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Military Discrimination on the Basis of Sexual Orientation: Don't Ask, Don't Tell and the Solomon Amendment

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MILITARY DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION: "DON'T ASK, DON'T TELL" AND THE SOLOMON AMENDMENT

I. INTRODUCTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person . . . the equal protection of the laws.[2]

Our Constitution protects us from arbitrary laws, helps us pursue equality, and preserves what our society views as fundamental rights. Recently, the recognition of these rights for a minority group, often the target of discriminatory treatment and subjected to violence for their non-traditional sexual preferences, has come to the forefront of national concern.[3] Although an increasing number of people support the rights of homosexual individuals,[4] there still exists a growing and

1. U.S. CONST. amend. I.

2. U.S. CONST. amend. XIV.

3. *See* Mary Wiltenburg, *Out of the Margins, Into the Mainstream*, CHRISTIAN SCIENCE MONITOR, Dec. 10, 2003, *available at* LEXIS, News Library, Curnws File; PUBLIC AGENDA, GAY RIGHTS: OVERVIEW (2004), *at* http://www.publicagenda.org/issues/overview.cfm?issue_type=gay_rights.

4. Throughout this Note the author uses the term sexual orientation to refer to one's preference of partner for intimate association, and the terms homosexual and gay in the generic sense to refer to those of non-heterosexual tendency. The author recognizes that categorizing people by sexuality is imprecise and not fully illustrative, but for purposes of writing the terms are useful.

heated debate about whether and how the Constitution seeks to protect the rights of this minority group.[5]

The U.S. military policy toward homosexual individuals in the armed forces fuels this debate.[6] Instead of recognizing society's increasing acceptance of homosexuality,[7] the U.S. military has moved backwards. The policies of the U.S. military have shifted from forbidding homosexual *conduct* to, in effect, forbidding homosexual *status*.[8] The military's outright discrimination on the basis of sexual orientation conflicts with society's increasing acceptance of homosexuality.

Examining the military's policy of discrimination in the context of on-campus university recruitment exemplifies this conflict. Most universities maintain strong nondiscrimination policies that forbid discrimination on the basis of sexual orientation.[9] Prior to 1995, law schools in particular adamantly enforced these policies.[10] One way in which law schools showed their commitment to nondiscrimination was to limit or refuse on-campus recruiting to *any* employer, including the U.S. military, that did not comply with the university's policy.[11]

In an effort to combat the universities' resistance and preserve military recruitment on university campuses, Congress enacted the

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5. *See* HarrisInteractive, *The Harris Poll #9* (Feb. 9, 2000) *available at* http://www.harrisinteractive.com/harris_poll/index.asp?PID=1/; Wiltenburg, *supra* note 3.

6. The author in no way intends to disparage our military's men and women, as she greatly appreciates the freedom they protect and knows that as a civilian she cannot understand the battlefield mentality. However, it is the author's opinion that societal progress requires that discriminatory regulations in any facet of society should be discussed, analyzed, and occasionally challenged.

7. *See* HarrisInteractive, *supra* note 5 (fifty-six percent "favor[] legislation to make it illegal to discriminate against gays and lesbians"); *Poll Indicates Americans Becoming More Accepting of Homosexuals* (CNN television broadcast, June 13, 2001) (interview with Frank Newport, The Gallup Poll's editor in chief), *at* http://cnnstudentnews.cnn.com/TRANSCRIPTS/0106/13/ns.05.html; Sean Macaulay, *High Time that Gay Time is Prime Time*, TIMES LONDON, July 24, 2003, *available at* LEXIS, News Library, Ttimes File.

8. *See infra* Part II.A.

9. Sylvia Law, *Civil Rights Under Attack by the Military*, 7 WASH. U. J.L. & POL'Y 117, 120–21 (2001).

10. *See infra* Part III.A.

11. *See id.*

Solomon Amendment,[12] which requires universities to allow the military to recruit on campus or risk the loss of federal funding.[13]

This Note argues that the Solomon Amendment is an unconstitutional condition because it forces each university to choose between the constitutional right to function as an expressive association and hundreds of millions of dollars in federal research funding. Part II introduces the "Don't Ask, Don't Tell" policy, which is the basis of the military's express discrimination against homosexuals. It lays out the history of military discrimination on the basis of sexual orientation as well as the constitutionality and sensibility (or lack thereof) of this discrimination. Part III discusses the Solomon Amendment's history and the financial and social costs associated with it. Part IV concludes that the Solomon Amendment is an unconstitutional condition because it forces the choice between First Amendment rights and federal funds, and is not justified by a compelling government interest or military goal furthered by the least restrictive means.

II. "DON'T ASK, DON'T TELL"

A. The Military's Policy on Homosexuality

The military maintains a clear policy, codified in Title 10 of the U.S. Code, of discrimination based on sexual orientation. This policy states:

> A member of the armed forces shall be separated from the armed forces . . . if one or more of the following findings is made . . .
>
> (1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings . . . that the member has demonstrated that—
>
> > (A) such conduct is a departure from the member's usual and customary behavior;

12. 10 U.S.C. § 983 (2000).

13. *See infra* Part III; Statement by Carl Monk, AALS Executive Director, to Deans of AALS Member and Fee-Paid Schools, Military Recruiting at Law School Career Services Offices (Aug. 13, 1997), *at* http://www.aals.org/military.html.

> (B) such conduct, under all the circumstances, is unlikely to recur;
>
> (C) such conduct was not accomplished by use of force, coercion, or intimidation;
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> (D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and
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> (E) the member does not have a propensity or intent to engage in homosexual acts.
>
> (2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
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> (3) That the member has married or attempted to marry a person known to be of the same biological sex.[14]

The "Don't Ask, Don't Tell" policy was enacted in 1993 as a compromise between society's increasing acceptance of homosexuality and the military's concerns for unit cohesion and morale.[15] Historically, military "prohibitions focused on typically

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14. 10 U.S.C. § 654(b) (2000).

15. Gregory M. Herek, *Social Science, Sexual Orientation, and Military Personnel Policy*, *in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY 3, 5–8 (Gregory M. Herek et al. eds., 1996). The military has long maintained some policy of discriminating on the basis of sexual orientation. Unit cohesion and morale were also the reasons presented in the mid-1900s to keep black soldiers separate from white soldiers. Michael R. Kauth & Dan Landis, *Applying Lessons Learned from Minority Integration in the Military*, *in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY, *supra* note 15, at 86, 88; Patricia J. Thomas & Marie D. Thomas, *Integration of Women in the Military: Parallels to the Progress of Homosexuals?*, *in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY, *supra* note 15, at 65, 75. "It took an Executive Order in 1945 by President Truman, issued against the advice of almost every admiral and general, to integrate our armed forces." Watkins v. United States Army, 875 F.2d 699, 729 n.32 (9th Cir. 1989) (Norris, J., concurring) (citing M. MILLER, PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN 79 (1983)). When the armed forces began to desegregate, there was racial tension, but this subsided when the military instituted "programs designed to address racial inequities and reduce interracial

homosexual behaviors . . . not on gay identity."[16] For example, in 1950 Congress enacted the Uniform Code of Military Justice, which codified the rules of the armed forces, including the criminalization of sodomy.[17] However, in subsequent decades the focus shifted to homosexual status.[18]

By the mid 1980s the military made clear that homosexuality was incompatible with "discipline, good order, and morale."[19] Recruits were openly questioned about their sexuality.[20] The military argued that homophobic men may lash out or refuse to interact with homosexual men, may not follow orders from a

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conflict." Herek, *supra* note 15, at 5. The same was true when the military integrated women into its ranks. *Id.* But after initial challenges, the armed forces have shown that they can weather adversity and come out stronger than before due to the added diversity. *See* Kauth & Landis, *supra* note 15, at 87–88. A new study indicates "the armed forces have a long history of successfully integrating minority groups that faced considerable prejudice in the civilian sector." Center for the Study of Sexual Minorities in the Military, *U.S. Military A Major Success in Integration and Diversity, Study Finds as Affirmative Action Debate Heats Up, Military Stands Out in Successful Integration of Wide Variety of Minorities* (June 25, 2003), *at* http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2003_0625.htm. However, military officials claim racial integration was an exception. *Id.* Nonetheless, the military has continually refused to take steps towards integrating those of varying sexual orientations.

16. Herek, *supra* note 15, at 5.

17. Act of May 5, 1950, ch. 169, 64 Stat. 141 (codified as amended at 10 U.S.C. § 925 (2000)). Section 925 states:

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

10 U.S.C. § 925 (2000).

18. Herek, *supra* note 15, at 6.

19. *Id.* at 6–7 (citing Department of Defense Directive 1332.14 (Jan. 28, 1982)).

20. *See* Human Rights Campaign, *Fact Sheet on Don't Ask, Don't Tell, Don't Pursue, Don't Harass*, *available at* http://www.hrc.org/Content/NavigationMenu/HRC/Get_Informed/Issues/Military2/Fact_Sheets_Dont_Ask_Dont_Tell/Don't_Ask,_Dont_Tell_Fact_Sheet.htm (last visited Feb. 28, 2004); Department of Defense Directive 1332.14 (Dec. 21, 1993), *available at* http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf (this policy change restricted military personnel from asking recruits about their sexuality).

homosexual commander, and may feel they have lost some of their privacy.[21] Various independent reports concluded that homosexuality would not, or should not, interfere with unit cohesion, but the military rejected these conclusions.[22] Congress and the courts deferred to the military's position, and the majority of discharges based on sexual orientation have been upheld.[23]

Nevertheless, in recent decades the acceptance of homosexuality has increased in society.[24] Thus, the outright military policy of questioning cadets about their sexual orientation became questionable in the 1990s. During his presidential campaign, soon to be President Clinton promised to lift the ban on homosexuals in the military.[25] But once in office, President Clinton's campaign promise to integrate gays and lesbians into the military caused so much opposition from the Joint Chiefs of Staff and Congress that the deference afforded to the military became clear; "Don't Ask, Don't

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21. Thomas & Thomas, *supra* note 15, at 74–77.

22. *See* Timothy Haggerty, *History Repeating Itself: A Historical Overview of Gay Men and Lesbians in the Military Before "Don't Ask, Don't Tell,"* *in* DON'T ASK, DON'T TELL: DEBATING THE GAY BAN IN THE MILITARY 22–24, 37–38 (Aaron Belkin & Geoffrey Bateman eds., 2003) (discussing the 1950s Crittenden Board Report and 1980s PERSEREC report); Herek, *supra* note 15, at 8 (discussing the 1993 RAND report); GARY L. LEHRING, OFFICIALLY GAY: THE POLITICAL CONSTRUCTION OF SEXUALITY BY THE U.S. MILITARY 132–33 (2003) (discussing the 1992 GAO report and the 1993 RAND report). The GAO Report is available at http://archive.gao.gov/d33t10/146980.pdf. The RAND Report is available at www.rand.org/publications/MR/MR323.

23. *See, e.g.*, Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997) ("For nearly twenty years we have upheld the constitutionality of the military's authority to discharge service members who engage in homosexual acts."); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980). It is true that any review of military regulations "is far more deferential than constitutional review of similar laws or regulations designed for civilian society" because military service requires "subordination of [individual] desires and interests." Goldman v. Weinberger, 475 U.S. 503, 507 (1986). However, the Supreme Court "ha[s] never abdicated [its] obligation of judicial review." *Id.* at 515 (Brennan, J., dissenting). "[O]ur citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Chappell v. Wallace, 462 U.S. 296, 304 (1983) (citing Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 188 (1962)). One might question whether continued recognition of "Don't Ask, Don't Tell" is an abdication.

24. *See supra* note 6 and accompanying text.

25. Herek, *supra* note 15, at 7–8.

Tell" was eventually enacted as a compromise between competing values.[26]

"Don't Ask, Don't Tell" has been justified in part by the military's ban on sodomy.[27] Officials claim that the policy does not affect people that have a sexual preference for those of the same sex, but instead affects only those who engage in, or have a propensity to engage in, gay acts.[28] However, stating that one is gay creates a presumption of propensity to engage in homosexual acts and is reason enough for discharge.[29] Thus, status is in effect regulated. The sodomy justification is being called into question as a result of the Supreme Court's recent decision in *Lawrence v. Texas*.[30]

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26. *Id.* at 8; Bruce Bartley, *Conflicts and Opportunities: The Role of the Armed Forces in Modern Democratic Societies*, Paper for the 51st Political Studies Association Conference Apr. 10–12, 2001, Manchester, United Kingdom, 7–8, *available at* www.psa.ac.uk/cps/2001/Bartley%20Bruce.pdf.

27. Scott Morris, *Europe Enters a New Millennium with Gays in the Military While the United States Drowns in Don't Ask, Don't Tell: Twin Decisions By the European Court of Human Rights*, 9 AM. U. J. GENDER SOC. POL'Y & L. 423, 431–32 (2001).

28. *See* Peter D. Jacobson, *Sexual Orientation and the Military: Some Legal Considerations*, *in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY, *supra* note 15, at 39, 40 (discussing the Clinton Administration's intent to focus "Don't Ask, Don't Tell" on homosexual conduct while creating a "'zone of privacy' around the soldier's private sexual status"); Lawrence J. Korb, *The President, the Congress, and the Pentagon: Obstacles to Implementing the "Don't Ask, Don't Tell" Policy*, *in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY, *supra* note 15, at 290 (arguing that President Clinton misframed the policy of "Don't Ask, Don't Tell" as "status versus conduct" rather than the "real issue . . . [of] status versus misconduct"). Department of Defense Directive 1332.14 ¶ E2.1.6.1 defines a homosexual act as "[a]ny bodily contact . . . between members of the same sex for the purpose of satisfying sexual desires." Department of Defense Directive 1332.14 ¶ E2.1.6.1 (Dec. 21, 1993) *available at* http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf.; *see also* Janet Lever & David E. Kanouse, *Sexual Orientation and Proscribed Sexual Behaviors*, *in* OUT IN FORCE: SEXUAL ORIENTATION AND THE MILITARY, *supra* note 15, at 17.

29. Department of Defense Directive 1332.14 ¶ E3.A1.1.8.1.2.2, *at* http://www.dtic.mil/whs/directives/corres/pdf/d133214wch1_122193/d133214p.pdf.

30. 539 U.S. 558 (2003). The underlying facts of the case are as follows: officers were dispatched to Lawrence's residence on a reported weapons disturbance. *Id.* at 562. They entered the apartment and observed Lawrence and another man engaged in sodomy. *Id.* at 563. The officer arrested the two men pursuant to Texas Penal Code section 21.06(a), which provided "[a]

In *Lawrence* the Supreme Court struck down the Texas anti-sodomy law and overturned *Bowers v. Hardwick*,[31] thus eliminating two related grounds for upholding regulations that discriminate on the basis of sexual orientation.[32] First, in trying to justify discriminatory regulations on something more than morality, many have argued that a particular regulation is acceptable because homosexual conduct, sodomy, is a criminal offense.[33] But with the elimination of sodomy from the criminal law, this justification for discrimination is eliminated. Second, by overturning *Bowers*, the Court eliminated a judicial reason to allow discrimination.[34]

The effect of *Lawrence* on military regulations has yet to be seen. All branches of government afford a significant level of deference to the military.[35] This is partly a result of history and tradition, and partly a result of the differences between civilian and military life. Thus, a proffered legitimate interest presented by the military may be perfectly acceptable in our legal system even though the very same interest presented in the civilian context would be refused. Because of this deference, the military's anti-sodomy law may just survive. If it does, the military could continue to argue that "Don't Ask, Don't Tell" is in furtherance of this policy. On the other hand, the Court may stand by its assertion that "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. [It] involves liberty of the person both in its spatial and more transcendent dimensions."[36] In so

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person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." *Id.*

31. 478 U.S. 186 (1986). In *Bowers*, a police officer observed Hardwick in his own bedroom, engaging in intimate sexual conduct with another adult male. *Id.* at 187–88. The conduct was in violation of a Georgia statute that criminalized sodomy, regardless of the sex of the participants. *Id.* Hardwick was not prosecuted, but he brought an action in federal court to declare the statute invalid. *Id.* at 188. The Court upheld the statute, concluding that it did not violate due process. *Id.* at 186.

32. *Lawrence*, 539 U.S. at 578; *see* discussion *supra* note 23.

33. *Lawrence*, 539 U.S. at 568–72.

34. Numerous courts have relied on *Bowers* to uphold discriminatory regulations. *See* Walls v. City of Petersburg, 895 F.2d 188, 193 (4th Cir. 1990); Marcum v. McWhorter, 308 F.3d 635, 641–42 (6th Cir. 2002); Flaskamp v. Dearborn Pub. Schs., 232 F. Supp. 2d 730, 741–42 (E.D. Mich. 2002).

35. *See* Jacobson, *supra* note 28; discussion *supra* note 23.

36. *Lawrence*, 539 U.S. at 562.

doing the Court could recognize that the line between the civilian and the military does not justify the military's anti-sodomy law.[37]

B. The Constitutionality of "Don't Ask, Don't Tell"

The following section is a brief overview of the constitutional questions that arise in the evaluation of "Don't Ask, Don't Tell" (and other regulations that discriminate on the basis of sexual orientation). It is not an exhaustive analysis but is instead intended as an introduction and as a foundation for additional reading and research.

Two areas of constitutional law are key in determining the constitutionality of regulations that discriminate on the basis of sexual orientation: due process and equal protection.[38] "The due process clause . . . protects practices which are 'deeply rooted in this Nation's history and tradition.' The equal protection clause, in contrast, protects minorities from discriminatory treatment at the hands of the majority."[39] The analysis of these two clauses in sexual orientation cases may change as a result of *Lawrence v. Texas*.[40]

Due process is concerned with fundamental rights—those inalienable rights so deeply rooted in history and tradition that they define our very concept of liberty.[41] Recognition of "new" fundamental due process rights is a high hurdle.[42] In the last few decades, liberty has been construed to include privacy, personhood, the right to marry and establish a home, to acquire knowledge, and to pursue happiness.[43] However, most of these fundamental rights have thus far applied only to heterosexuals.

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37. It is helpful to keep in mind that the "Don't Ask, Don't Tell" policy *does not* just regulate what happens in the barracks or while a soldier is on base. It may be perfectly acceptable for the military to regulate all sexual conduct while in the barracks, surrounded by dozens of people. But the "Don't Ask, Don't Tell" policy reaches beyond this; it affects conduct off base, in a soldier's private home, and even the thoughts and feelings of soldiers. It declares that if a soldier has a desire for homosexual activity or companionship, he or she is not fit for duty. *See* 10 U.S.C. § 654(b) (2000).

38. U.S. CONST. amend. V, XIV.

39. Watkins v. U.S. Army, 875 F.2d 699, 718 (9th Cir. 1989) (Norris, J., concurring).

40. 539 U.S. 558 (2003).

41. 16B AM. JUR. 2D *Constitutional Law* § 911 (1998).

42. *See id.*

43. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 15-1 to 15-3, at 1302–11 (2d ed. 1988); Eisenstadt v. Baird, 405 U.S. 438 (1972)

Extension of fundamental rights to homosexuals is hotly disputed. General benefits and rights afforded to heterosexual couples, such as hospital visitation and health benefits, have consistently been denied to same-sex couples.[44] While a few states have enacted domestic partnership and civil union laws that increase the rights available to same-sex couples, the rights afforded are not equal to those that arise with marriage.[45] Furthermore, it is currently disputed whether such laws will be given full faith and credit in other states.[46] An amendment to the Constitution has even been proposed

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(holding that a law prohibiting the distribution of contraceptives to unmarried persons was in conflict with fundamental human rights); Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidating a state law prohibiting the use of and counseling regarding the use of contraceptive drugs and devices); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (stating that liberty "denotes not merely freedom from bodily restraint but also the right of the individual . . . generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men"); 16B AM. JUR. 2D *Constitutional Law* § 892.

44. David Von Drehle, *Same-Sex Unions Move Center Stage; After a Decade on Fringe, Gay Marriage Enters American Consciousness*, WASH. POST, Nov. 23, 2003, at A1, *available at* LEXIS, News Library, Wash. Post File, 2003 WL 67888204.

45. California, Hawaii, Massachusetts, and Vermont have varying levels of protection for same-sex partners. *See, e.g.*, California Secretary of State Kevin Shelley, *Domestic Partners Registry*, *at* http://www.ss.ca.gov/dpregistry/ (last visited Feb. 16, 2004); Rose Arce, *Massachusetts Court Upholds Same-Sex Marriage* (Feb. 6, 2004), *at* http://www.cnn.com/2004/LAW/02/04/gay.marriage/; Equality California, *Domestic Partnerships: State of the Law in California*, *available at* http://eqca.org/press/releases/ab205_dpbrochure.pdf (last visited Jan. 16, 2004); Hawaii Department of Health, *Vital Records: About Reciprocal Beneficiary Relationships*, *available at* http://www.state.hi.us/doh/records/rbrfaq.htm (last visited Feb. 16, 2004); Vermont Civil Union.com, *Vermont Civil Union Resource Guide*, *available at* http://www.vermontcivilunion.com (last visited Feb. 23, 2004); Vermont Secretary of State Deborah L. Markowitz, *Municipal Information: Civil Unions / Marriage*, *at* http://www.sec.state.vt.us/municipal/civil_mar.htm (last visited Feb. 16, 2004); *see also* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 957 (Mass. 2003) (civil union not equal).

46. The U.S. Constitution guarantees Full Faith and Credit by each state for the acts, records, and judicial proceedings of every other state. U.S. CONST. art. IV, sec. 1. However, Congress has declared that "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as marriage under the laws of such other State . . . or a right or claim arising from such relationship." Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 28 U.S.C. § 1738(c)).

to prevent recognition of homosexual unions by defining marriage as a union between a man and a woman and limiting the benefits of marriage to legally married couples.[47]

Lawrence may provide an avenue for the extension of the fundamental right of privacy to homosexuals. In *Lawrence* the majority of the Court resolved the case by examining whether "the petitioners were free as adults to engage in the private conduct in the exercise of their liberty under the Due Process Clause of the Fourteenth Amendment."[48] The Court reviewed prior decisions that illustrate the reach of the Due Process Clause, concluding with a thorough review of *Bowers v. Hardwick*.[49] In *Bowers* the Court

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While states *can* afford full faith and credit, it is unclear whether many *will*. *See* Marriage Laws, Alternative Lifestyles: Same Sex Marriage, http:// usmarriagelaws.com/search/alternative_lifestyles/same_sex_marriage/index.s.html; Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat 2419, 28 U.S.C. 1738(c).

47. S.J. Res. 26, 108th Cong. (2003) ("Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the Constitution of any State, nor State or Federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups."); *see also* CBS News.com, *Gay Marriage Battle Lines Drawn* (July 31, 2003), *at* http://www.cbsnews.com/stories/ 2003/08/03/politics/printable566402.shtml. In July 2004, the U.S. Senate rejected the proposed amendment, but the House plans to go ahead with a symbolic vote on the issue in fall 2004 nonetheless. Susan Milligan, *Senate Rejects Gay Marriage Amendment*, BOSTON GLOBE, Jul. 15, 2004, at A1. In February 2004, San Francisco City Hall officials issued hundreds of marriage licenses and wed more than 2,500 same-sex couples notwithstanding the fact that California law defines marriage as between a man and a woman. CAL. FAM. CODE § 308.5 (2004); CNN.com, *Same-sex Marriage Decisions Delayed* (Feb. 18, 2004), *at* http:// www.cnn.com/2004/LAW/02/17/samesex.marriage/ index.html. In August 2004, the California Supreme Court ruled that San Francisco's mayor overstepped his authority by issuing the licenses and voided the marriages, but the court did not resolve whether same-sex marriage was constitutional; it only addressed whether local officials could bypass California's judicial and legislative branches. David Kravetz, *California Supreme Court Voids Gay Marriages in San Francisco, Saying Mayor Overstepped Authority*, ASSOCIATED PRESS, Aug. 12, 2004.

48. *Lawrence*, 539 U.S. at 567.

49. *Id.* at 564–78. The Court attacked the formulation of the issue in *Bowers* as discussed in the text, as well as the historical data upon which that decision relied. The *Lawrence* court recognized that *Bowers* was making the "broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral." *Id.* at 571. However, it also recognized the stigma of criminality and that "[t]he issue is whether the majority may use the

asked whether the "Constitution confers a fundamental right upon homosexuals to engage in sodomy."[50] However, the *Lawrence* Court recognized that this formulation of the issue "demean[ed] the claim the individual put forward."[51] While the text of the law seemed to simply prohibit a sexual act, the penalties of the law, and the purposes underlying the law, had "more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."[52] The *Lawrence* Court thus recognized the importance of the purpose and effect of the law, instead of relying solely on the actual text, and concluded that liberty allows choice.[53]

Some commentators see *Lawrence* as a keystone decision, the beginning of a new era of fundamental rights.[54] Others are wary of whether it will have much effect at all, primarily because it did not address the question of equal protection.[55]

Equal protection is implicated when the majority discriminates against a minority. The judiciary has developed three tests for measuring the constitutionality of a discriminatory regulation: (1) rational basis; (2) intermediate scrutiny; and (3) strict scrutiny. Policies that affect sexual orientation and other categories that the nation has yet to recognize as deserving of extra protection are

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power of the State to enforce these views on the whole society through operation of the criminal law." *Id.*

50. *Bowers*, 478 U.S. at 190; *Lawrence*, 539 U.S. at 567.

51. *Lawrence*, 539 U.S. at 567.

52. *Id.*

53. *Id.* "At the heart of liberty is the right to define one's own concept of existence." *Id.* at 574 (quoting Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 851 (1992)). "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions." *Lawrence*, 539 U.S. at 562.

54. *See* Center for the Study of Sexual Minorities in the Military, *Legal Scholars Question Whether Sodomy Ruling Will Affect Military Gay Ban* (June 26, 2003), *at* http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2003_0626.htm.

55. *See, e.g.*, Stephen A. Allen, *Gay Rights: Separate but Equal?*, *at* http://www.h-net.msu.edu/~hns/articles/2003/070803b.html (last visited Feb. 16, 2004) (noting that by not addressing Equal Protection, *Lawrence v. Texas* "leaves the door open to certain types of discrimination").

reviewed with the lowest threshold standard—rational basis review.[56] Under rational basis review courts ask only (1) whether the government has some legitimate interest; and (2) whether the means chosen are reasonably related to the goal.[57] If both questions are answered affirmatively, the regulation stands and whatever discriminatory effect it has is an unfortunate by-product of the lawmaking process.

In contrast, courts apply intermediate scrutiny to review discrimination based on gender.[58] Judges ask (1) whether there is an important interest; and (2) whether that interest is substantially furthered by the classification.[59] And for those categories that are suspect, such as race and religion, courts apply strict scrutiny to review anything that intends to, or has the effect of, discriminating based on these categories.[60] Courts ask (1) whether there is a compelling state interest; and (2) if so, whether the regulation furthers that interest by using the least discriminatory means.[61] "Getting to yes" when applying intermediate or strict scrutiny is much tougher than doing so under rational basis review. Courts are thus more likely to uphold a law under rational basis review. A few court decisions have manipulated rational basis to look more like

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56. *See, e.g.*, Romer v. Evans, 517 U.S. 620, 633 (1996); Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990).

57. *See* TRIBE, *supra* note 43, § 16-2, at 1440.

58. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 532–33 (1996).

59. *See* TRIBE, *supra* note 43, § 16-32, at 1602–03.

60. *See, e.g.*, Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984). Strict scrutiny is also used to review regulations that "imping[e] directly on access to, or levels of, those rights deemed fundamental in the sense that departures from equality in their availability are suspect." TRIBE, *supra* note 43, § 16-9, at 1458. For example, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court applied strict scrutiny to strike down a state law that provided for sterilization of twice-convicted felons if their crimes involved moral turpitude, unless the crimes were embezzlement or a violation of revenue acts. *Id.* at 541. The court recognized that procreation is fundamental and within the realm of personal autonomy, and could not find any compelling reason to uphold the law. *Id.* at 541–42; *see* TRIBE, *supra* note 43, § 16-12, at 1463–64. In so deciding, the Court recognized that the Equal Protection clause protects the citizenry from "classifications unequally distributing access to choices that ought to be placed beyond government's reach . . . because, in government's hands, control over those choices would pose too great a danger of majoritarian oppression or enduring subjugation." TRIBE, *supra* note 43, § 16-12, at 1464.

61. *See, e.g.*, *Palmore*, 466 U.S. at 432–33.

intermediate or strict scrutiny because to do otherwise would have been too unjust.[62] However, this sort of "rational basis plus" analysis, while useful for an occasional victory, does little for long-term protection.

Many have argued that sexual orientation is a suspect class deserving a heightened level of judicial scrutiny.[63] However, current jurisprudence dictates that questions of sexual orientation need only be reviewed pursuant to rational basis. At minimum this means that

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62. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 230 (1982) (explicitly applying rational basis, but requiring showing of a substantial state interest to justify denying a "discrete group of innocent children the free public education that [the state] offers to other children residing within its borders"); City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 447–50 (1985).

63. *See, e.g.*, Renee Culverhouse & Christine Lewis, *Homosexuality as a Suspect Class*, 34 S. TEX. L. REV. 205, 240 (1993); Samuel A. Marcosson, *Constructive Immutability*, 3 U. PA. J. CONST. L. 646, 648–49 (2000) (noting "the wide consensus of scholars that sexual orientation . . . should be a suspect classification subject to the most exacting judicial scrutiny"). Several factors are reviewed in determining whether a class is suspect: (1) history of purposeful discrimination; (2) whether the discrimination is invidious; and (3) whether the group lacks the political power to obtain redress. *See* Watkins v. U.S. Army, 875 F.2d 699, 724–26 (9th Cir. 1989) (Norris, J., concurring); Culverhouse & Lewis, *supra*, at 240. Clearly the private and public sectors have discriminated against homosexuals because of their status—there have been numerous reports of violence related to homosexuals, of schools and employers refusing to accept homosexual candidates for jobs, and of same-sex partners being prevented from marrying. *See* USATODAY.com, *Bill to Ban Job Discrimination Against Gays Passes* (Apr. 24, 2002), *at* http://www.usatoday.com/news/washington/2002/04/24/gays.htm.; National Desk, *Houston Police Set Trap to Quell Tide of Violence Against Homosexuals*, N.Y. TIMES, Aug. 8, 1991, at A12, *available at* LEXIS, News Library, Major Newspapers File; Religious Tolerance.org, *Same-Sex Marriages & Civil Unions*, *at* http://www.religioustolerance.org/hom_marr.htm (last visited Feb. 18, 2004); *Watkins*, 875 F.2d at 724 (Norris, J., concurring). Furthermore, this discrimination is invidious—it is so grossly unfair that it is "inconsistent with the ideals of equal protection." *Id.* (Norris, J., concurring). Sexual orientation does not determine a person's contribution to society, and may be immutable. While immutability is not required for a class to be suspect, it is an important consideration. *Id.* at 725 (Norris, J., concurring). Sexual orientation is central to a person's identity and does not change to fit the person's mood. Because of this discrimination, and the minority status of homosexuals, the political process is generally beyond reach. There are "social, economic, and political pressures to conceal one's homosexuality" that prevent wide-spread participation in the political sphere. *Id.* at 727 (Norris, J., concurring).

sexual orientation cannot be denied all protection of the law.[64] However, it also means that same-sex couples can be denied the ability to marry a partner[65]or to even visit that partner in the hospital[66]—rights that traditional couples enjoy as fundamental—because the state can usually present some reason as to why homosexuals should not be afforded these rights.[67] States need only show there is some legitimate interest for the law, and thus far morality seems to be legitimate enough.[68]

The *Lawrence* Court decided not to address the debate over equal protection and the proper level of review because it could decide the case on due process grounds.[69] The majority merely stated, "[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants."[70] Many

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64. Romer v. Evans, 517 U.S. 620, 629–31 (1996). In *Romer* the Court struck down a constitutional amendment that prohibited any ordinance or action designed to protect homosexuals from discrimination. *Id.* at 635–36. The Colorado constitutional amendment overturned in *Romer* "impose[d] a special disability upon those persons alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint." *Id.* at 631.

65. *See* Adams v. Howerton, 673 F.2d 1036 (9th Cir. 1982) (refusing to recognize same-sex marriage for immigration because Congress had a rational basis to limit spousal status to heterosexual marriages); Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971) (marriage historically between a man and woman, so no fundamental right to homosexual marriage).

66. *See, e.g.*, Baker v. State, 744 A.2d 864, 870 (Vt. 1999).

67. *See, e.g.*, Standhardt v. Superior Court, 77 P.3d 451 (Ariz. App. 2003).

68. Justice O'Connor's concurring opinion in *Lawrence* opines that morality is a legitimate interest for due process challenges but not for equal protection claims. *See Lawrence*, 539 U.S. at 564 (O'Connor, J., concurring). For further discussion see *infra* note 70.

69. *Lawrence*, 539 U.S. at 564. Recall that the Texas sodomy statute, unlike the Georgia statute in question in *Bowers*, applied only to acts between members of the same sex. *Compare* Bowers v. Hardwick, 478 U.S. 186, 187–88, n.1, *with Lawrence*, 539 U.S. at 564. It is interesting that the Court did not decide the case on the narrower grounds of equal protection. *See, e.g.*, Marcia Coyle, Law.com, *Measuring High Court's Momentum, at* http://www.law.com/jsp/article.jsp?id=1059980425358 (Aug. 11, 2003).

70. *Lawrence*, 539 U.S. at 575. The Court's statement does not make sense as anything other than a way to avoid addressing the equal protection question and as a way to balance its bold step in the due process analysis to avoid looking illegitimate. If a prohibition were drawn to avoid equal protection problems, due process would kick in to protect the fundamental rights of

commentators and gay rights proponents would have liked to see the Court address equal protection, and to increase the level of review given to questions of sexual orientation. If the Court had overturned the Texas law on both constitutional grounds the decision would have a more solid footing. However, the *Lawrence* decision does at least advance the availability of fundamental due process rights for homosexuals.[71] *Lawrence* thus provides two avenues by which "Don't Ask, Don't Tell" may be overturned: repealing sodomy laws and recognizing fundamental due process rights for homosexuals.

C. The Sensibility of "Don't Ask, Don't Tell"

Even if "Don't Ask, Don't Tell" is constitutional after *Lawrence*, is it sensible? Many potential soldiers have been deterred from entering the military because of the policy, and numerous soldiers have been discharged.[72] According to the Pentagon "more

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privacy and personhood that are clearly guaranteed to heterosexual couples (and now perhaps also to homosexuals). The prohibition as applied to heterosexuals would thus be invalid, and the law would only affect homosexuals. The equal protection clause would then kick in to invalidate the entire prohibition. While this is circular, any such attempt to get around the equal protection problem would quickly fail.

In her concurring opinion, Justice O'Connor states that she would have ruled that the Texas statute was unconstitutional based on the Equal Protection Clause, but would have left *Bowers* intact. *Id.* at 579 (O'Connor, J., concurring). O'Connor explained that the Texas law, which applied only to homosexuals, could not be justified on morality grounds like the law in *Bowers* (which applied to heterosexuals and homosexuals, thus only raising due process questions) *Id.* at 582 (O'Connor, J., concurring). "Moral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.* (O'Connor, J., concurring). However, even O'Connor would have applied rational basis review, and O'Connor would continue to recognize morality as a legitimate interest for Due Process questions. *Id.* at 579–85 (O'Connor, J., concurring).

71. The extent of due process rights that will be afforded to homosexuals is, of course, unclear at this point, but will be developed over time. While the Court never stated that it was creating a fundamental right, its entire discussion is about liberty and freedom of choice. The Court protects these fundamental rights and cannot even find a legitimate state interest to "justify [the state's] intrusion into the personal and private life of the individual," let alone a compelling reason. *Id.* at 578.

72. *See, e.g.*, Human Rights Watch, *U.S. Military's "Don't Ask, Don't Tell" Policy Panders to Prejudice*, (Jan. 23, 2003), *at* http://hrw.org/press/2003/01/us012303.htm.

than 8,500 men and women . . . have been discharged from the armed forces since the 'Don't Ask, Don't Tell' policy came into force in 1994."[73] And in 2001, "a record 1,256 servicemembers were discharged because of their sexual orientation."[74]

Although the policy provides an exception if "separation of the member would not be in the best interest of the armed forces,"[75] the exception is somewhat hollow because the same people that make the rule enforce the rule.[76] For example, "[b]etween October 2001 and September 2002, the Army discharged ten trained linguists—seven of them proficient in Arabic—because they are gay."[77] These discharges came during the height of intelligence gathering following the terrorist attacks on September 11, 2001.[78] Furthermore, the military loses some very smart, active, and strong participants at a large monetary cost. The General Accounting Office estimated that the replacement cost per enlisted soldier (recruiting, training, and other expenses) in the 1980s was approximately $28,000.[79] The replacement cost for an officer was approximately $120,700.[80] These figures are, of course, much larger today—more than two decades later.

Many people, including the former Judge Advocate General for the Navy, Rear Admiral John D. Hutson, have concluded in the intervening years since the "Don't Ask, Don't Tell" policy was enacted that the policy does not work, and that the concerns

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73. abcNEWS.com, *Not Fit to Fight?* (Jan. 30, 2003), *at* http://abcnews.go.com/sections/primetime/DailyNews/gays_military_030130.html.

74. Human Rights Watch, *supra* note 72; *see also* LEHRING, *supra* note 22, at 139–41 (comparing the number of people discharged from 1990–2001 and the percentage of discharges per military branch).

75. 10 U.S.C. § 654(e)(2) (2000).

76. *Id.* § 654(e) (specifying that application of this exception must be determined in accordance with "regulations prescribed by the Secretary of Defense").

77. Human Rights Watch, *supra* note 72; *see also* Q-online, *US Army Expels 9 Translators for Being Gay* (Nov. 18, 2002), *at* http://www.q.co.za/2001/2002/11/18-usmilitary.html (discussing how the expulsion of gay linguists is a "vivid illustration of how 'don't ask, don't tell' and anti-gay discrimination harms the national security of the United States and the war on terrorism.").

78. *See* Q-online, *supra* note 77.

79. Haggerty, *supra* note 22, at 35; LEHRING, *supra* note 22, at 133.

80. Haggerty, *supra* note 22, at 35.

originally addressed by the policy may not hold weight.[81] In 1995 President Clinton signed an executive order prohibiting discrimination on the basis of sexual orientation in the awarding of security clearances.[82] Following the signing of that order "the CIA, NSA and FBI have not forbidden openly gay people from joining their organizations, as the Pentagon does."[83] The CIA has not had problems with openly gay agents, even those in the field, and in 2000 held a gay pride celebration at Langley, the CIA headquarters, to reflect their commitment to nondiscrimination.[84] The effectiveness of gay agents in these agencies is an indication that the unit cohesion and morale problems alleged by the military are not, in reality, a concern.

Furthermore, at least twenty-four major military powers worldwide, including Germany, the United Kingdom, Canada, Australia, and Israel, allow openly gay soldiers.[85] The Center for the Study of Sexual Minorities in the Military "has published studies on the Israeli, British, Australian and Canadian militaries since they

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81. Center for the Study of Sexual Minorities in the Military, *Senior Admiral Says Lifting Gay Ban Would Strengthen Military: Former Navy JAG Calls 'Don't Ask, Don't Tell' "Odious"* (Aug. 21, 2003), *at* http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2003_0821.htm [hereinafter *Senior Admiral Says Lifting Gay Ban Would Strengthen Military*].

82. *See* Center for the Study of Sexual Minorities in the Military, *As More Intelligence Agents Work with Military Personnel, Scholars Question Rationale for Pentagon's Gay Ban: CIA May be Model for Loosening Restrictions on Gay Soldiers* (July 15, 2002), *at* http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2002_0717.htm [hereinafter *As More Intelligence Agents Work with Military Personnel, Scholars Question Rationale for Pentagon's Gay Ban*]. However, if someone has already been "discharged or dismissed from the Armed Forces under dishonorable conditions" (including discharge on the basis of sexual orientation) that person may be denied security clearance by the Department of Defense. 10 U.S.C. § 986(c)(4) (2000); 10 U.S.C. § 654(b) (2000).

83. *See As More Intelligence Agents Work with Military Personnel, Scholars Question Rationale for Pentagon's Gay Ban*, *supra* note 82.

84. *Id.*

85. Human Rights Watch, *supra* note 72; Center for the Study of Sexual Minorities in the Military, *Researchers See No Problems When U.S. Troops Fight With Gay-Friendly British* (May 14, 2003) *at* http://www.gaymilitary.ucsb.edu/PressCenter/press_rel_2003_0513.htm. *See generally* Morris, *supra* note 27 (discussing the less progressive attitude of the United States regarding gays in the military and comparing U.S. cases to cases from the European Court of Human Rights).

lifted their gay bans, which conclude that allowing gays to serve openly does not undermine military readiness."[86] In fact, throughout history military groups have allowed and even heralded gay soldiers.[87] For example, homosexuality was introduced to young Spartan men as part of their training.[88] In fourth-century Greece, homosexual lovers formed an effective battalion called the Sacred Band.[89] Some have even argued that homosexual soldiers were better warriors because of their love and devotion.[90]

There are many reasons to question both the constitutionality and the sensibility of "Don't Ask, Don't Tell". However, the law currently exists and it is enforced. The existence of "Don't Ask, Don't Tell" leads to policy conflicts that will be discussed in depth in the following sections.

III. THE SOLOMON AMENDMENT

A. The Current State of the Law

The federal government provides billions of dollars every year to universities for research in numerous fields and to students for financial aid.[91] However, the Solomon Amendment limits receipt of

86. *Senior Admiral Says Lifting Gay Ban Would Strengthen Military*, *supra* note 81.

87. *See, e.g.*, The History Net, *Introduction to Ancient Greek Eroticism* (describing homosexuality in Greece and Sparta, citing to *Homosexual Eros in Early Greece* and Plato's *Symposium*), *at* http://ancienthistory.about.com/library/weekly/aa072099.htm (last visited Feb. 2, 2003).

88. *Id.* (citing *Homosexual Eros in Greece*).

89. *Id.*; Paul Halsall, Homosexuality in Early Greece (1986) (unpublished graduate student course essay), *available at* http://www.fordham.edu/halsall/pwh/greekeros.html.

90. *See supra* note 89.

91. Federal financial aid has increased from eleven billion dollars in 1970 to fifty-six billion dollars in fiscal year 2001. *See* Congressional Budget Office, *Staff Working Papers: Trends in College Tuition and Student Aid Since 1970* (Dec. 1988) at 16–17, *available at* ftp://ftp.cbo.gov/49xx/doc4958/doc16.pdf; Congressional Budget Office, *Private and Public Contributions to Financing College Education* (Jan. 2004), *available at* ftp://ftp.cbo.gov/49xx/doc4984/01-23-Education.pdf. Federal research funding obligations to universities and colleges increased from over ten billion dollars in 1994 to more than nineteen billion dollars in 2002. *See* National Science Foundation, Division of Science Resources Studies, Federal Funds for Research and Development, Detailed Historical Tables: Fiscal Years 1951–2002, tbl. 20. Federal obligations to university and college performers for research, by agency: fiscal years 1970–

these funds to those universities that allow military training and recruiting programs on campus.[92] The Solomon Amendment provides that any institution, or subelement of an institution, that prevents military training or recruiting access will be denied funding from the Departments of Defense, Transportation, Labor, Health and Human Services, and Education.[93] The Solomon Amendment and its enforcing regulations have become increasingly problematic for institutions of higher education.

The Solomon Amendment was originally enacted in 1995 in an atmosphere of policy conflicts between the military and universities. As originally enacted, the Solomon Amendment applied only to funds provided by the Department of Defense.[94] It was also interpreted as distinguishing between subelements of an institution so that if one subelement—the law school, for example—refused access to military recruiters, only the law school would lose funding.[95] Many law schools at the time maintained nondiscrimination policies that included sexual orientation, and partially implemented these policies by limiting or refusing on-campus recruiting access to any employer, including the military, that retained discriminatory hiring practices.[96] Most continued to honor their nondiscrimination policies

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2002, *at* http://www.nsf.gov/sbe/srs/nsf03325/pdf/hist20.pdf (Aug. 2003). The Departments of Defense, Transportation, Labor, Health and Human Services, and Education alone funded $6.8 billion in 1994 and $14.8 billion in 2002. *See id.*

92. 10 U.S.C. § 983 (2000).

93. 10 U.S.C. § 983 provides in part:

> (b) DENIAL OF FUNDS FOR PREVENTING MILITARY RECRUITING ON CAMPUS.—No funds described in subsection (d)(2) may be provided by contract or by grant (including a grant of funds to be available for student aid) 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 Transportation from gaining entry to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting . . . .

Id.

94. National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 558, 108 Stat. 2663, 2776 (1994); *see also* Law, *supra* note 9.

95. *See id.* at 121.

96. *See id.* at 120–21.

despite the Solomon Amendment because little funding came to law schools through the Department of Defense, and parent institutions were not affected by the subelement's practice.[97]

However, in the face of these opposing subunits, Congress updated the Solomon Amendment in 1997 to apply to funding from the Departments of Transportation, Labor, Health and Human Services, and Education.[98] This change created a larger threat to law schools and institutions of higher education in general, because it threatened federal financial aid.[99] Most law schools recognized that they would be unable to attract students, especially with the rising costs of education, if students were unable to receive financial aid.[100] However, the Association of American Law Schools (AALS), which consists of approximately 165 member schools,[101] required members to comply with its policy of nondiscrimination.[102] The AALS

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97. *See infra* note 141 and accompanying text; Law, *supra* note 9, at 121.

98. Act of Sept. 30, 1996, Pub. L. No 104-208 § 514, 110 Stat. 3009, 3009-270 to 3009-272; Law, *supra* note 9, at 121–22. In 1996 Congress also amended Title 10 of the United States Code by adding section 983—this section denied funding from the Department of Defense as well as those departments listed in 110 Stat. 3009, to any institution that maintained an anti-ROTC policy. 10 U.S.C. § 983 (2000); *see also* Solomon Amendment Response and Protest, *Rules and Regulations: Initial Regulations Interpreting the Solomon Amendment*, § 216.4 (1997) (discussing funding restrictions imposed by 108 Stat. 2663 and 110 Stat. 3009), *available at* http://www.law.georgetown.edu/solomon/Rules.html. In 1999 the various sections discussed were recodified and consolidated in section 983 of Title 10 of the United States Code. *See* National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609–11 (1999).

99. *See* Law, *supra* note 9, at 122.

100. *See id.*

101. Association of American Law Schools, *What is the AALS?*, *at* http://www.aals.org/about.html (last visited Feb. 9, 2004).

102. The bylaws state:

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

Association of American Law Schools, *Bylaws of the Association of American Law Schools, Inc.* § 6-3 (adopted Dec. 29, 1971; amended through Jan. 5, 2004), *available at* http://www.aals.org/bylaws.html (last visited Jan. 16,

realized that the law schools were being forced to abandon their policies and therefore allowed each school to create an exception allowing military recruiters on campus as long as the school provided "amelioration" that expressed its disapproval of the military's discrimination policy.[103] Many law schools continued to exclude all employers that maintained discriminatory hiring practices except the military, which they were forced to allow to recruit on campus, despite the policy conflicts.

The situation improved in 1999 with the passage of the Frank-Campbell Amendment, which stated that penalties do not apply to funds "available solely for student financial assistance or related administrative costs."[104] As a result of this amendment many schools were once again able to turn away military recruiters because financial aid was no longer threatened.[105] The AALS "reinstituted its policy requiring that accredited schools prohibit discriminatory employers, including the military, from using law school placement office facilities and services."[106]

Unfortunately, this reprieve did not last long. On January 13, 2000, interim regulations were adopted that defined "institution" as including subelements.[107] The result was that if even one subelement, such as the law school, refused access to military recruiters, the entire school risked losing funds. With millions of dollars in funding for research and administration typically coming

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2004). The AALS added sexual orientation to the policy by unanimous vote in 1990. *See* Law, *supra* note 9, at 121; Association of American Law Schools Section on Sexual Orientation and Gender Identity Issues, *What are the AALS Policies About the Solomon Amendment and What Action Does the Section Recommend?*, *at* http://home.pacbell.net/pkykwan/AALS/section.htm (last visited Nov. 1, 2003).

103. Statement by Carl Monk, *supra* note 13 (to provide "amelioration," member schools "should assure that all students . . . are informed each year that the military discriminates on a basis not permitted by the school's nondiscrimination rules"); Law, *supra* note 9, at 122–23.

104. Act of Oct. 25, 1999, Pub. L. No. 106-79, § 8120, 113 Stat. 1212, 1260.

105. *See* Law, *supra* note 9, at 123.

106. *Id.*; *see* Memorandum from Carl Monk, AALS Executive Director, to Deans of AALS Member and Fee-Paid Schools, Executive Committee Policy Regarding "Solomon Amendment" (Jan. 24, 2000), *at* http://www.aals.org/00-2.html.

107. *See* Federal Acquisition Regulations System, 48 C.F.R. § 209.470-1 (2003); Law, *supra* note 9, at 123.

from these federal departments,[108] institutions, and each subelement, were constructively forced to allow military recruiters on campus. The AALS returned to its policy of amelioration so that its 165 member schools would not be forced to exit the organization.[109] The interim regulations became final in July 2002.[110] Furthermore, recent interpretations of the Frank-Campbell Amendment indicate that financial aid in the form of work study and Perkins grants may be removed if an institution refuses access to military recruiters since these programs benefit the student and the school.[111] As a result, institutions such as independent law schools that may not have been affected by the other funding conditions are also forced to allow recruiters on campus.[112]

As it now stands, an institution (whether in its entirety or as a subelement) that denies access to military recruiters or ROTC stands to lose, at minimum, research funding from the Department of Defense. Any subelement that denies access stands to lose funding from the Departments of Defense, Labor, Health and Human Services, and Education. In the more likely scenario, research and capital improvement funding from all of the listed departments will be denied to the entire institution if even one subelement of the institution refuses access. Additionally, work-study programs and Perkins grants will not be supported. In the worst-case scenario, all of the previously mentioned funding will be denied as well as all federal financial aid, in spite of the Frank-Campbell Amendment. This area has been quite volatile and reactionary; thus far the military, through Congress, has been able to restrict funding to institutions of higher education at its whim,[113] so it is not hard to

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108. *See infra* notes 114–123 and accompanying text.

109. *See* Solomon Amendment Response and Protest, *The AALS Commitment to Nondiscrimination and the AALS' Amelioration Requirement, at* http://www.law.georgetown.edu/solomon/Commitment.html (last visited Jan. 15, 2004).

110. Federal Acquisition Regulations System, 48 C.F.R. § 209 (2003); Solomon Amendment Response and Protest, *July 2002 Final Regulations, at* www.law.georgetown.edu/solomon/.

111. *See* Brandon Bigelow, *Law Student Division Assembly Tackles Student Loans, Affirmative Action, and Education Financing*, STUDENT LAWYER (Oct. 1999), *available at* http://www.abanet.org/lsd/stulawyer/oct99/offspeak.html.

112. *See* Law, *supra* note 9, at 122.

113. The power of the government to restrict funding under the Spending Clause is discussed in Part IV.

imagine that it could further restrict funding if it saw a threat of non-access.

Moreover, what constitutes non-access has not been clearly stated. Refusing to allow military recruiters on campus at all when other employers are allowed surely fits within the regulation. But what if students protest near the interviewing rooms or take all interview slots for the purpose of thwarting recruitment? What if the law school's amelioration policy has the effect of turning students away from military interviews? Could such actions be interpreted as action by the school administration, either directly or through ratification? These situations and others have yet to come to the forefront, but the risk is apparent.

B. The Costs of Solomon

The Solomon Amendment is not an abstract, merely potential threat to universities. The fiscal effect of Solomon reaches into the hundreds of millions of dollars for each university. Moreover, the constitutional impact squarely limits First Amendment freedoms. Universities that have limited access to military recruiters in the past have had to change their policies in response to military officials' threats to pull funding. The costs of the Solomon Amendment are described more fully in the following section.

1. Funding and Financial Aid

When the Air Force informed the University of Southern California (USC) in May 2002 that USC was not in compliance with the Solomon Amendment, the Air Force stated that "denial of funding would result in the loss of approximately 300 to 500 million dollars in federal funding to the University."[114] Yale was told it would lose $350 million.[115] The University of Pennsylvania could have lost $800 million.[116] Harvard estimated a loss of $328

114. Letter from Matthew L. Spitzer, Dean, USC Law School, to the USC Law School Community (Aug. 19, 2002) (on file with author).

115. Outlaws @ Yale Law School, *Projects*, *at* http://www.yale.edu/lgblsa/projects.htm (last visited Jan. 15, 2004); Jessamyn Blau, *Law Students, Faculty Protest JAG Recruiters*, YALE DAILY NEWS, Oct. 7, 2002, *available at* http://www.yaledailynews.com/article.asp?AID=19990.

116. Lambda Grads, *What is JAG and What Does It Have to Do with the Law School's Nondiscrimination Policy?*, *at* http://dolphin.upenn.edu/~lgrads/jag.html (last visited Nov. 17, 2003).

million.[117] For the 2002-2003 academic year, the University of California, Santa Barbara received approximately $91 million, roughly seventy percent of its research budget, from federal funding.[118] A Boston Globe article in November 2002 estimated that the threat of loss to Columbia, Harvard and Yale combined was $1 billion.[119]

The National Institutes of Health (NIH), a division of the United States Department of Health and Human Services, supports research and medical institutions across the country.[120] Its 1998 funding level was approximately $2.75 billion, and President Bush proposed to double this funding by fiscal year 2003.[121] Brown University alone received nearly $50 million over a two-year period.[122] In addition, the NIH offers to repay up to $35,000 per year of qualified education debt for those that commit to a two-year research career.[123]

In 1996 the American Bar Association reported that 140 schools each received on average $82,810 in work-study funding.[124] Work-study and Perkins loans are administered by the federal government and by the individual school—both pay a portion of the funding.[125] Other federal financial aid programs include Pell grants (maximum $4000 per year), Federal Supplemental Educational Opportunity Grants ($100-$4000 per year), and Stafford loans (maximum for

117. *See The AALS Commitment to Nondiscrimination and the AALS' Amelioration Requirement*, *supra* note 109, *at* http://www.law.georgetown.edu/solomon/Commitment.html.

118. University of California at Santa Barbara Office of Budget and Planning, 2002–03, *Institutional Research and Planning, Campus Profile* (Feb. 2003), http://bap.ucsb.edu/IR/campus-profiles.html.

119. Patrick Healy, *Despite Concerns, Law Schools Admit Military Recruiters*, THE BOSTON GLOBE, Nov. 12, 2002, at A1.

120. U.S. Dep't of Health & Human Services, National Institutes of Health, *About NIH*, *at* http://www.nih.gov/about/ (last modified Jan. 29, 2004).

121. Press Release, U.S. Dep't of Health & Human Services, Secretary Thompson Promotes Increased Research Funding (Mar. 9, 2001), *available at* http://www.hhs.gov/news/press/2001pres/20010309.html.

122. *Id.*

123. U.S. Dep't of Health & Human Services, National Institutes of Health, *Grants & Funding Opportunities*, *at* http://grants1.nih.gov/grants/index.cfm (last visited Jan. 15, 2004).

124. Statement by Carl Monk, *supra* note 13.

125. U.S. Department of Education, *The Student Guide: Financial Aid from the U.S. Department of Education 2003–2004*, *available at* http://www.studentaid.ed.gov/students/attachments/siteresources/StudentGuideEnglish2003_04.pdf (last visited Feb. 9, 2004).

undergraduate and graduate study combined is $138,500).[126] The average student accumulates $15,000-$17,000 in loan debt while pursuing a four-year Bachelor's degree.[127] The average student accumulates an additional $61,000-$73,500 in loan debt to pursue a professional degree.[128]

2. Chilled Speech

As discussed more fully in Part III.B.2, the Solomon Amendment chills university speech by diluting the message sent by the university.[129] Furthermore, it potentially chills student speech. While the Amendment does not specifically forbid protests or educational events, depending upon the scope of such activities, the Department of Defense could interpret them as effectively blocking military access to the campus.

The extent to which each institution has been able to enforce its nondiscrimination policy has varied with the modifications of the Solomon Amendment. For example, "[i]n 1978, New York University School of Law (N.Y.U. Law) became the first [educational institution] in the United States to deny access to placement services for employers who openly discriminate on the basis of sexual orientation."[130] It adhered to this policy until October 16, 2000, when financial concerns resulting from the Solomon Amendment forced it to allow military recruiters on campus.[131]

Likewise, the University of Southern California Law School (USC) has long required "employers who use [the] Career Services Office ("CSO") to certify that they do not discriminate in violation of [the school's anti-discrimination] policy."[132] USC did not block recruiters with discriminatory practices from interviewing and hiring its students, but it did not allow those employers to recruit in the

126. *Id.*

127. American Council on Education, *Frequently Asked Questions* (based on the 1999–2000 National Postsecondary Student Aid Study), *at* http://www.acenet.edu/faq/viewInfo.cfm?faqID=21 (last modified Jan. 15, 2004).

128. *Id.*

129. Part IV.B explains that universities are expressive associations—an organization that conveys a message and is thus protected by the First Amendment guarantee of free speech.

130. Law, *supra* note 9, at 120.

131. *See id.* at 128.

132. Letter from Matthew L. Spitzer, Dean, *supra* note 114.

same locations as other employers during the on-campus interviewing program.[133] After the Solomon Amendment was enacted USC stood by its policy and procedures.[134] However, when university-wide funding was threatened, USC was forced to create a policy exception—it provided military materials to students along with all other recruiting information, and it allowed the military to arrange interview space at the ROTC offices on campus (other employers interviewed students at a hotel across the street).[135] Some recruiters challenged USC's practice, but until 2002 USC was ultimately deemed in compliance with Solomon.[136] Then, on May 30, 2002, USC received a letter from the Air Force stating that the school was not in compliance with Solomon and had one month to fix the situation or the Air Force would recommend that the Secretary of Defense deny funding.[137] After numerous discussions and pleas, USC was forced to allow the military to participate fully in all recruiting programs.[138]

Similarly, the fall of 2002 marked the opening to military recruiters of many campuses that had previously fought to remain closed: "Boston University, Columbia, Harvard, New York University . . . Western New England College, Yale, and five other schools also have either changed their nondiscrimination policies or taken other steps to accommodate military recruiters."[139] The University of Pennsylvania School of Law also opened its doors to military recruiters in 2002 due to the threat that up to $800 million could be pulled from the institution.[140] Three independent law schools—Golden Gate, Vermont Law School, and William Mitchell College of Law—have managed to maintain the full force of their anti-discrimination policies (at least following the Frank-Campbell Amendment removing restrictions on most financial aid) because

133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. Healy, *supra* note 119.
140. Jon Passaro, *Law Students Protest Military Recruitment*, THE DAILY PENNSYLVANIAN (Sept. 16, 2003), *available at* http://www.dailypennsylvania.com/vnews/display.v/ART/2003/09/16/3f66cbe2b2873?in_archive=1.

they receive little federal funding.[141] Virtually every school has now been forced to abandon or dilute its nondiscrimination policy.[142] While the texts of most policies remain intact, the message has changed.

Students have reacted in various ways. In January 2002, approximately twenty protestors stood with arms locked outside the Judge Advocate General Corps (JAG) interview rooms at New York University School of Law.[143] They asked each student that came for an interview a few questions about his or her knowledge of "Don't Ask, Don't Tell," then allowed the student to pass.[144] The Vice Dean warned protestors that he would take disciplinary action if the demonstrators prevented the interviews from taking place after one interviewee threatened a protestor with physical violence.[145] Some students also signed up for interview slots to confront JAG recruiters.[146] In September 2003 approximately 100 students gathered at the University of Pennsylvania School of Law to protest JAG interviews.[147] Thus far the military has not reacted to these protests, but students are unsure of the effect their actions will have under the Solomon Amendment because of the volatile history of the amendment. For example, in October 2002 a group of Loyola Law School students wanted to conduct a protest similar to those at NYU.[148] However, the idea was vetoed because both students and the administration were concerned about the potential reaction of the government and members of the Loyola community.[149]

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141. Healy, *supra* note 119.

142. *See* Law, *supra* note 9, at 128.

143. John Woods, *Military Recruiting at Law School Triggers Protest Over Gay Rights*, NEW YORK LAW JOURNAL (Feb. 11, 2002), *available at* http://www.amsa.org/adv/lgbtpm/postings2.cfm?id=6 (last visited Jan. 15, 2004). A similar protest occurred at NYU in October 2000, when the school allowed access to a military recruiter for the first time in twenty-two years. Law, *supra* note 9, at 128. Gay and Lesbian students filled all the interview slots—some discussed policies, others interviewed as if they were straight. *Id.* A second JAG recruiter canceled his visit when students boycotted by not signing up for interviews. *Id.*

144. Woods, *supra* note 143.

145. *Id.*

146. *Id.*

147. Passaro, *supra* note 140.

148. Contact author for more information.

149. Interview with David Burcham, Dean, Loyola Law School of Los Angeles (Mar. 2, 2004).

IV. SOLOMON AND THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS

A. The Doctrine of Unconstitutional Conditions

The doctrine of unconstitutional conditions is implicated when the government restricts receipt of federal money to those willing to surrender a constitutional right.[150] Congress has the power pursuant to the Spending Clause to allocate federal money for a wide variety of programs.[151] While no one has a right to government benefits, once the government chooses to offer a benefit it generally cannot condition receipt on surrender of a constitutional right.[152] One exception is if the government's interest outweighs the right at issue.[153]

Case law regarding unconstitutional conditions conveys two basic principles: (1) if the condition is placed on a potential recipient rather than on a federal program, constitutional questions arise; and (2) if the government is the speaker, the government can take steps to make sure its message is clearly conveyed.[154] However, the application of these principles is somewhat perplexing.

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150. *See* 16A AM. JUR. 2D *Constitutional Law* § 395 (1998); TRIBE, *supra* note 43, § 10-8, at 681; Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1415 (1988–1989).

151. U.S. CONST. art. I. § 8.

152. *See* United States v. Am. Library Ass'n, 539 U.S. 194, 210 (2003) ("'the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech" even if he has no entitlement to that benefit.'" (quoting Board of Comm'rs, Wabaunsee Cty. v. Umbehr, 518 U.S. 668, 674 (1996))); Blackburn v. City of Marshall, 42 F.3d 925, 931 (5th Cir. 1995) ("It is well established that 'even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.'" (quoting Perry v. Sindermann, 408 U.S. 593, 597 (1972))); Rust v. Sullivan, 500 U.S. 173, 201 (1991); *see also* Sullivan, *supra* note 150, at 1415.

153. 16A AM. JUR. 2D *Constitutional Law* § 395 (1998); Sullivan, *supra* note 150, at 1415, 1419 (the doctrine of unconstitutional conditions is important because by balancing indirect effect on liberty against justification, the doctrine prevents the government from accomplishing indirectly what it cannot accomplish directly).

154. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001); Rosenberger v. Rector, 515 U.S. 819, 833 (1995). The term "government

For example, in *Rust v. Sullivan*[155] the Court upheld a Title X program that provided funds for family planning as long as the provider did not counsel or provide abortions.[156] The Court determined that the restriction was on the program, which had limited funds, and not on the recipient—if Title X funds were used for a consultation, abortion counseling could not be provided.[157] However, the very same medical provider could counsel abortions if the patient paid the consultation fee, or another program supported the visit.[158] In addition, the Court concluded that Congress specifically implemented the Title X program for pre-pregnancy planning; thus abortion counseling did not fit within the scope of the program.[159] Furthermore, the Court found that Congress determined abortion counseling was not in the public interest.[160] In other words, the government chose to advocate a specific message when it implemented Title X.

Subsequently, in *Rosenberger v. Rector and Visitors of University of Virginia*,[161] the Court struck down a university payment policy that excluded payments to a student group "for the sole reason that their student paper 'primarily promotes or manifests a particular belie[f] in or about a deity or an ultimate reality.'"[162] The Court determined that the plan was viewpoint discriminatory—payments were excluded because of the message of the publication.[163] Because the funds were provided to private speakers, student groups, the

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speaker" includes when the government is using private speakers to convey a government message. *Id.*

155. 500 U.S. 173 (1991).

156. *Id.* at 177–78.

157. *Id.* at 196.

158. *Id.* The dissent thought the Court's holding supported "viewpoint-based suppression of speech" because it unconstitutionally imposed upon individuals dependent on the government who could not pay out-of-pocket for the consultation. *Id.* at 204 (Blackmun, J., dissenting).

159. "Congress intended Title X funds 'to be used only to support *preventive* family planning services.'" *Id.* at 179.

160. *Id.* at 201.

161. 515 U.S. 819 (1995).

162. *Id.* at 822–23.

163. *Id.* at 828–29, 837.

University did not convey a message and thus had no reason to interfere with the First Amendment.[164]

In a final example, the Court struck down a condition on a legal services program. In 1974 Congress established the non-profit Legal Services Corporation to distribute funds to organizations that would provide free legal assistance in non-criminal proceedings and matters.[165] However, funds were not available if the representation involved an effort to challenge existing welfare laws.[166] The Court determined that this restriction constituted an unconstitutional condition in part because the "program was designed to facilitate private speech, not to promote a governmental message."[167] It thus focused on the speaker element rather than upon whom the condition was placed. The Court noted that a lawyer who obtains funding from Legal Services Corporation (LSC) acts for his or her client, and does not speak for the government.[168] It stated that "[t]he private nature of the speech involved here, and the extent of LSC's regulation of private expression, are indicated further . . . [w]here the government uses or attempts to regulate a particular medium."[169]

These examples illustrate the principles of the unconstitutional conditions doctrine, but some question how the decisions are distinguishable. For example, why did *Legal Services* seem to presume that the condition was on the recipient and not on the program like in *Rust*? How does the lawyer differ from the doctor? Is *Legal Services* distinguishable because it involves the judicial system? Does *Rust* differ because the issue in question was abortion funding? These questions remain unanswered, but the principles are clear: if the condition is on the recipient, Congress has little latitude, but if the funds support a government speaker, the government has wide latitude to ensure that its message is projected.

These principles can be applied to the Solomon Amendment without confusion, despite the perplexing precedent. First, the Solomon Amendment places a condition squarely on the recipient

164. *Id.* at 833–34. University of Virginia ("UVA") is a state-run university and is thus the government actor in this case. *Id.* at 822. Allowing private religious speech did not implicate the Establishment Clause. *Id.* at 846.

165. Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536 (2001).

166. *Id.* at 536–37.

167. *Id.* at 542.

168. *Id.*

169. *Id.* at 543.

and not on any particular program.[170] The "program" consists of hundreds of different funds and grants that are allocated to help students pay for college and for university researchers to discover important new techniques and cures.[171] Had the funds been allocated to universities for recruiting purposes, with a restriction that if the university allowed on campus recruiting it had to allow the military to participate, then it would look more like a condition on a program. Instead, the Solomon Amendment clearly tells the recipient of distinct funds that it must do something unrelated to the reason for those funds in order to keep the funds.

Second, the government neither speaks nor conveys a specific message when it awards research funding. The question here is not whether the government sends a message through Solomon, but whether the government sends a message when it funds a research program.[172] The government does assert that it wants scientific progress, but that is too broad of a message to be in question here. In fact, the various research programs that are funded by the government are often in conflict, and thus it would be impossible for the government to send one specific message. Instead, the government provides funds for university researchers to speak through their studies.[173] Thus, the government does not have to ensure that its message is clearly conveyed because it does not send a specific message.

Accordingly, the government has placed a condition on the recipients of federal research funding, each of which conveys its own

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170. 10 U.S.C. § 983(b) (2000).

171. *See id.* § 983(d).

172. The doctrine of unconstitutional conditions deals with restrictions on funding, and the message sent by the government when it chooses to fund one program over another. Solomon may take away funding, but it does not grant funding. Thus, it is necessary to look at the underlying funding program.

173. Some may argue that this analysis differs for state-run universities since state-run universities are, in a way, an arm of the government. However, distinguishing between universities in this way creates an unnecessary complication. Even if a state-run university is in some way the government in some situation, there is still no overall governmental message conveyed by awarding research funding. Additionally, the researchers, while employed by the university, clearly have some independent, private interest. Furthermore, the research is usually supported in part by private funds. The state could, perhaps, require military training and recruiting on campus as part of maintaining the state-run university, but the goal cannot be accomplished through restraints on federal research funding.

message, and none of which convey a particular governmental message.[174] Therefore, if Solomon forces universities to surrender their constitutional rights, it constitutes an unconstitutional condition unless the government has an interest that outweighs the constitutional right at issue.[175]

B. The Universities' Asserted Rights: Expressive Association

Organizations, including universities, may receive First Amendment protection through recognition as expressive associations.[176] An expressive association conveys a message, a form of expression, and thus engages in speech—it projects information to those near the speaker. In recent years the idea of expressive association has shifted from focusing on the rights of individuals associating as a group, to the rights of the group independent of the individuals.[177] Freedom of association "plainly presupposes a freedom not to associate."[178] Moreover, it is important to realize that an organization does not have to exist solely for the purpose of spreading a particular message, and not every member of the organization must agree with the policy for expressive association to exist.[179] "An association must merely engage in expressive activity that could be impaired."[180]

The level to which the right to expressive association is protected is partially dependent on the character of the organization.[181] The government can regulate a corporation formed

174. There may be some exception for researchers working on Department of Defense contracts or developing specific research for a government purpose.

175. 16A AM. JUR. 2D CONSTITUTIONAL LAW § 395 (1998).

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

177. *Compare* Boy Scouts of Am. v. Dale, 530 U.S. 640, 648–50 (2000) (focusing on the rights of the Boy Scouts as a group that engages in "expressive activity") *with* Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (focusing on the individual rights of parents to choose schools for their children).

178. Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984).

179. *Dale*, 530 U.S. at 654–55.

180. *Id.* at 655.

181. *See, e.g.*, Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) (holding that commercial speech is subject to intermediate scrutiny); 16A AM. JUR. 2D *Constitutional Law* § 483 (1998). Corporate speech is protected by the First Amendment just as individual speech is protected. *Id.* § 467. However, the governmental interest in regulating speech is more likely to outweigh a corporation's First Amendment

solely to do business more than it can regulate a small organization formed specifically to teach the concept of democracy to third world countries, because we place more First Amendment value upon the organization that is formed for expressive association. Most organizations fall somewhere in the middle of this spectrum—while functioning as a business, the organization develops a particular mission.[182]

For example, Ben & Jerry's Ice Cream Company is a profitable corporation that is known for "incorporating wholesome, natural ingredients" into its product and for its "nonpartisan social mission that seeks to meet human needs and eliminate injustices in our local, national and international communities by integrating these concerns into our day-to-day business activities."[183]

Similarly, many universities are known for incorporating certain values into their educational missions. "We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition."[184] In *Regents of the University of California v. Bakke*,[185] Justice Powell recognized that "[a]cademic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."[186] Furthermore, the Court has stated that "the 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."[187]

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interest than an individual's First Amendment interest. *See id.* § 480 ("[C]ommercial speech enjoys a more limited measure of protection."). This is particularly true when the organization does not exist to convey a particular message. *See id.*

182. *Roberts*, 468 U.S. at 635 (O'Connor, J., concurring).

183. Ben & Jerry's, *Our Mission Statement*, *at* http://www.benjerry.com/our_company/our_mission/ (last visited Jan. 16, 2004).

184. Grutter v. Bollinger, 539 U.S. 306, 330 (2003).

185. 438 U.S. 265 (1978).

186. *Id.* at 312.

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

From the above analysis, it is clear that a university is an expressive association that deserves constitutional protection when it conveys a message. However, that is not the end of the analysis. A court must also determine if the government's interest in promoting the military through funding restrictions significantly affects the group's ability to advocate its viewpoint, and then balance the government's interest against the burden imposed using strict scrutiny.

C. The Effect of the Government's Interest—Promoting the Military—On a University's Ability to Advocate Its Viewpoint

The government has an interest in promoting the military. This interest extends from encouraging military service to enhancing public relations with the military. In enacting the Solomon Amendment, Congress and the military chose to advance this goal by restricting funds expended for independent purposes—research and financial aid. The question is whether this method significantly affects a university's ability to advocate its message of nondiscrimination. This Note concludes that it does, because the university is forced to change its expressive message to avoid losing hundreds of millions of dollars in funding.

The United States District Court in New Jersey recently addressed this question following a motion for a preliminary injunction in *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld* (FAIR litigation).[188] In the FAIR litigation the plaintiffs alleged that Solomon is an unconstitutional condition. The plaintiffs requested a preliminary injunction to stop the enforcement of Solomon, but the district court denied the request because it concluded that the plaintiffs' chance of success on the merits was not reasonably likely.[189] The district court reasoned that the Solomon Amendment is not a direct restriction of speech and therefore the analysis differs from other unconstitutional conditions cases.[190] Furthermore, the universities' rights of expressive association were

188. 291 F. Supp. 2d 269 (D.N.J. 2003). FAIR is an association of law schools and faculties. Other plaintiffs include the Society of American Law Teachers ("SALT"), the Coalition for Equality, the Rutgers Gay and Lesbian Caucus, law professors and law students. *Id.* at 275–76.

189. *Id.* at 274–75.

190. *Id.* at 315.

not greatly infringed because Solomon did not require the military recruiters to take leadership roles at the campuses, and the military recruiters would only be on campus a few days each year.[191] However, the court's conclusion is flawed.

The court relied on *Rust* and similar cases that state, "when the Government appropriates public funds to establish a program it is entitled to define the limits of that program."[192] The court recognized that the Solomon Amendment does not create a specific spending program and thus Congress's wide latitude to define was more limited.[193] However, it also concluded that any interference with speech was incidental because Solomon does not directly exclude a particular point of view like the programs in *Rust* and *American Library Ass'n*.[194] But in determining whether the Solomon Amendment infringed upon the universities' expressive rights the court analyzed the wrong question. Instead of determining the effect of forcing the schools to advocate a different policy, the court looked at the impact of having a military recruiter on campus a few days each year.[195]

By requiring a university to change its nondiscrimination policy, provide amelioration, or ignore its policy, the Solomon Amendment directly infringes upon each university's right to communicate a message and exercise its right to free speech through expressive association. The government requires the university to convey a message of partial nondiscrimination by forcing the school to choose its policy or hundreds of millions of dollars in federal funding. The effect of this spreads over more than the few days the recruiter is

191. *See id.* at 310, 314.

192. *Id.* at 299.

193. *Id.* at 300.

194. *Id.*; *cf.* Rust v. Sullivan, 500 U.S. 173 (1999) (holding that a Title X program that provided funding for family planning but did not counsel or provide abortions was constitutional); United States v. Am. Library Ass'n, 539 U.S. 194 (2003) (upholding the Children's Internet Protection Act, holding that it does not impose an unconstitutional condition on public libraries). While Solomon does not explicitly limit a viewpoint like these cases, it was specifically created to stop universities from fully enforcing their nondiscrimination policies. The driving force behind the Solomon Amendment was the conflict between "Don't Ask, Don't Tell" and the universities' policies. This implicit, background reasoning is still a clear regulation of viewpoint.

195. *Forum for Academic & Institutional Rights*, 291 F. Supp. 2d at 310.

actually on campus (even if that is when most attention is concentrated on the policy) and significantly affects the university's ability to advocate its message. The statement "non-discrimination usually" is quite different from the statement "non-discrimination always." As long as "Don't Ask, Don't Tell" is in place, the Solomon Amendment forces universities to change their speech.[196]

Some counter that free speech entitles people to express their views, and to counter opposing views. They thus conclude that although Solomon may be somewhat restrictive, it does not restrict the school from verbally challenging the policy. However, being able to speak against something is not the same as being able to convey one's message to others, to speak one's mind outright.[197] Solomon stops universities from stating a clear message of nondiscrimination and thus significantly infringes upon their right to expressive association.

D. Weighing the Government's Interest Against the Burden Imposed on the University

It has been established that universities have a First Amendment right to expressive association and that the Solomon Amendment significantly interferes with the ability of the universities to advocate their message of nondiscrimination. While Solomon appears to be an unconstitutional condition, the remaining question is whether, on balance, the government's interest in promoting the military exceeds the infringement on the universities' rights to expressive association.

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196. *See* Richard W. Garnett, *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 MINN. L. REV. 1841, 1849–50 (2001) ("We should therefore attend not only to the ways that government, by regulating associations' activities, burdens the expression of individuals. We should also think and worry . . . about whether and how government supervision of associations' expression threatens, crowds out, and commandeers their educational, soul-making role.").

197. As discussed in Part III.B, universities have been threatened with denial of funds for denying recruiters on-campus access, and student protests have not led to any change of policy. Furthermore, student and university speech has been chilled by the fear that their speech may be interpreted as "prohibit[ing], or in effect prevent[ing]" access to military recruiters. 10 U.S.C. § 983 (2000). It is important to note that the speech in these scenarios is a message of nondiscrimination. It is not dangerous, or otherwise constitutionally problematic. In fact, the nondiscrimination message the universities want to send is generally considered a positive and desirable message.

This question is answered by applying the strict scrutiny test: does the government have a compelling interest that the program furthers using the least restrictive means?

The district court in the FAIR litigation did not adequately weigh the governmental interest against the burden imposed on a university's free speech because it concluded that Solomon did not significantly affect the ability of each university to advocate its message.[198] However, having determined otherwise, it is appropriate to apply strict scrutiny. Accoringly, this Note concludes that although the government's interest in raising and maintaining a military is compelling, Solomon is far from constituting the least restrictive means of accomplishing this goal. Thus, Solomon is an unconstitutional condition that is not made valid by the government's interest.

Courts have had to balance the government's interest against the burden imposed in many cases. For example, in *Roberts v. Jaycees*[199] the Court recognized that local chapters of the Jaycees (a large organization formed for fraternal networking) did engage in expressive association that would be impaired by the forced inclusion of women in the organization.[200] However, the Court also recognized that the Jaycees provided business contacts and employment promotions, and that "[a]ssuring women equal access to such goods, privileges, and advantages clearly furthers compelling state interests."[201] Thus, the Court concluded that "Minnesota's compelling interest in eradicating discrimination against its female citizens justifie[d] the impact that application of the statute to the Jaycees may have on the male members' associational freedoms."[202] It also concluded that a less restrictive means was not available.[203]

In the present situation the government clearly has a compelling interest in raising and maintaining a military to protect our nation's

198. *See Forum for Academic & Institutional Rights*, 291 F. Supp. 2d. at 313–14. The court determined that the compelling interest test should not apply because Solomon does not directly affect associational rights. *Id.* at 310–11. Instead, the court applied the medium scrutiny test outlined in *United States v. O'Brien*, 391 U.S. 367 (1968). *Id.* at 311.

199. 468 U.S. 609 (1984).

200. *Id.* at 621.

201. *Id.* at 626.

202. *Id.* at 623.

203. *Id.*

safety. However, Solomon fails to further this interest using the least discriminatory means. First, the government has numerous ways to recruit soldiers, including television ads, high school recruiting, bus banners, mailings, word of mouth, and online recruiting tools. Second, the "problem" Solomon addresses is not an inability to recruit university students or law students, but is instead a convenience problem.

Schools that exclude or limit military recruiting do not ban students from taking jobs with the military. They merely ask the military, and other discriminatory employers, to conduct interviews off campus. While this is less convenient than conducting interviews on campus, it does not eliminate a pool of applicants. Most schools that limited access in the past permitted the military to place advertisements for off-campus recruiting in the career services offices, or to otherwise reach students to let them know the military would be interviewing.

Given the various recruiting options discussed above, Solomon does little to accomplish the overall goal of promoting the military, and it does so in a very restrictive way—Solomon directly infringes upon First Amendment rights. On balance, Solomon cannot withstand constitutional scrutiny. If Congress and the military were to eliminate "Don't Ask, Don't Tell," Solomon could be a valid exercise of Congress' spending power, as long as it did not conflict with any of the universities' other constitutional rights.[204] However, because the underlying discrimination remains, Solomon is not a valid spending regulation.

In conclusion, the government cannot show that its interests outweigh the universities' right of expressive association. The balancing test tips in favor of protecting the First Amendment freedom of a university. Therefore, the Solomon Amendment is an unconstitutional condition that must be struck down.

V. CONCLUSION

Our military has long discriminated on the basis of sexual orientation, but society has become ever more accepting of homosexuality. Universities, the traditional spheres of free

204. This assumes that another discriminatory policy does not replace "Don't Ask, Don't Tell."

expression, took some of the initial steps in the societal transformation by adding sexual orientation to their nondiscrimination policies. However, these policy changes have placed universities in direct conflict with the military.

In order to successfully portray and advocate their message of nondiscrimination, many universities, particularly law schools, limited on-campus recruiting to those companies and organizations that maintained a nondiscrimination policy equivalent to the university's policy. Thus, discriminatory employers, including the military, were not provided with on-campus recruiting resources. Congress and the military reacted to this environment by enacting the Solomon Amendment.

The Solomon Amendment forces universities to choose between federal funding and fully advocating their messages of nondiscrimination. Thus, for a university to receive federal aid, it must surrender its First Amendment right to expressive association. Therefore, Solomon is unconstitutional and cannot stand. It is possible that Solomon could be saved if "Don't Ask, Don't Tell" is eliminated, which may transpire following the recent decision in *Lawrence v. Texas*. By striking down sodomy laws, overturning *Bowers*, and recognizing some fundamental due process rights for homosexuals, the Court provided numerous grounds to attack regulations that discriminate on the basis of sexual orientation.

If the military did not discriminate, its policy would not conflict with universities' policies of nondiscrimination. If a policy conflict did not exist, universities would not have a First Amendment reason to exclude the military from recruiting on campus. Furthermore, if Solomon remained intact to reach those schools that continued to exclude the military for non-First Amendment reasons, the unconstitutional conditions claim would fail barring a different infringement of constitutional rights. However, the military does discriminate on the basis of sexual orientation, and a

First Amendment conflict does exist. Therefore, the Solomon Amendment must be struck down as an unconstitutional condition.

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