³⁷⁷ Senator Barack Obama, ServiceNation Presidential Forum (Sept. 11, 2008), available at <http://www.servicenation.org/pages/Summit-Program-Transcripts-and-Media> (follow “Download Presidential Candidates Forum Transcript” hyperlink).

³⁷⁸ Downs, *supra* note 375.

³⁷⁹ *Id.*

³⁸⁰ *Id.*

³⁸¹ Harry G. Summers, Jr., *Stalking the Wrong Quarry*, WASH. TIMES, Dec. 7, 1989, at F3.

³⁸² Downs, *supra* note 375 (quoting Prof. David Gelernter of Yale Univ.).

³⁸³ One prominent journalist calls this the “leavening effect” of people from nonmilitary backgrounds entering the service. Thomas E. Ricks, *The Widening Gap Between the Military and Society*, ATLANTIC MONTHLY, July 1997, at 66, 74.

³⁸⁴ Dunlap, *supra* note 370, at 11; see MICHAEL S. NEIBERG, MAKING CITIZEN-SOLDIERS: ROTC AND THE IDEOLOGY OF AMERICAN MILITARY SERVICE 133 (2001).

³⁸⁵ Declaration of Major General Thomas J. Romig, *supra* note 232, at 7.

advocates, all of whom chose a career in the military before ever contemplating a career in the law.³⁸⁶ When military service, not to mention awareness of military job opportunities, is left only to those who already have a connection or commitment to the armed forces, the natural result is a military population drawn from military families and intent on staying in the military for a full career; in other words, a “professional military caste.”³⁸⁷

A defense establishment that is physically and psychologically distant from the population it serves carries with it evident dangers.³⁸⁸ Among these hypothetical perils is the bleak prospect of an isolated, resentful military, directed by uninformed civilian political decision makers who are either contemptuous of the military, overly enamored with it, or both. As Thomas E. Ricks predicted more than a decade ago in the *Atlantic Monthly*, “It now appears not only possible but likely that over the next twenty years the U.S. military will revert to a kind of garrison status, largely self-contained and increasingly distinct as a society and subculture.”³⁸⁹ According to Major General Romig, “Without on-campus access to law students and the Career Services Directors, the Army JAG Corps will receive applications only from those already familiar with the military.”³⁹⁰ Avoiding such a scenario is beneficial to

³⁸⁶ In an article advocating civilian education for military officers, Gen. David H. Petraeus argued that the best way to combat the military’s “cloistered existence” is to expose officers to environments in which they are “repeatedly challenged” and cannot hide behind either military camaraderie or military doctrine. David H. Petraeus, *Beyond the Cloister*, AM. INTEREST, July-Aug. 2007, at 16, 16-19. General Dunlap has made a similar suggestion:

To broaden the outlook of future officers, and to acquaint more of the Meritocrats [civilian political elites] with members of the armed services, military academy cadets should spend a year at a top civilian institution. For the same reasons, mid-level officers should spend at least one year obtaining an advanced degree in a residence program at a leading university. Civilian universities should include more national security and military history courses in their curricula.

Dunlap, *supra* note 179, at 390-91. Journalist Amy Waldman has noted that

[v]arious . . . measures could improve civil-military relations: Require military officers to go to civilian graduate schools and civilian decision makers to spend time at military academies; preserve or restore ROTC on campuses, both to provide access to the military and because its mere presence can educate students about military affairs; and have undergraduates study military history and culture.

Amy Waldman, *GIs—Not Your Average Joes: What the Military Can Teach Us About Race, Class, and Citizenship*, WASH. MONTHLY, Nov. 1996, at 26, 33. Thomas E. Ricks wrote that “[w]henver possible, military officers pursuing higher degrees should be sent to civilian universities, whether or not this means closing some military schools.” Ricks, *supra* note 383, at 78.

³⁸⁷ Waldman, *supra* note 386, at 29.

³⁸⁸ For a different perspective on the military-civilian divide, see George F. Will, Forrester Lecture at the United States Naval Academy (Jan. 24, 2001), available at <http://www.usna63.org/tradition/history/WillMidnLecture.html>. According to Will,

We’re told all the time that there is a large and growing problem and that there is a need to close the gap between the military and civilian society. [sic] I think that the gap is healthy and the gap is necessary, that the gap must exist in any society and, in a sense, especially in a democratic society. That is because the military must be an exemplar of certain virtues that will, at any given time, seem anachronistic and it is a function of the military to be exemplars.

Id.

³⁸⁹ Ricks, *supra* note 383, at 69. See generally, THOMAS E. RICKS, MAKING THE CORPS (1998).

³⁹⁰ Declaration of Major General Romig, *supra* note 232, at 9.

the military and to the public because it protects against the development of an “intellectually alienated officer corps” insulated from society and uniform in outlook.³⁹¹ It is, moreover, similarly advantageous to the concerned law schools themselves because it affords them the best opportunity to have a hand in molding future generations of military legal leaders.³⁹²

VII. CONCLUSION

Throughout the Solomon Amendment litigation, Solicitor General Clement was careful to frame the government’s position in terms of functional, rather than expressive goals. He maintained that relegating JAG recruiters to undergraduate campuses or off-campus locales was unequal treatment not “because of the message it sends,” but only “because it denies the opportunity to recruit as effectively.”³⁹³ “[T]here might be a line,” he conceded, “where [a law school] recruitment office could conduct itself in a way that would effectively deny access.”³⁹⁴ That line, however, would not be crossed by signs, peaceful protests, or symbolic speech. The military’s only concern, Clement asserted, was with “conduct that effectively negates” its access to campus, thereby amounting to a “functional difference.”³⁹⁵

The government’s position impliedly expressed a great deal of faith in military recruiters to weather the storm of hostile receptions. By doing just that, recruiters play an important role in a delicate balancing act of national priorities: the armed forces gain unfettered access to a potential labor pool, while aggrieved parties are free to exercise their full panoply of expressive rights in denouncing an unwelcome guest. Thus, the dean of Harvard Law School, expressing disappointment with the Court’s decision, simultaneously expressed “hope that many members of the . . . community will accept the [C]ourt’s invitation to express their views clearly and forcefully regarding the military’s discriminatory employment policy.”³⁹⁶ The dean of Penn Law

³⁹¹ Dunlap, *supra* note 370, at 11. Another author called this military insulation “the crux of our civil-military divide: As American society grows more socially distant from its own military, American warrior consciousness is further intensifying within the combat arms community itself.” Robert D. Kaplan, *On Forgetting the Obvious*, AM. INTEREST, July-Aug. 2007, at 6, 11.

³⁹² Some in the antiwar movement have suggested that having more servicemembers from elite schools and privileged backgrounds would act as a deterrent to future wars. According to Sen. Jim Webb (D-VA), “[I]t’s only when the mothers of Harvard wake up and worry about their son or daughter that we are going to have a hedge against adventurism.” *Morning Edition: GI Bill Proposal Expands College Benefits for Vets* (National Public Radio broadcast Apr. 10, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=89420368>. In this sense, it particularly troubling that so many of the leading litigants seeking to exclude recruiters from law school campuses were among the most prestigious schools in the country. As one commentator has written, “Ivy League campuses also have been a wellspring for more liberal-minded officers.” An influx of nontraditional officer candidates can help “mitigate [the] homogeneity” that the professional, all-volunteer military might otherwise assume; preventing the accession of “insider[s] with a different outlook [is] very bad for a military in a democracy.” Waldman, *supra* note 386, at 30.

³⁹³ Transcript of Oral Argument, *supra* note 1, at 22.

³⁹⁴ *Id.* at 21.

³⁹⁵ *Id.* at 24.

³⁹⁶ *Military Recruiting Upheld*, HARV. MAG., May-June 2006, at 73, 73.

School, as the case was still unfolding, promised to take “ameliorative action, including the posting of information about the military’s discrimination policies with their recruiting materials, and presenting programs on topics of relevance throughout the year.”³⁹⁷

These responses from leaders of the legal academic community crystallize the free speech victory that the Solomon case ultimately achieved. Since the Supreme Court decision, various essays, symposia, and presentations have responded to “the Court’s invitation to students, administrators, and faculty who oppose the Solomon Amendment and/or the Don’t Ask, Don’t Tell policy . . . to remedy what they take to be ‘bad speech’ and unwanted association with more speech and association.”³⁹⁸ From the law schools’ perspective, the “silver lining” in the Court’s decision was that its “clear language once and for all freed up students, faculty, and administrators to protest without fear of reprisal.”³⁹⁹ At best, this “call to action”⁴⁰⁰ presents an opportunity for additional dialogue and advocacy through lawful resistance to a perceived discriminatory policy. In their eagerness to speak out in the aftermath of the Solomon decision, the law schools have actually affirmed the Court’s central holding. Instead of excluding the military from campus altogether, the schools have made a profound determination: “[t]he more speech, the better for both social justice and law school performance.”⁴⁰¹

The core lesson of *Rumsfeld v. FAIR* is perhaps best exemplified by a speech delivered by Harvard’s current president at a recent ROTC commissioning ceremony. President Drew G. Faust chose to attend, thereby formally acknowledging the students’ service and recognizing an organization that has long been denied an official presence on campus. At the same time, she expressed her opposition to the homosexual policy, stating her belief that “every Harvard student should have the opportunity to serve in the military, as you do.”⁴⁰² Faust ran the risk of pleasing nobody. She could have alienated some members of the community for offering pointed criticism during her commissioning speech, and still other members of the community for attending the ceremony and speaking at all. In other words, the president interacted with members of an institution that she may not always agree with, during the course of which she respectfully and unequivocally voiced her opinion.

That is free speech at its best.

³⁹⁷ Memorandum from Michael A. Fitts, *supra* note 303.

³⁹⁸ Martha M. Ertman, *Accepting the Court’s Invitation*, 57 J. LEGAL EDUC. 159, 159 (2007).

³⁹⁹ James G. Leipold, *Law School Strategies for Amelioration and Protest: What Law Schools Can Do*, 57 J. LEGAL EDUC. 172, 173 (2007).

⁴⁰⁰ *Id.* at 176.

⁴⁰¹ Ertman, *supra* note 398, at 161; *see also* Wolff, *supra* note 9 (“My colleagues are right to be outraged at the Solomon Amendment. But the best 1st Amendment response to Solomon is to express that outrage, support our students vocally and work hard to eradicate ‘don’t ask, don’t tell’”).

⁴⁰² Drew Gilpin Faust, President, Harvard Univ., Remarks at the Harvard ROTC Commissioning Ceremony (Jun. 4, 2008), *available at* http://president.harvard.edu/speeches/faust/080604_rotc.php.