

## The High Price of Equality: The Effect of the Solomon Amendment on Law Schools' First Amendment Rights

*"The essentiality of freedom in the community of American universities is almost self-evident . . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation."*<sup>1</sup>

### I. INTRODUCTION

Imagine a generous contributor to a law school announced that it would no longer contribute to the school unless it was allowed to discriminate against certain classes of the student body.<sup>2</sup> How should that law school respond?<sup>3</sup> Congress's enforcement of the Solomon Amendment forces universities and law schools across the country to face this exact ultimatum.<sup>4</sup>

A recent federal law, referred to as the Solomon Amendment, presents institutions of higher learning with the choice of either subsidizing a discriminatory employer's on-campus recruitment to receive federal funding, or standing by a policy of nondiscrimination based on sexual orientation and risk losing federal funds.<sup>5</sup> The threat of losing a significant amount of federal funding has forced law schools to abandon their academic principles and support the military's on-campus recruitment.<sup>6</sup> Law schools have traditionally created an academic environment to promote the school's values, educational mission and message of nondiscrimination.<sup>7</sup> These schools allege, however,

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1. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

2. Beth A. Allen, *Parting Thoughts: Solomon's Judgment*, 59 OR. ST. B. BULL. 70, 70 (1998) (framing issue in hypothetical statement).

3. *Id.* (pondering whether school would choose money over equality).

4. *See id.* (articulating choice of law schools); Terry Carter, *Costly Principles: Pentagon Forces Law Schools to Choose Between Federal Funding and Backing of Gay Rights*, 83 A.B.A. J. 30, 30 (1997) (discussing possible courses of action for law schools).

5. Carter, *supra* note 4, at 30 (describing dilemma law schools are face when forced to choose between funding or principles).

6. *See* Robin Ingle, *Gays in the Military: A Policy Analysis of "Don't Ask, Don't Tell" and the Solomon Amendment*, 20 HAMLINE J. PUB. L. & POL'Y 89, 101 (1998) (noting law schools' decisions to allow on-campus military recruitment despite inconsistencies with nondiscrimination policies).

7. *See* Alvaro Ignacio Anillo, *The National Endowment for the Humanities: Control of Funding Versus Academic Freedom*, 45 VAND. L. REV. 455, 474 (1992) (articulating government prohibition of subsidy coercion to forfeit First Amendment rights); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment"*, 99 YALE L.J. 251, 316-17 (1989) (describing schools' right to make decisions regarding their academic mission free from government intrusion); Amy Kapczynski, *Queer Brinkmanship: Citizenship and the Solomon Wars*, 112 YALE L.J. 673, 674 (2002) (noting special protection of speech in university

that the enforcement of the Solomon Amendment infringes on their First Amendment rights by interfering with the spirit of this expressive, scholastic environment.<sup>8</sup>

Law schools endeavor to establish, teach, and live by the values of justice and equality.<sup>9</sup> Accordingly, in 1990, the Association of American Law Schools (AALS) added “sexual orientation” to their list of protected classes under the anti-discrimination policy.<sup>10</sup> Law schools have since denied their facilities and personnel to employers that discriminate based on sexual orientation.<sup>11</sup> These schools prohibit military recruiters from using the services and support of the career centers for on-campus interviews because of the military’s discriminatory hiring practices, and its failure to assure the school that it would not discriminate based upon sexual orientation.<sup>12</sup>

Congress perceived the ban on on-campus military recruitment as a hostile insult to the country’s armed services and responded by enacting the Solomon Amendment.<sup>13</sup> The Solomon Amendment has undergone increasingly harsh permutations since its enactment and currently states:

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context).

8. See Memorandum of Law in Support of Plaintiffs’ Motion for Preliminary Injunction at 7, *Forum for Academic and Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003) (No. 03 Civ. 4433) [hereinafter Plaintiffs’ Memorandum] (alleging Solomon Amendment violates law schools’ First Amendment rights); Inqli, *supra* note 6, at 101 (illustrating effect of Solomon Amendment on law schools’ learning environment). *But see* Memorandum of Law in Support of Defendant’s Motion to Dismiss and Opposition to Plaintiffs’ Motion for Preliminary Injunction at 2, *Forum for Academic and Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003), (contending Solomon Amendment valid exercise of congressional power under Spending Clause); Eric Wang, *Biting the Hand that Feeds*, *CAVALIER DAILY U. WIRE* (Univ. of Va.), Oct. 1, 2003 (contending Congress’s use of Spending Power in Solomon Amendment is constitutional).

9. See John A. Scanlan, *Aliens in the Marketplace of Ideas: The Government, the Academy, and the McCarran-Walter Act*, 66 *TEX. L. REV.* 1481, 1484 (1988) (explaining vital role of educators in instilling values in youths).

10. See Inqli, *supra* note 6, at 99 (detailing AALS’ decision to add “sexual orientation” to list of protected classes under nondiscrimination policy).

11. See Inqli, *supra* note 6, at 99 (noting prohibition of employers who discriminate based on sexual orientation from utilizing career services).

12. See Inqli, *supra* note 6, at 99 (describing ban on military because refuses to guarantee not to discriminate based on sexual orientation).

13. 140 *CONG. REC.* H3861 (daily ed. May 23, 1994) (statement of Representative Solomon) (summarizing Representative Solomon’s perception of institutions of higher learning’s disdain for armed services). Representative Richard Pombo echoed this perspective when he stated that Congress should put “[s]ome institutions of higher education in this country . . . on notice that their policies of ambivalence or hostility to our Nation’s armed services do not go unnoticed—either by this House or by the American people.” *Id.* H3863. Representative Pombo warned Congress of “[a] growing, and misguided sense or moral superiority . . . creeping into the policies of colleges and universities in this country.” *Id.* Representative Pombo further threatened:

[t]hese colleges and universities need to know that their starry-eyed idealism comes with a price. If they are too good—or too righteous—to treat our Nation’s military with the respect it deserves . . . then they may also be too good to receive the generous level of taxpayer dollars presently enjoyed by many institutions of higher education in America.

*Id.* Pombo urged his colleagues to “support the Solomon Amendment and send a message over the wall of the ivory tower of higher education.” *Id.*

No funds . . . may be provided . . . to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice . . . that either prohibits, or in effect prevents access by military recruiters for purposes of military recruiting . . .”<sup>14</sup>

In an effort to accommodate the military while adhering to their nondiscrimination policies, law schools made information about military employment available to inquiring students and did not deter students from pursuing such jobs.<sup>15</sup> The law schools did not, however, allow the military to use the schools’ career services departments.<sup>16</sup> In December 2001, the Department of Defense sent letters to several law schools claiming they were in violation of the Solomon Amendment and risked losing federal funding.<sup>17</sup> By Autumn 2003, with millions of federal dollars at stake, every law school whose parent institution receives federal money relented and supported the military’s on campus recruitment efforts notwithstanding the inconsistency with their anti-discrimination policy.<sup>18</sup>

This Note examines the Solomon Amendment and its First Amendment implications on law schools.<sup>19</sup> The Note will first discuss the historical intersection of the role of an institution of higher learning and First Amendment principles.<sup>20</sup> The Note will then define the limits of Congress’s Spending Power, under which Congress enacted the Solomon Amendment, and the Unconstitutional Conditions Doctrine.<sup>21</sup> Next, the Note will explain the Solomon Amendment’s enactment and the history of its development.<sup>22</sup> After summarizing the recent litigation challenging the Solomon Amendment’s constitutionality, the note will analyze the Solomon Amendment’s effect on law schools’ First Amendment right to freedom of speech, academic freedom, and expressive association.<sup>23</sup>

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14. 10 U.S.C. § 983 (2003) (introducing Solomon Amendment’s language); Sylvia Law, *Civil Rights Under Attack by the Military*, 7 WASH. U. J.L. & POL’Y 117, 121-23 (2001) (delineating different versions of amendment).

15. See Ingli, *supra* note 6, at 99 (maintaining law schools’ policy regarding military recruitment complies with AALS standards); Patrick Healy, *Despite Concerns, Law Schools Admit Military Recruiters*, BOSTON GLOBE, Nov. 12, 2002, at A1 (describing schools’ practices of denying military access to career services while still allowing military recruitment).

16. See *supra* note 15 and accompanying text (clarifying limits of law schools’ accommodations for on-campus military recruitment).

17. See Healy, *supra* note 15, at A1 (declaring Defense Department’s response to law schools’ ban on on-campus military recruitment as aggressive).

18. See *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 228 (3d Cir. 2004) (articulating law schools’ decision to give military access to career services after Congress threatened funds).

19. See *infra* Part III (examining Solomon Amendment’s First Amendment implications on law schools).

20. See *infra* Part II.A (discussing law schools’ role in First Amendment context).

21. See *infra* Part II.B (articulating Congress’s spending power and Doctrine of Unconstitutional Conditions).

22. See *infra* Part II.C (discussing Amendment’s enactment and various developments over time).

23. See *infra* Parts II.D & III (outlining recent Solomon Amendment cases and analyzing Solomon

## II. HISTORY

### A. First Amendment Principles in the University Environment

The First Amendment has historically served a unique function in the university context.<sup>24</sup> The First Amendment affords universities the right of freedom of speech and the right to create a forum for the free exchange of ideas, shape their own pedagogical mission and freely associate without government intrusion.<sup>25</sup> The United States Supreme Court has repeatedly subjected governmental restrictions on universities' First Amendment rights to strict judicial scrutiny.<sup>26</sup>

#### 1. Free Speech in a University Context

The Supreme Court has recognized and protected the right of free speech in the university context.<sup>27</sup> The societal value of universities and law schools is derived from the irrefutable benefits flowing from the creation of an

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Amendment's effect on schools' First Amendment rights).

24. See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (announcing landmark role of First Amendment in university context).

25. See Plaintiffs' Memorandum, *supra* note 8, at 1 (outlining rights granted to universities through First Amendment). Law schools have the freedom to shape their own pedagogical mission and decide which core values to instill in their students free from government intrusion. *Id.*

26. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (noting danger of chilling effect restriction of speech would have in university context); *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (distinguishing limits of government restrictions on speech in university context); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604 (1967) (indicating standard government restrictions must meet in First Amendment context).

27. See *Grutter*, 539 U.S. at 332 (reiterating Court's tradition of protecting free speech in university environment). The Court recognized the importance of freedom of speech, particularly in the university context, because of the important purpose of education in society. *Id.* at 332-33; *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000) (addressing importance of protecting right of free speech at university level). The Court discussed the importance of the role of the university as a forum for discussion and the free exchange of ideas. *Southworth*, 529 U.S. at 233; *Rosenberger*, 515 U.S. at 834 (discussing viewpoint restrictions on speech in university environment). The Court was careful to note that while the government has no duty to subsidize a university's free speech rights, once it does the government must subsidize on a viewpoint neutral basis. *Rosenberger*, 515 U.S. at 834; *Rust*, 500 U.S. at 200 (explaining limitations imposed on government control of speech in university context). When the government subsidizes an activity or an entity it does not have the power to control that entity's speech. *Rust*, 500 U.S. at 200. The university is a "traditional sphere of free expression" that is crucial to the function of our society. *Id.* The Court, therefore, subjects governmental funding decisions that interfere with free speech rights to strict scrutiny analysis. *Id.*; *Keyishian*, 385 U.S. at 603 (highlighting role of free speech at university level of protecting nation's freedom). The Court stressed the danger in allowing the government to decide what ideas society should be exposed to. *Keyishian*, 385 U.S. at 603. Nowhere is the protection of the right of free speech more crucial than in the classroom. *Id.*; *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (predicting effect on education if government allowed to intrude upon free speech at university level). In his opinion, Chief Justice Warren discusses the possible effects of government control over scholarship in our universities. *Sweezy*, 354 U.S. at 250. Warren opines that placing restraints on our colleges and universities serves only to undermine democracy and destroy the spirit of our society. *Id.* Scholarship can only flourish in an environment where "[t]eachers and students . . . always remain free to inquire, to study and to evaluate, to gain new maturity and understanding." *Id.*

atmosphere of open and uninhibited discussion among students and professors from a variety of backgrounds.<sup>28</sup> The Court generally regards the university as the traditional sphere of free expression and the environment that is most conducive to speculation and experiment.<sup>29</sup> The right of free speech in the university context is of such paramount constitutional importance that the Court has subjected restrictions on speech to the highest scrutiny.<sup>30</sup>

Freedom of speech at the university level is so vital and fundamental to the growth of society that it is difficult to conceive of a state interest that would justify government intrusion in this area.<sup>31</sup> The value of the university experience is enriched when both faculty and students are able to engage in political expression and association free from government intrusion.<sup>32</sup> The Court has stressed that institutions of higher learning must remain environments where teachers and students are free to inquire, study, and gain new perspectives.<sup>33</sup> If courts permitted the government to use its authority to control speech at universities, dissident views would not be voiced and our society would risk becoming static and one-dimensional.<sup>34</sup>

The Court has safeguarded First Amendment principles and the free exchange of ideas from diverse groups of individuals.<sup>35</sup> Promoting uninhibited channels of communication at institutions of higher learning is especially crucial because of the expansive freedoms of speech and thought associated with the university environment.<sup>36</sup> The Court has found this interest so

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28. See *Grutter*, 539 U.S. at 333 (stressing significance of diverse, open, free exchange among university students). The Court held that the University of Michigan Law School's use of race in admissions decisions did not violate the Equal Protection Clause. *Id.* at 342. The Court quoted Justice Powell's statement in *Regents of the University of California v. Bakke* that the First Amendment grants universities the freedom to make their own educational decisions. *Id.* at 333; *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (observing need for independent, uninhibited discussion in university environment).

29. See *Southworth*, 529 U.S. at 238 (Souter, J., concurring) (noting purpose of university); *Rust*, 500 U.S. at 200 (describing role of university).

30. See *Southworth*, 529 U.S. at 237 (discussing Court's treatment of restrictions on speech at university level); *Rosenberger*, 515 U.S. at 835 (explaining level of examination government restrictions on speech will be subjected to); *accord Rust*, 500 U.S. at 195 n.4 (applying strict scrutiny analysis to funding regulations on abortion services); *Speiser v. Randall*, 357 U.S. 513, 521 (1958) (subjecting tax exemption procedures to strict scrutiny).

31. See *Sweezy*, 354 U.S. at 251 (noting Court's failure to envision state interest validating government restrictions on speech at university level).

32. *Id.* at 251, 254 (discussing value of free expression at university level). History has shown the virtue of political activity by minority, dissident groups, who have often been in the forefront of democratic thought. *Id.* at 251. The absence of opposing views voices would be a symptom of grave illness in our society. *Id.* at 251.

33. *Id.* at 250 (noting significance of protecting students' and faculty's right to free speech).

34. *Id.* (highlighting potential danger to society if government permitted to control speech at universities).

35. See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (summarizing Court's promotion of First Amendment principles and diversity).

36. See *id.* at 329, 332 (recognizing importance of free speech due to unique role of university); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (observing academic value of discovery of truth "out of a multitude of tongues"). Appellants Hochfield, Maud, Garver, and Keyishian refused to sign certificates affirming that they were not presently Communists, or had informed the University president if they were

compelling that the it determined that schools may consider race in admissions decisions in order to advance a robust exchange of ideas from a diverse student population.<sup>37</sup> Freedom of speech is so intimately tied to the role of education in our society that the Court has traditionally treated cases involving free speech at the university level with specialized care.<sup>38</sup>

## 2. Academic Freedom in a University Context

Academic freedom encompasses a university's right to make academic determinations necessary to further a university's specific pedagogical mission.<sup>39</sup> The Court has scrutinized government restrictions on universities' academic freedom.<sup>40</sup> The Court has defined academic freedom as a university's right to determine for itself on academic grounds "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."<sup>41</sup> These four essential freedoms help a university provide an atmosphere that encourages individual thought and inquiry.<sup>42</sup> The Court cautioned that liberties such as academic freedom are so vital to the growth of our country that the government should be extremely reluctant to intrude upon them.<sup>43</sup>

The First Amendment guarantee of academic freedom benefits all of society, not just the university itself.<sup>44</sup> The classroom provides an environment where

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formally members of the Communist party. *Keyishian*, 385 U.S. at 592. The University informed each appellant that failure to execute the certificates would result in dismissal from the University. *Id.* The University also required Appellant Starbuck, a non-faculty employee, to execute a written oath answering the question, "Have you ever advised or taught or were you ever a member of any society or group or person which taught or advocated the doctrine that the Government of the United States . . . should be overthrown or overturned by force, violence, or any unlawful means?" *Id.* When Starbuck refused to respond, the University fired him from his position. *Id.*

37. See *Grutter*, 539 U.S. at 329-30 (discussing compelling interest in diversity and First Amendment principles); *Keyishian*, 385 U.S. at 603 (describing interest in robust exchange from diverse population as compelling).

38. See *Grutter*, 539 U.S. at 329 (detailing Court's position on free speech at university level).

39. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (granting schools right to determine their own educational mission); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (recognizing foundation of academic freedom); *Brown v. Li*, 308 F.3d 939, 950 (9th Cir. 2002) (declaring school's right to engage in expressive activity of designing its own curriculum).

40. See *Hazelwood*, 484 U.S. at 266 (recognizing right of school to disassociate from speech inconsistent with its educational mission); *Ewing*, 474 U.S. at 225 (observing university's right of academic freedom in making determinations for student dismissals); *Keyishian*, 385 U.S. at 603 (reiterating nation's commitment to protecting academic freedom); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (discussing significance of academic freedom in American universities); *Brown*, 308 F.3d at 951 (granting educational institutions right to establish policies free from government intrusion).

41. See *Sweezy*, 354 U.S. at 263 (listing four essential academic freedoms).

42. *Id.* (stressing importance of free speech in university environment).

43. *Id.* at 250 (cautioning against government intrusion upon university's academic freedom).

44. See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (recognizing broad benefits of academic freedom).

dissenting opinions are encouraged and valued.<sup>45</sup> Universities allow individuals to freely question conventional thinking and express thoughts that challenge societal norms.<sup>46</sup> Laws that interfere with universities' academic freedom by smothering the individual thought universities seek to promote should be of great concern to our society.<sup>47</sup>

In addition to the four essential freedoms, academic freedom includes the autonomous decision-making power of the university itself.<sup>48</sup> Academic freedom embraces a university's right to make conscientious decisions within the scope of these four essential freedoms.<sup>49</sup> Universities must make decisions daily in striving to achieve university objectives and advance core values.<sup>50</sup> Supreme Court precedents demonstrate that educational institutions possess the exclusive right to determine their academic policies and that third parties have no constitutional right to interfere with those policies.<sup>51</sup> The Court has a responsibility to protect academic freedom and is reluctant to interfere with the academic determinations of institutions of higher learning.<sup>52</sup> The Court has cautiously noted that academic freedom does not absolve universities from all

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45. *Id.* (noting value of diverse exchange of opinions in classroom).

46. *Id.* (asserting concern of universities to encourage independent thought).

47. *See id.* (elucidating danger of laws which create orthodox classroom environments).

48. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (stating academy's right to make academic decisions encompassed in academic freedom). Respondent Ewing was enrolled in a six-year program to earn both an undergraduate and medical degree. *Id.* at 215. Students must pass the "NBME Part I," a two day written test, in order to qualify for the final two years of the program. *Id.* at 215-16. Ewing failed the exam, receiving the lowest score in the history of the program. *Id.* at 216. The Review Board evaluated Ewing's score and academic record and decided to dismiss him from the program. *Id.* Upon Ewing's request, the Board reconsidered its decision but ultimately reaffirmed their position that Ewing should be released from the program. *Id.* Ewing appealed and had the opportunity to be heard in person but the Executive Committee of the Medical School denied Ewing leave of absence status that would allow him to retake the exam. *Id.*

49. *Id.* at 225 (stressing importance of university's meticulous decision-making process). The Board did not casually decide to dismiss Ewing; rather, the Board based its determination on a number of different factors. *Id.* at 227. Not only did Ewing receive the lowest score in the history of the exam, but he also had a checkered academic record with low grades and incomplete courses. *Id.*

50. *Id.* at 226 (pointing to voluminous number of decisions universities make daily).

51. *See Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (summarizing Supreme Court precedent giving educational institutions right to determine values). Plaintiff Brown, a master's degree candidate at the University of California Santa Barbara, wrote a thesis subject to approval of the thesis committee. *Id.* at 942. The thesis committee is instructed not to approve a dissertation that does not conform to disciplinary and departmental standards. *Id.* at 944. After receiving approval but without the committee's knowledge, Brown added a "Disacknowledgements" section into his thesis that included negative and obscene statements about faculty members. *Id.* at 943. The Court relied upon Supreme Court precedent to determine whether the University's academic freedom protected its decision not to place Brown's thesis in the library. *Id.* at 952. The Court held that the University's right to academic freedom outweighed Brown's First Amendment rights because the University's decision not to approve his thesis was reasonably related to the school's pedagogical mission. *Id.* at 952.

52. *See Ewing*, 474 U.S. at 226 (indicating areas where Court reluctant to interfere). The Court expressly stated that judges should show great respect for faculty determinations. *Id.* at 225. The Court explained that judges "may not override [the faculty's academic determination] unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Id.*

challenges, but rather supported deference to the expertise of universities in making determinations to advance their educational missions.<sup>53</sup> The Court itself has indicated that it is not an appropriate forum to review the academic decisions universities make in an effort to shape and promote their pedagogical missions.<sup>54</sup>

### 3. Freedom of Association

Freedom of association gives members of an organization the right to associate for an expressive purpose free from government intrusion.<sup>55</sup> The Supreme Court of the United States has held that forcing organizers to allow certain groups to participate in the organization's functions violates the organizers' First Amendment right to freely associate.<sup>56</sup> Organizations have the right to associate freely for an expressive purpose and the power to choose the content of their message.<sup>57</sup> The government may not force an organization to advocate an idea that the organization disagrees with.<sup>58</sup> The Court has held that if "the government [were] freely able to compel . . . speakers to propound political messages with which they disagree, . . . protection [of a speaker's freedom] would be empty, for the government could require speakers to affirm in one breath that which they deny in the next."<sup>59</sup>

The Court has upheld mandates requiring organizations to subsidize certain programs so long as the program's agenda is viewpoint neutral.<sup>60</sup> If a law or policy requires an organization to fund activities or entities that engage in political expression offensive to that organization's beliefs or policies, then the Court will scrutinize such a regulation.<sup>61</sup> A law that forces an organization to

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53. See *Brown*, 308 F.3d at 952 (highlighting concept of deference when dealing with universities' academic freedom).

54. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985) (discussing Court's unwillingness to second-guess universities' academic decisions).

55. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (discussing effect of government intrusion on right of association); *Bd. of Regents v. Southworth*, 529 U.S. 217, 232-33 (2000) (discussing effect of mandatory student fees on students' First Amendment right of freedom of association); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (defining First Amendment right of free expressive association); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000) (recognizing right to associate freely for various political, social, economic, educational, religious, and cultural purposes); *Troster v. Pa. State Dept. of Corrs.*, 65 F.3d 1086, 1090-91 (3d Cir. 1995) (outlining Supreme Court decisions in compelled expression cases).

56. See *Boy Scouts*, 520 U.S. at 648 (indicating Supreme Court's position on forcing group members to accept certain people into their organization).

57. See *Hurley*, 515 U.S. at 573 (recognizing speakers' right to control content of their message).

58. *Id.* at 575 (noting inability of government to force speakers to promote beliefs they abhor).

59. See *id.*, 515 U.S. at 575-76 (quoting *Pacific Gas & Electric Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16 (1986)).

60. See *Southworth*, 529 U.S. at 221 (concluding university may use mandatory students fees if recipient programs are viewpoint neutral).

61. *Id.* at 228 (discussing interest in not being forced to contribute to organizations whose activities conflict with beliefs).

promote a message inconsistent with the organization's expressly stated purpose violates the organization's First Amendment right to freedom of association.<sup>62</sup>

Furthermore, the government may not intrude into the affairs of an organization and force it to accept members that would undermine its expressive message.<sup>63</sup> In *Boy Scouts of America v. Dale*,<sup>64</sup> the Court examined whether a state anti-discrimination law that forced the Boy Scouts to retain a gay scoutmaster violated the Boy Scouts' First Amendment right of expressive association.<sup>65</sup> The Boy Scouts, upon learning of his sexual orientation, revoked the membership of James Dale, an openly gay scoutmaster.<sup>66</sup> Dale sued the Boy Scouts for violating the state's public accommodations law and sought readmission to the organization.<sup>67</sup> The Court held that the government violates an organization's freedom of association when it forces the organization to include or support an unwanted person or group, and the presence of that person or group significantly affects the organization's ability to advocate its public or private viewpoints.<sup>68</sup>

There is no violation of an organization's First Amendment right of freedom of association if the government does not force the organization to endorse a message inconsistent with the group's expressive purpose.<sup>69</sup> The Supreme Court recognizes the right of organizations to associate for the purpose of advancing a variety of political, social, economic, educational, religious and cultural ends.<sup>70</sup> The First Amendment protects these objectives that have a

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62. *Id.* at 232 (suggesting university's mandatory student fees could violate students' right to freedom of association).

63. *See* *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649, 661 (2000) (setting forth limitations on government forcing organizations to accept or support certain entities).

64. 530 U.S. 640 (2000).

65. *Id.* at 644 (articulating issue of case).

66. *Id.* (stating Boy Scout's action against Dale). The Boy Scouts is a private organization whose primary objective is to instill its fundamental values in young people. *Id.* at 644. The Boy Scouts claim that homosexuality is inconsistent with its core values. *Id.* James Dale, a homosexual assistant scoutmaster, appeared in a newspaper article advocating the need for role models for homosexual teenagers. *Id.* at 645. Later that month, the Boy Scouts revoked Dales' membership because the Boy Scouts "specifically forbid membership to homosexuals." *Id.*

67. *Id.* (asserting cause of action).

68. *Boy Scouts*, 530 U.S. at 649 (stressing importance of protecting organization's expressive purpose). The Court discussed previous decisions where it held that the interests protected by public accommodations laws were sufficiently compelling to justify an intrusion into organizations' freedom of association. *Id.* at 657-58. In each of those cases, the distinguishing factor was that the forced membership did not significantly interfere with the organization's expressive purpose. *Id.* at 658. In *Boy Scouts*, however, the Court determined that forcing the Boy Scouts to reinstate Dale's membership would significantly burden its right to freedom of association. *Id.* at 659.

69. *See* *Pi Lambda Phi Fraternity v. Univ. of Pittsburgh*, 229 F.3d 435, 438 (3d Cir. 2000) (deciding revocation of fraternity's charter not First Amendment violation because not expressive association); *Troster v. Pa. State Dep't of Corrs.*, 65 F.3d 1086, 1089 (3d Cir. 1995) (examining potential expressive message of wearing flag patches on uniforms).

70. *See* *Pi Lambda Phi*, 229 F.3d at 443 (listing various protected expressive purposes).

significant expressive value to the organization.<sup>71</sup> If the government action, however, does not constitute a sufficient expressive message, then there is no First Amendment violation of freedom of association.<sup>72</sup> A violation of an organization's First Amendment right of freedom of association occurs only if the governmental act forces the organization to assert or endorse a message inconsistent with the organization's expressed beliefs.<sup>73</sup>

*B. Congress's Spending Power and the Unconstitutional Conditions Doctrine*

There is a delicate balance between these First Amendment rights and Congress's spending power.<sup>74</sup> Article I, section 8, clause 1 of the United States Constitution, the Spending Clause, grants Congress the power to place conditions on the grant of federal funds.<sup>75</sup> Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further broad federal policy objectives.<sup>76</sup> The Unconstitutional Conditions Doctrine, developed by

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71. *Id.* at 447 (pointing out disconnect between drug activity and protected First Amendment expression).

72. *See Troster*, 65 F.3d at 1087 (stating court's holding). Pennsylvania State Department of Corrections (Department) adopted a uniform policy requiring correction officers to wear an American flag patch on the right sleeve of their uniform shirts. *Id.* at 1088. Dieter H.M. Troster, an employee of the Department of Corrections, refused to wear the flag patch because he felt that government-imposed uniform regulations undermined the freedom that the flag symbolized. *Id.* Troster filed for a preliminary injunction to stop the Department's efforts to discipline him. *Id.* The United States Court of Appeals for the Third Circuit held that Troster's act of passively wearing a flag patch on his uniform sleeve was not a manifestation of assent to any specific attitude or belief. *Id.* at 1091; *see also Pi Lambda Phi*, 229 F.3d at 443. In *Pi Lambda Phi*, the Pittsburgh police arrested four members of the fraternity when they found drugs and drug paraphernalia during a raid. *Pi Lambda Phi*, 229 F.3d at 443. After an investigation and review, the University of Pittsburgh (University) decided to revoke the fraternity's charter and stated that the fraternity could reapply for student organization status on April 30, 1997. *Id.* On December 4, 1996, the Vice Chancellor for Student and Public Affairs determined that, despite the fraternity's compliance with the requirements set forth in the revocation decision, the University should not recertify the fraternity's chapter. *Id.* at 440. The plaintiff brought suit against the University alleging First Amendment violations of plaintiff's right of freedom of association. *Id.* at 438. The court held that the plaintiff's freedom of association claim fails because the fraternity failed to show that they met the minimum constitutional requirements for an expressive association. *Id.* at 444.

73. *Troster*, 65 F.3d at 1091 (holding government requirement constitutional because plaintiff not compelled to assent to any beliefs or attitudes).

74. *See* U.S. CONST. art. I, § 8, cl. 1. *Compare* *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001) (declaring restrictions on legal counsel for indigent welfare clients violative of First Amendment), *and* *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (holding government denial of tax exemption infringed upon taxpayers' First Amendment rights), *with* *Rust v. Sullivan*, 500 U.S. 173, 203 (1991) (deciding funding restrictions on abortion services do not violate Title X recipients' First Amendment rights), *and* *Regan v. Taxation with Representation*, 461 U.S. 540, 549 (1983) (stating government denial of tax exempt status does not violate nonprofit corporation's First Amendment rights).

75. *See* U.S. CONST. art. I, § 8, cl. 1 (granting Congress spending power). Article I, section 8, clause 1 states that, "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States."

76. *See* *United States v. Am. Library Assoc., Inc.*, 539 U.S. 194, 230-32 (2003) (discussing government restrictions on funding for internet access in public libraries); *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (considering validity of Congress's indirect imposition of minimum drinking age under spending power); *see also Rust*, 500 U.S. at 193 (examining constitutionality of conditions to receipt of federal funding for abortion

the Court during the *Lochner* era, limits this congressional power by placing restrictions on the types of conditions Congress may impose.<sup>77</sup> This doctrine states that Congress may not condition funds upon the forfeiture of a constitutionally protected right, such as a First Amendment right.<sup>78</sup> Congressional abuse of its spending power is particularly dangerous in the First Amendment context if Congress uses funding as a tool to suppress ideas contrary to the government's own interest.<sup>79</sup>

### C. Congress's Enactment of the Solomon Amendment

In 1994, Congress devised the Solomon Amendment in an effort to combat the growing trend among law schools of refusing to subsidize on-campus military recruitment.<sup>80</sup> The Solomon Amendment, which Congress later codified as 10 U.S.C. § 983, has undergone several modifications and currently states that the federal government may deny funds to any institution of higher education that either prohibits or effectually prevents the Secretary of Defense entry to campuses and access to students for recruitment purposes.<sup>81</sup> The

services).

77. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (articulating independent constitutional bar on Congress's spending power). The *Lochner* Era is defined by the Court's overturning of state laws that interfered with interstate commerce under the Due Process Clause of the Fourteenth Amendment. See Cass R. Sunstein, *Why The Unconstitutional Conditions Doctrine is an Anachronism (With Particular Reference to Religion, Speech, and Abortion)*, 70 B.U. L. Rev. 593, 597 (1990). See generally *Lochner v. New York*, 198 U.S. 45 (1905). In the late 1930s the new focus became personal liberties. See Sunstein, *supra*, at 596-97. Government intervention in both economic and personal areas became more frequent with the rise of the regulatory state following the demise of economic due process. See *id.* at 596-97.

78. See *Velazquez*, 531 U.S. at 549 (declaring government subsidy condition unconstitutional because of free speech restriction); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995) (rejecting public university's speech-based funding condition because it violated students' First Amendment rights); *Speiser*, 357 U.S. at 518-19 (holding governmental conditions of tax program infringed on taxpayer's constitutional right to freedom of speech).

79. See *Velazquez*, 531 U.S. at 549 (declaring invalid funding condition limiting arguments available to attorneys representing indigent welfare clients); see also *Regan*, 461 U.S. at 548 (holding Congress's decision not to fund lobbying of state legislatures does not constitute unconstitutional condition); *Perry*, 408 U.S. at 597 (acknowledging greater harm when spending power abuse affects First Amendment rights in university context); *Speiser*, 357 U.S. at 518-19 (stating Congress's conditions-based decisions not to fund effectually penalizes speech).

80. 10 U.S.C. § 983 (2005). In 1994 and 1995, Representative Gerald Solomon successfully persuaded Congress to enact amendments to federal laws to deprive schools federal funding if they refused to let military recruiters on campus. Ingle, *supra* note 6, at 100.

81. 10 U.S.C. § 983.

No funds . . . may be provided by contract or by grant . . . to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that that institution (or any subelement of that institution) has a policy or practice . . . that either prohibits, or in effect prevents: (1) the Secretary of a military department or Secretary of Homeland Security from gaining entry to campuses, or access to students . . . on campuses, for purposes of military recruiting; or (2) access by military recruiters for purposes of military recruiting to . . . information pertaining to students . . . enrolled at that institution (or any subelement of that institution).

*Id.* § 983(b); see also National Defense Authorization Act of 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663 (1994) (citing first version of Solomon Amendment). The 1994 version of the Solomon Amendment only

specific funds at stake, which do not include funds solely available for student aid, include those funds administered by the Departments of Defense, Transportation, Labor, Health and Human Services, and Education, and related agencies.<sup>82</sup> In an effort to comply with the Solomon Amendment's terms and uphold their anti-discrimination policies, law schools allowed the military access to their students, and at times their campuses, yet law schools did not provide the same affirmative assistance that they provided other employers.<sup>83</sup> While initially the Department of Defense did not consider these practices violative of the Solomon Amendment, the policies and opinions of the Department of Defense changed drastically following the September 11<sup>th</sup> terrorist attacks.<sup>84</sup> The Department of Defense's new informal policy required law schools not only to provide access to students and campuses, but to also afford military recruiters the identical treatment all other employers received.<sup>85</sup> In 2004, Congress amended U.S.C. § 983 to reflect the military's informal policy and stated that law schools would be penalized if they prevented military

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applied to Department of Defense funds and the actual institution violating the Solomon Amendment, not its parent institution. National Defense Authorization Act of 1995 § 558. As of 1997, however, the Amendment also applied to funds administered by the Departments of Transportation, Labor, Health and Human Services, and Education. *Id.* The Amendment gave the Department of Defense the power to not only deny funding to an institution in violation of the Amendment, but also any subelement of that institution. *Id.*; see also Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education, 63 Fed. Reg. 56,819 (Oct. 23, 1998) (implementing 32 C.F.R. § 216.3). The Department of Defense initially interpreted the language of the Amendment to mean that if a subelement of an institution violated the amendment then only that subelement would lose federal funding. Military Recruiting, 63 Fed. Reg. at 56,819. In 2000, the Department of Defense eliminated the subelement provision for Department of Defense funds, but the provision still applied to funding from the other federal departments. Defense Federal Acquisition Regulation Supplement; Institutions of Higher Education, 65 Fed. Reg. 2056 (Jan. 13, 2000). The statute currently states that if a law school violates the Solomon Amendment, the Department of Defense may deny funds to the law school and its parent institution, while the government may only deny funding from other departments to the law school. *Id.*

82. 10 U.S.C. § 983(d)(2); see Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, § 514(b), 110 Stat. 3009-270 (1996) (formerly 10 U.S.C. § 503), repealed by Pub. L. No. 106-65, 113 Stat. 512 (1999). In addition to Department of Defense funds, a law school in violation of the Solomon Amendment may also lose any funds made available in an appropriations act covering the Departments of Labor, Health and Human Services, and Education, and other related federal agencies. 10 U.S.C. §983(b); Military Recruiting, 63 Fed. Reg. at 56,821. The Solomon Amendment affects campus-based student financial aid programs such as the Federal Perkins Loan program, the Federal Work-Study program, and the Federal Supplemental Educational Opportunity Grant program. Military Recruiting, 63 Fed. Reg. at 56,821. The Solomon Amendment does not, however, affect student aid programs where the federal government distributes funds directly to students, such as the Federal Pell Grant program, the Federal Family Education Loan program, and the Federal Direct Student Loan program. *Id.*

83. *Forum for Academic & Institutional Rights v. Rumsfeld*, 390 F.3d 219, 227 (3d Cir. 2004) (explaining how law schools attempted to accommodate military recruitment without abandoning antidiscrimination policies). For example, Harvard Law School allowed the military to interview students at its Veterans Association, but did not provide law school personnel to organize interviews. *Id.* Boston College Law School permitted the military to recruit on campus, but stored its literature in the library rather than in the career services office. *Id.*

84. *Id.* (noting change in Department of Defense's perspective on law school's treatment of military recruiters).

85. *Id.* (introducing Department of Defense's new recruitment policy).

recruiters access from campus “in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer.”<sup>86</sup>

#### D. Recent Solomon Amendment Litigation

Recently, a number of student and faculty organizations have challenged the constitutionality of the Solomon Amendment in federal court.<sup>87</sup> In June 2004, the United States District Court for the District of Connecticut ruled on two separate challenges to the Solomon Amendment.<sup>88</sup> In *Student Members of SAME v. Rumsfeld*,<sup>89</sup> plaintiff law student organizations brought suit against the Secretary of Defense claiming enforcement of the Solomon Amendment infringed on their First Amendment right of association and right to receive information.<sup>90</sup> While the court dismissed the complaint in part because the student organizations lacked standing to assert the associational claim, the court held that the Solomon Amendment interfered with the students’ right to receive the law school’s message of equality.<sup>91</sup> Subsequently, the same court decided *Burt v. Rumsfeld*,<sup>92</sup> where plaintiff law school faculty members challenged the Solomon Amendment on the grounds that it interferes with their First Amendment right to freedom of speech and association.<sup>93</sup> In denying the Secretary of State’s motion to dismiss in part, the court determined that the faculty members had standing because they suffered a First Amendment injury, as the Amendment forced the faculty to endorse the military’s discriminatory message inconsistent with the message of the faculty.<sup>94</sup>

Even more recently, in August 2004, in *Burbank v. Rumsfeld*,<sup>95</sup> the United States District Court for the Eastern District of Pennsylvania ruled on law school faculty members, students, and a student organization’s claim that the Solomon Amendment violates their First Amendment rights of free speech,

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86. Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 552, 118 Stat. 1811, 1911 (2004); see *Forum for Academic & Institutional Rights*, 390 F.3d at 227.

87. See generally *Forum for Academic & Institutional Rights*, 390 F.3d at 219-46; *Forum for Academic and Institutional Rights v. Rumsfeld*, 291 F. Supp. 2d 269 (D.N.J. 2003), *rev’d*, 390 F.3d 219 (3d Cir. 2004); *Burt v. Rumsfeld*, 322 F. Supp. 2d 189 (D. Conn. 2004); *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388 (D. Conn. 2004); *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 27, 2004).

88. See generally *Burt*, 322 F. Supp. 2d at 189-203; *Student Members of SAME*, 321 F. Supp. 2d at 388-98.

89. 321 F. Supp. 2d 388 (D. Conn. 2004).

90. See *id.* at 390 (stating cause of action).

91. *Id.* at 395 (articulating case holding).

92. 322 F. Supp. 2d 189 (D. Conn. 2004).

93. *Id.* at 196 (setting forth legal grounds for challenging Solomon Amendment’s constitutionality).

94. *Id.* at 198 (finding faculty had standing because enforcement of Solomon Amendment caused them injury).

95. No. 03-5497, 2004 U.S. Dist. LEXIS 17509 (E.D. Pa. Aug. 27, 2004).

association and academic freedom.<sup>96</sup> The court partially based its decision to deny the Secretary of Defense's motion to dismiss on the First Amendment injuries plaintiffs suffered as a result of the Solomon Amendment's enforcement.<sup>97</sup> As examples of how the Solomon Amendment implicates First Amendment rights, the court cited the faculty's inability to teach about equality and access to justice, and students' resulting belief that their law school is not committed to fighting discrimination on the basis of sexual orientation.<sup>98</sup>

Finally, in November 2004, the United States Court of Appeals for the Third Circuit ordered a preliminary injunction against the enforcement of the Solomon Amendment in *Forum for Academic and Institutional Rights v. Rumsfeld*.<sup>99</sup> Plaintiff, an organization consisting of law schools and faculty, appealed the United States District Court for the District of New Jersey's denial of their motion to preliminarily enjoin the Secretary of Defense from enforcing the Solomon Amendment.<sup>100</sup> The plaintiff alleged that enforcement of the Solomon Amendment infringes on law schools' First Amendment rights and that a preliminary injunction was necessary to prevent plaintiff from suffering irreparable harm.<sup>101</sup> The court grounded its analysis in First Amendment principles of freedom of speech and association.<sup>102</sup> The court held that law schools are expressive associations and that the Solomon Amendment's enforcement prevents law schools from disseminating their viewpoint of nondiscrimination.<sup>103</sup> The court further determined that the Amendment forces law schools to "propagate, accommodate, and subsidize the military's message," despite its inconsistency with the schools' anti-discrimination policy.<sup>104</sup> The court, therefore, reversed the district court's decision and remanded to the district court to enter a preliminary injunction.<sup>105</sup>

### III. ANALYSIS

The Solomon Amendment violates law schools' First Amendment rights by using the denial of federal funds to force institutions of higher learning to

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96. *Id.* at 6 (stating Plaintiffs' claim against Department of Defense regarding unconstitutionality of Solomon Amendment).

97. *Id.* at 7-8 (providing reasons for court's denial of Defendant's motion to dismiss).

98. *Id.* at 8-10 (listing First Amendment injuries Plaintiffs suffered due to Solomon Amendment's enforcement).

99. 390 F.3d 219 (3d Cir. 2004).

100. *Id.* at 224 (recalling lower court's decision).

101. *Id.* at 228-29 (contending injunction necessary to prevent further injury to plaintiff due to Solomon Amendment's enforcement).

102. *Id.* at 231, 236 (identifying First Amendment principles on which court based analysis).

103. *Forum for Academic and Institutional Rights*, 390 F.3d at 231 (holding Solomon Amendment interferes with law schools' First Amendment right of freedom of association).

104. *Id.* at 236 (determining Solomon Amendment forces schools' to support a message of discrimination inconsistent with beliefs).

105. *Id.* at 246 (announcing disposition).

promote a message inconsistent with their anti-discrimination policies.<sup>106</sup> The Department of Defense uses the Solomon Amendment to force law schools to allow military participation in their on-campus recruitment programs despite the military's discriminatory employment practices towards homosexuals.<sup>107</sup> The government may not use its spending power to "produce a result which [it] could not command directly."<sup>108</sup> The government unconstitutionally conditions the receipt of federal funding on law schools' surrender of First Amendment rights.<sup>109</sup> The Solomon Amendment coerces law schools into forfeiting their right to engage in expressive activities, to determine their own pedagogical mission, and to freely associate.<sup>110</sup>

*A. Solomon Amendment: Violation of Law Schools' Freedom of Speech*

The Solomon Amendment violates law schools' First Amendment right to freedom of speech.<sup>111</sup> The purpose and role of education in our country are intimately tied to the First Amendment right of freedom of speech.<sup>112</sup> The fundamental role of a university is to provide an environment of free inquiry, study and expression so that our society may benefit and flourish.<sup>113</sup> The First Amendment affords universities the freedom to engage in academic and political expression free from government intrusion.<sup>114</sup> The benefits derived from the First Amendment protection of a variety of viewpoints in a university setting are immeasurable.<sup>115</sup> If the government was allowed to control the message and ideas expressed at the university level then the virtue of dissenting voices, which have often proven to be in the forefront of democratic thought, would be eradicated.<sup>116</sup>

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106. See *id.* at 235 (discussing effect of Solomon Amendment on law schools' First Amendment rights).

107. See *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 239 (3d Cir. 2004) (reasoning that requiring schools to open their campuses to military conveys a contrary ideological message); Ingli, *supra* note 6, at 99 (observing inconsistency between supporting discriminatory employers and school's antidiscrimination policy).

108. *Speiser v. Randall*, 357 U.S. 513, 526 (1958); see *supra* notes 77-78 and accompanying text (examining limitations on government's spending power).

109. See *supra* notes 77-79 and accompanying text (defining unconstitutional conditions doctrine).

110. See *supra* Part III (setting forth First Amendment rights upon which Solomon Amendment infringes).

111. See *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, \*8-9 (E.D. Pa. Aug. 27, 2004) (asserting Solomon Amendment caused injury to plaintiffs' First Amendment right of freedom of speech); Plaintiffs' Memorandum, *supra* note 8, at 19 (arguing Solomon Amendment violative of law schools' freedom of speech).

112. See *supra* notes 27-38 and accompanying text (highlighting connection between speech and education).

113. See *supra* notes 27-28 and accompanying text (discussing societal importance of free and open university environment).

114. See *supra* notes 27-28 and accompanying text (acknowledging beneficial effects of free expression amongst university students and faculty).

115. See *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (stressing importance of diversity of viewpoints).

116. *Sweezy v. New Hampshire*, 354 U.S. 234, 251 (1957) (declaring stifling effect of government interference on society); Plaintiffs' Memorandum, *supra* note 8, at 19-20 (discussing prohibition on Congress

Through its spending power, the government has used the Solomon Amendment as a means to suppress free expression at universities and law schools.<sup>117</sup> Law schools and universities have determined that a message of non-discrimination, including discrimination on the basis of sexual orientation, is crucial to their educational purposes.<sup>118</sup> While the Department of Defense does not share this belief, it does not have the right to interfere with this message and directly compel law schools and universities to abandon their convictions and assist the military's on-campus recruitment efforts.<sup>119</sup> Courts should therefore, not permit the Department of Defense to circumvent this constitutional obstacle by using its spending power to put financial pressure on law schools to abandon their message of equality.<sup>120</sup>

The Solomon Amendment inhibits law schools and universities from exercising their right to freedom of speech.<sup>121</sup> Since 1990, when the AALS added "sexual orientation" to the list of protected classes under their anti-discrimination policy, law schools have refused to support or subsidize the on-campus recruitment of employers who discriminate on the basis of sexual orientation.<sup>122</sup> Law schools intentionally send out this message of equality to convey that they will not tolerate, nor accommodate, employers who intend to discriminate against students on the basis of sexual orientation.<sup>123</sup> Due to the military's "Don't Ask Don't Tell" policy regarding homosexuals in the military, law schools have refused to subsidize the military's on-campus recruitment efforts.<sup>124</sup> By financially pressuring law schools to subsidize its

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regarding directly compelling certain speech).

117. See Inqli, *supra* note 6, at 106 (explaining how Congress's use of spending power defeats free speech at universities); *Hypocrisy on the Hill*, CORNELL DAILY SUN, Feb. 16, 2004, at 1, available at <http://www.cornellsun.com/vnews/display> (quantifying schools' loss upon failing to comply with government's demands).

118. See Plaintiffs' Memorandum, *supra* note 8, at 5 (quoting AALS antidiscrimination policy); Inqli, *supra* note 6, at 99 (discussing AALS decision to include sexual orientation as protected category).

119. See *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 394-95 (D. Conn. 2004) (recognizing Solomon Amendment prevents students from receiving law school's message of equality); Plaintiffs' Memorandum, *supra* note 8, at 19-20 (indicating limit on Congress's power to compel law school actions).

120. See *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (declaring government may not use spending power to produce results it could not command directly); *Speiser v. Randall*, 357 U.S. 513, 518 (1958) (stating Congress may not use spending power to restrict speech if unconstitutional when attempted directly); *supra* notes 77-79 and accompanying text (exposing Congress's attempt to use financial pressure to infringe on constitutionally protected rights).

121. See *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 175509, \*8-9 (E.D. Pa. Aug. 27, 2004) (describing Solomon Amendment's implications on free speech).

122. Inqli, *supra* note 6, at 99 (describing law school's policy of excluding employers who discriminate from on-campus recruitment program).

123. See *Burbank*, 2004 U.S. Dist. LEXIS 175509, at \*8-10 (stating importance of school's message of equality and equal access to justice); *Student Members of SAME*, 321 F. Supp. 2d at 395 (D. Conn. 2004) (concluding Solomon Amendment interferes with school's message of equality).

124. See Inqli, *supra* note 6, at 99 (explaining law schools' decision not to subsidize military's on-campus recruitment).

recruitment, the government is interfering with law schools' message of equality by forcing law schools to sponsor a message contrary to their nondiscrimination policy.<sup>125</sup> If the government were allowed to use institutions of higher learning as a tool to further its own agenda then the value of free expression at these institutions would be meaningless.<sup>126</sup> Universities and law schools play a vital role in the promotion of free expression and the advancement of equality in our society.<sup>127</sup> The government should not contaminate the purity of freedom of speech in an effort to serve its own interests.<sup>128</sup>

*B. Solomon Amendment: Violation of Law Schools' Academic Freedom*

The Solomon Amendment interferes with law schools' right to academic freedom.<sup>129</sup> Traditionally, institutions of higher learning have the right to make decisions regarding their pedagogical mission free from government intrusion.<sup>130</sup> Under the First Amendment, universities and law schools have the right to determine the values and ideas they wish to teach and promote.<sup>131</sup> Law schools and universities determine "who may teach, what may be taught, [and] how it shall be taught," based on their expressed education purpose.<sup>132</sup> Academic freedom grants law schools the autonomy to make these decisions

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125. See *Student Members of SAME v. Rumsfeld*, 321 F. Supp. 2d 388, 394-95 (D. Conn. 2004) (noting Amendment obstructs schools' message of equality contained in their antidiscrimination policy from reaching students); Plaintiffs' Memorandum, *supra* note 8, at 25 (outlining inconsistency between law schools' message of equality and supporting military recruitment).

126. See *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (discussing effect on university when it becomes tool of government); Plaintiffs' Memorandum, *supra* note 8, at 31-32 (setting forth government's desire to compel law schools to promote its viewpoint).

127. See *Grutter v. Bollinger*, 539 U.S. 306, 330 (2003) (noting compelling state interest in universities); *Bd. of Regents v. Southworth*, 529 U.S. 217, 233 (2000) (stressing need to protect freedom of speech at university level); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (declaring value of free speech at university level); *Sweezy*, 354 U.S. at 250 (discussing societal benefit of free speech at university level); Plaintiffs' Memorandum, *supra* note 8, at 21 (recognizing constitutional importance of free speech at universities).

128. See Plaintiffs' Memorandum, *supra* note 8, at 31-32 (outlining Congress's interference with freedom of speech to further its interests); *supra* note 27 and accompanying text (outlining value of free speech at university level).

129. See *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 231 (3d Cir. 2004) (maintaining Solomon Amendment interferes with law school's chosen method of furthering educational mission).

130. See *Southworth*, 529 U.S. at 237 (describing academic freedom rights); *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 266-67 (1988) (maintaining schools' right to make determinations regarding educational mission); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (highlighting law schools' autonomous decision-making as central component of academic freedom); *Keyishian*, 385 U.S. at 603 (recognizing importance of protecting academic freedom); *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring) (outlining four essential freedoms in right of academic freedom); *Brown v. Li*, 308 F.3d 939, 951 (9th Cir. 2002) (declaring schools' right to express policies free from government intrusion).

131. See *supra* note 130 and accompanying text (discussing right of academic freedom).

132. See *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring) (listing four essential freedoms of academic freedom).

free from government intrusion.<sup>133</sup>

The government, through the Solomon Amendment, infringes on law schools' academic freedom by using financial ultimatums to coerce law schools into abandoning their autonomous decision-making power.<sup>134</sup> Law schools define the character of their school through a variety of different features such as curriculum, mission statement, hiring criteria, admissions policies and anti-discrimination policy.<sup>135</sup> The content of these policies sends a very clear message to outsiders about the values, morals and ideas that are important to a particular institution.<sup>136</sup> The government, through the Solomon Amendment, has taken the power to make decisions within the scope of academic freedom out of the rightful hands of academic institutions.<sup>137</sup>

The Solomon Amendment does not only compel law schools to forfeit the right to determine what ideals it will support, but it has also forced law schools to promote a message inconsistent with its anti-discrimination policy.<sup>138</sup> The financial pressure the Solomon Amendment imposes forces law schools to not just allow the military on campus, but to subsidize its recruitment efforts.<sup>139</sup> Career service departments in law schools require that all employers who wish to participate in on-campus recruitment program certify that they do not discriminate on the basis of sex, sexual orientation, marital or parental status, race, color, religion, national origin, age or handicap; as outlined in law schools' anti-discrimination policy.<sup>140</sup> If an employer refuses to certify this to the law school due to their discriminatory employment practices, then the law school does not extend its services and resources to such an employer for on-campus recruitment.<sup>141</sup> The Department of Defense, even though it refuses to

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133. See *Kuhlmeier*, 484 U.S. at 266 (stating schools have right to determine their own pedagogical mission); *Ewing*, 474 U.S. at 226 n.12 (asserting institutions of higher learning's right to make academic determinations free from government intrusion).

134. See *Ewing*, 474 U.S. at 226 n.12 (discussing law schools' autonomous decision-making power); Plaintiffs' Memorandum, *supra* note 8, at 22 (observing importance of law schools' right to make decisions regarding academic freedom).

135. See *Brown*, 308 F.3d at 950-51 (describing schools' right to engage in expressive activity of establishing curriculums); J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 316 (1989) (listing methods schools use to promote their educational mission). But see Lee Bockhorn, *The Wisdom of Solomon*, DAILY STANDARD, Nov. 8, 2002, at 2 (denouncing use of academic freedom to justify almost any school policy).

136. See Byrne, *supra* note 135, at 316 (observing significant message schools send to community).

137. See Plaintiffs' Memorandum, *supra* note 8, at 24 (discussing how Solomon Amendment infringes on law schools' academic freedom).

138. See *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 239 (3d Cir. 2004) (determining Solomon Amendment forces schools to support contrary ideological message); Plaintiffs' Memorandum, *supra* note 8, at 25-26 (noting law schools' forced acceptance of message inconsistent with their antidiscrimination policy).

139. See *supra* note 86 and accompanying text (arguing requirement of equal treatment between military and other non-discriminatory employers violates schools' academic freedom).

140. See Inqli, *supra* note 6, at 99 (delineating protected classes included in AALS antidiscrimination policy).

141. See Inqli, *supra* note 6, at 99 (declaring certification requirement for employers to participate in on-

certify that they will not discriminate on the basis of sexual orientation, has used the Solomon Amendment to enter campuses and utilize the career services' resources despite its failure to comply with the universal requirements of the program.<sup>142</sup> Although law schools do not allow discriminatory employers to participate in the on-campus recruitment program, the Department of Defense has decided that these rules do not apply to them.<sup>143</sup>

The Solomon Amendment places law schools in the precarious position of either forfeiting federal funding or surrendering the faith of the student body.<sup>144</sup> Law schools' anti-discrimination policies send a message to the public and their students that the law schools will not tolerate discrimination on the basis of sexual orientation.<sup>145</sup> The public entrusts law schools with the responsibility of teaching their students the value of equality and need to counteract injustice.<sup>146</sup> Students rely on law schools to consistently uphold and enforce the values that they promote.<sup>147</sup> Although the financial pressure on law schools is real, how can law students believe their school is seriously committed to fighting discrimination when it acquiesces to the Department of Defense's demands?<sup>148</sup> An element of hypocrisy exists when law schools have an opportunity to confront injustice against which they preach, yet instead fold and abandon their principles.<sup>149</sup> Law students cannot truly put their faith in schools

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campus recruitment program).

142. See Inqli, *supra* note 6, at 104 (stating Congress uses Solomon Amendment to blackmail law schools into supporting military recruitment).

143. See Plaintiffs' Memorandum, *supra* note 8, at 5 (exposing Congress's aggressive approach towards law schools).

144. See Plaintiffs' Memorandum, *supra* note 8, at 17; Carter, *supra* note 4, at 30 (articulating choice presented to law schools).

145. See Plaintiffs' Memorandum, *supra* note 8, at 1, 5 (describing purpose of antidiscrimination policy as illustrative of moral values and encouraging freedom of expression).

146. See Plaintiffs' Memorandum, *supra* note 8, at 4 (indicating values and ideas law schools stress at law schools); Healy, *supra* note 15, at A1 (noting special obligation lawyers have to fight injustice).

147. See Plaintiffs' Memorandum, *supra* note 8, at 5, 15-18 (discussing importance of law schools' commitment to fighting discrimination against students).

148. See *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, \*9-10 (E.D. Pa. Aug. 27, 2004). Students from the University of Pennsylvania Law School affirm that the Law Schools' accommodation of military recruiters has caused them to "associate the Law School in [their] mind[s] with a discriminatory and unprincipled organization," and, "believe[] that the Law School appears to accept and participate in the discrimination by the military." *Id.* A law school faculty member stated in his affidavit that "his ability to teach and communicate messages about the importance of access to justice, and equal treatment and respect for personal autonomy and dignity, [has been] undermined by [the Department of Defense's] actions." *Id.* at \*8; Plaintiffs' Memorandum, *supra* note 8, at 15-18 (revealing student concerns regarding law schools' acquiescence to government); "Don't Ask," *Do Litigate*, HARVARD CRIMSON, Sept. 29, 2003 (stressing disconnect between what law schools words and actions); Alice Gomstyn, *Military Recruiting Goes to Court*, CHRON. HIGHER EDUC., Dec. 12, 2003, at 17 (quoting law professor's concern about teaching students about justice while school supports discrimination); Patrick Healy, *Law Lets Colleges Bar Military Recruiters Without Risking a Loss of Student Aid*, CHRON. HIGHER EDUC., Nov. 5, 1999, at A38 (highlighting hypocrisy of law schools' submission to Department of Defense); *Hypocrisy on the Hill*, *supra* note 117, at \_\_\_ (explaining difficulty in finding law schools' commitment sincere).

149. See *supra* note 148 and accompanying text (examining hypocrisy element in law schools' decision to

that qualify their convictions by saying, even indirectly, that they will not support employers who discriminate against their students—unless federal money is at stake.<sup>150</sup> Law schools cannot claim that they does not abet discrimination when in fact they do.<sup>151</sup> Unfortunately, the real lesson law schools have taught their students by acquiescing to the government is that it is possible to put a price on equality.<sup>152</sup>

*C. Solomon Amendment: Violation of Law Schools' Freedom of Association*

The Solomon Amendment violates law schools' First Amendment right to freedom of association.<sup>153</sup> Any organization, like a law school, that chooses to associate for an expressive purpose has the right to choose which messages it will include and exclude, without government interference.<sup>154</sup> Law schools make their message of equality clear through their specific anti-discrimination policies.<sup>155</sup> These policies announce to the schools' students and the community that this institution does not support discriminatory employers.<sup>156</sup> This institutional action is entirely expressive, and therefore protected by the First Amendment right of freedom of association.<sup>157</sup>

The Solomon Amendment undermines the strength of law schools' expressed commitment to anti-discrimination and muddles the law schools'

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subsidize recruitment efforts of employers who discriminate).

150. See *supra* note 148 and accompanying text (discussing incongruence between law schools' support of military recruitment and their antidiscrimination policy).

151. See *supra* note 148 and accompanying text (demonstrating inconsistency between law schools' words and actions).

152. See *Burbank*, 2004 U.S. Dist. LEXIS 17509, at \*9-10 (reiterating student concerns about school's commitment to fighting discrimination); Beth Allen, *Solomon's Judgment*, 59 OR. STATE B. BULL. 70, 70 (criticizing law schools for engaging in cost-benefit analysis regarding equality); *supra* note 13 and accompanying text (observing Congress's desire for law schools to pay price for their idealism).

153. See *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 235 (3d Cir. 2004) (holding law schools have reasonable likelihood of success on their freedom of association claim); Plaintiffs' Memorandum, *supra* note 8, at 23-26 (arguing Solomon Amendment infringes on law schools' right to freely associate). But see *Forum for Academic and Institutional Rights*, 390 F.3d at 260 (Aldisert, J., dissenting) (arguing Solomon Amendment not violative of law schools' First Amendment right to freely associate).

154. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (discussing forced inclusion of inconsistent message violates organizations freedom of association); *Bd. of Regents v. Southworth*, 529 U.S. 217, 227-28 (2000) (discussing unconstitutionality of compelling students to contribute to organization promoting inconsistent message); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-76 (1995) (stating speaker's right to determine substance of message); *Pi Lambda Phi Fraternity, Inc. v. Univ. of Pittsburgh*, 229 F.3d 435, 443 (3d Cir. 2000) (recognizing right to associate for variety of expressive purposes); *Troster v. Pa. State Dept. of Corrs.*, 65 F.3d 1086, 1091 (3d Cir. 1995) (discussing prohibition on compelling individuals to assent to particular beliefs).

155. See *Forum for Academic and Institutional Rights*, 390 F.3d at 235 (determining law schools are expressive associations); Plaintiffs' Memorandum, *supra* note 8, at 1, 5 (demonstrating law schools use antidiscrimination policies to make their message of equality clear).

156. See *Forum for Academic and Institutional Rights*, 390 F.3d at 235 (explaining law schools send their equality message to students and community through their various policies).

157. See *id.* (defining law schools' decision not to discriminate on the basis of sexual orientation as categorically expressive).

messages of anti-discrimination.<sup>158</sup> The law schools' seemingly absolute ban on employers who discriminate becomes blurry when law schools are forced to allow military participation in on-campus recruitment programs.<sup>159</sup> This forced act undercuts law schools' perceived commitment to fighting discrimination and impairs law schools' ability to communicate their policies in the most effective way.<sup>160</sup>

The Solomon Amendment also compels law schools to send a message inconsistent with the schools' explicit anti-discrimination policies.<sup>161</sup> By allowing the military to participate in on-campus recruitment, law schools must advertise and promote the visit, circulate the military's recruitment literature, provide employees to coordinate meetings and interviews between the military and students, and supply already limited campus space.<sup>162</sup> Law schools' recruitment assistance involves communication and the dissemination of information, which is highly expressive.<sup>163</sup> The military, therefore, is not only asking law schools to tolerate its message of discrimination but also to subsidize that discriminatory message.<sup>164</sup> Law schools' promotion and support of the military's recruitment efforts suggests to students and the community that employers who discriminate are as accepted and embraced by the institution as non-discriminatory employers.<sup>165</sup> The Solomon Amendment, therefore, compels law schools to affirm a message that is entirely inconsistent

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158. *Forum for Academic and Institutional Rights*, 390 F.3d at 239 (maintaining Solomon Amendment counters law schools' expressed belief in equality).

159. *See Boy Scouts*, 530 U.S. at 648 (holding compelled inclusion of an unwanted group impairs organizations' ability to express its chosen message); *Burbank v. Rumsfeld*, No. 03-5497, 2004 U.S. Dist. LEXIS 17509, \*9-10 (E.D. Pa. Aug. 27, 2004) (explaining law schools' support of military recruitment causes students to believe school accepts discrimination).

160. *See Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 573-76 (1995) (asserting organizations' freedom of association right prevents government from controlling their expressive message); *Forum for Academic and Institutional Rights v. Rumsfeld*, 390 F.3d 219, 239 (3d Cir. 2004) (stating Amendment allows conflicting discriminatory message to counter schools' beliefs); Plaintiffs' Memorandum, *supra* note 8, at 24-25 (noting enforcement of Solomon Amendment dilutes strength of law schools' antidiscrimination policies).

161. *See Forum for Academic and Institutional Rights*, 390 F.3d at 239 (highlighting antagonistic message created by forcing law schools to subsidize of military's on-campus recruitment efforts).

162. *See Forum for Academic and Institutional Rights*, 390 F.3d at 236 (holding Amendment violates First Amendment rights because schools must propagate, accommodate, and subsidize military's message); Plaintiffs' Memorandum, *supra* note 8, at 5 (listing ways that law schools must subsidize military's on-campus recruitment); Gomstyn, *supra* note 148, at 17 (pointing to resources law schools forced to extend to military for recruitment purposes).

163. *See Forum for Academic and Institutional Rights*, 390 F.3d at 237 (categorizing law school's recruitment efforts as expressive, and therefore, requiring First Amendment protection). *But see id.* at 257 (Aldisert, J., dissenting) (asserting recruitment not expressive conduct conveying any message).

164. *See Plaintiffs' Memorandum*, *supra* note 8, at 25 (distinguishing between requiring law schools to accept message and forcing law schools to subsidize message).

165. *See Forum for Academic and Institutional Rights*, 390 F.3d at 239 (affirming Amendment forces schools to convey message of acceptance of employers, including those who discriminate); *supra* note 148 and accompanying text (describing how schools' support of military recruitment sends message of endorsement of discrimination to students).

with the expressed anti-discrimination policy of the institution.<sup>166</sup>

#### IV. CONCLUSION

The Solomon Amendment violates law schools' First Amendment rights by forcing law schools to support a discriminatory employer's on-campus recruitment, despite the inconsistencies with the schools' expressed anti-discrimination policies. Law schools refuse to support any employers, including the military, who discriminate on the basis of any category outlined in the AALS anti-discrimination policy. Congress enacted the Solomon Amendment in order to financially pressure law schools to subsidize military recruitment even though the military's employment practices are inconsistent with law schools' anti-discrimination policies. The Solomon Amendment, therefore, infringes upon law schools' First Amendment rights of freedom of speech, academic freedom, and freedom of association.

United States Supreme Court precedent, along with federal court rulings, provide guidance on the scope and limitations of these First Amendment freedoms. The Court has consistently protected against government contamination of free speech at the university level. The government, through the Solomon Amendment, infringes on law schools' right to freedom of speech by interfering with law schools' right to promote and express the ideas they believe will best shape the schools' characters. Congress's enforcement of the Solomon Amendment also infringes on law schools' academic freedom by inhibiting law schools from determining what ideas are essential to the advancement of their educational missions. Additionally, the Solomon Amendment muddles the clear, expressive policy that law schools, as an organization, decided to adhere to by forcing law schools to support a discriminatory employer contrary to the language of the schools' anti-discrimination policies.

The Solomon Amendment coerces law schools into abandoning their rights and principles by supporting an employer that discriminates. The government should not be permitted to use financial pressure to violate law schools' First Amendment rights and contaminate their message of equality in an effort to further its own interest. Unfortunately, the Solomon Amendment forces law schools to send a clear message to their students and the public: there is a price to pay for equality, and we are not willing to pay it.

*Abigail K. Holland*

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166. See Plaintiffs' Memorandum, *supra* note 8, at 25 (concluding acceptance of employer who discriminates inconsistent with expressed antidiscrimination policy). But see Eric Wang, *Biting the Hand that Feeds*, CAVALIER DAILY, Oct. 1, 2003 (stating law schools not forced to affirm any viewpoint when allowing on-campus military recruitment).