Do Law Schools Forfeit Federal Income Tax Exemption When They Deny Military Recruiters Full Access to Career Services Programs: The Hypothetical Case of Yale University v. Commissioner

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DO LAW SCHOOLS FORFEIT FEDERAL INCOME TAX EXEMPTION WHEN THEY DENY MILITARY RECRUITERS FULL ACCESS TO CAREER SERVICES PROGRAMS?
THE HYPOTHETICAL CASE OF YALE UNIVERSITY v. COMMISSIONER

INTRODUCTION

The overwhelming majority of United States law schools prohibit prospective employers from utilizing the schools' official programs for student recruitment if those employers discriminate against students on any of several grounds, including sexual orientation. By virtue of these longstanding anti-discrimination policies, some law schools at times have limited the avenues through which military recruiters may interview students. The reason for restricting the military's access to interviewing

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2 See Linda Greenhouse, Supreme Court Weighs Military Access to Law Schools, N.Y. TIMES, Dec. 7, 2005, at A1. A law school may join the Association of American Law Schools (the "AALS") only if it has adopted such a policy. See id. The Bylaws of the AALS state as follows:

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.

The Association of American Law Schools Bylaws, § 6-3.b, available at http://www.aals.org/about_handbook_requirements.php (last visited July 24, 2008). In addition, the AALS Executive Committee Regulations state as follows:

A member school shall inform employers of its obligation under Bylaw 6-3(b), and shall require employers, as a condition of obtaining any form of placement assistance or use of the school's facilities, to provide an assurance of the employer's willingness to observe the principles of equal opportunity stated in Bylaw 6-3(b).


programs is simple: by law, homosexuals who disclose their sexual orientation may not serve in the United States armed forces.5

In response to the refusal of many law schools to grant military recruiters full use of on-campus recruiting services, Congress enacted the Solomon Amendment.6 The Solomon Amendment eliminates certain federal funding otherwise available to an institution of higher education if one of its departments, such as its law school, denies military recruiters the same access to its students and campus that other recruiting employers receive.7 The United States Supreme Court and a federal court of appeals have recently upheld the constitutionality of the Solomon Amendment.8 Consequently, most law schools now permit military recruiters to participate in their general career services programs.9

Those who have tangled with the government over the Solomon Amendment may assume that additional legal analysis of the issues raised by the controversy between law schools and the military is irrelevant. The courts have spoken, and the law schools have lost. However, exactly what private American law schools and their affiliated universities have lost has not been thoroughly explored. The potential ramifications of recent judicial decisions are fascinating, if not astonishing. The intriguing implications of these cases arise not from what they hold in isolation, but from how they arguably relate to an opaque doctrine of federal income tax law governing tax-exempt charitable organizations. The issue is whether private law schools that have denied military recruiters full access to student recruitment programs have forfeited their federal income tax exemption under section 501(c)(3) of the Internal Revenue Code (the "Code")10 on account of the public

\[\text{than two dozen law schools}^{\text{at one time or another denied military recruiters access to students.}}\]


7 See infra notes 17-25 and accompanying text.

8 See infra notes 26-31 and accompanying text.


10 Code section 501(a) exempts from federal income taxation numerous organizations described in Code section 501(c). Section 501(c)(3) organizations are described as follows: Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for
policy doctrine, announced in *Bob Jones University v. United States*. Under this doctrine, an organization fails to qualify as a tax-exempt charity under Code section 501(c)(3) if it violates "fundamental" or "established" public policy.

The purpose of this article is twofold. First, it seeks to explore and develop the legal arguments for and against revoking the federal income tax exemption of private, tax-exempt law schools that have dared to defy military recruiters. Secondly, this article aims to expose and illustrate the vagaries of the unsettled and malleable public policy doctrine, with the objective of demonstrating that the doctrine should be reformed.

the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

I.R.C. § 501(c)(3) (2008). For ease of discussion, this article refers to organizations exempt from federal income taxation under Code section 501(a) by virtue of satisfying the requirements of Code section 501(c)(3) as "exempt under Code section 501(c)(3)."

**Notes:**


12 Id. at 592, 593, 594, 596 n. 21, 598.

13 Id. at 586, 591.

Toward these ends, this article presents a hypothetical Supreme Court case\textsuperscript{15} determining the tax-exempt status of several private, free-standing law schools, and private universities affiliated with law schools, that once prevented, or continue to prevent, military recruiters from fully participating in school-sponsored recruitment programs. Four opinions by fictional Supreme Court justices explore the nuances of the public policy doctrine as applied to the controversy over the Solomon Amendment. Part I of this article sets forth a plurality opinion—written by “Chief Justice Orthodoxy”—that expansively applies the public policy doctrine. Part II lays out an opinion authored by “Justice Rigor,” who concurs in part with the plurality, but applies the doctrine even more aggressively. Parts III and IV present separate opinions written by “Justice Trendspotter” and “Justice Wisdom,” respectively. These latter opinions concur in part in the result of the plurality opinion, but primarily dissent from both the result and the analysis of the plurality. Each dissenting opinion critiques Chief Justice Orthodoxy’s plurality opinion for different reasons, and in a manner that identifies or illustrates the indeterminate scope of the public policy doctrine. This article then summarizes how the hypothetical case of Yale University \textit{v. Commissioner} illustrates the need to reform the public policy doctrine.

I. \textbf{CHIEF JUSTICE ORTHODOXY’S PLURALITY OPINION}\textsuperscript{16}

\textbf{A \hfill Background}

These consolidated cases come to us on writ of certiorari from numerous United States Courts of Appeals, which themselves have heard appeals of United States Tax Court cases determining the tax-exempt status of several private universities and law schools. The seemingly myriad appellate court decisions have resulted in the continued exemption from federal income taxation of some schools, and the revocation of exemption of many others. A painstaking review of these appellate opinions unhappily reveals no


\textsuperscript{15} Other scholars have employed the device of crafting hypothetical judicial opinions to analyze legal issues. \textit{See, e.g., Borris Bittker, The Case of the Checker-Board Ordinance: An Experiment in Race Relations}, 71 YALE L.J. 1387 (1962); Richard Delgado, \textit{Five Months Later (The Trial Court Opinion)}, 71 TEX. L. REV. 1011 (1993).

\textsuperscript{16} Orthodoxy, C.J., delivered the plurality opinion in which Custom, J., Convention, J., and Conformity, J. joined; Rigor, J. joined Parts A and B of the plurality opinion and issued a separate opinion concurring in the result of Part C.1 and dissenting from Part C.2; Trendspotter, J. and Wisdom, J. (joined by Prudence, J. and Balance, J.) each issued separate opinions dissenting from Part C.1 of the plurality opinion and concurring in the result of Part C.2.
discernable pattern explaining their dispositions. This Court granted
certiorari to announce and clarify the tax-exempt status of these private
schools in light of our opinion in Bob Jones University v. United States.17

In order to understand the basis for deriving the three groupings of law
schools described in this opinion,18 the federal income tax exemption of
which is in question in this litigation, it is instructive to review briefly the
terms of the Solomon Amendment19 and the chronology of recent judicial
opinions ruling on the constitutionality of the Solomon Amendment. The
Solomon Amendment denies specified federal funding to any academic
institution (such as a university) if any sub-element of that institution (such
as its law school) maintains a policy or practice that prevents the military
"from gaining access to campuses, or access to students ... on campuses, for
purposes of military recruiting in a manner that is at least equal in quality
and scope to the access to campuses and to students that is provided to any
other employer."20

Originally enacted in 1994, the Solomon Amendment has undergone
several modifications. The statute initially withheld Department of Defense
("DOD") funding from any institution of higher education with a policy that
denied military recruiters, or effectively prevented them from obtaining,
campus entry, student access, or access to student directory information for
recruiting purposes.21 The DOD issued interpretive regulations under the
original statutory language that limited loss of DOD funding to the specific
sub-element of the university (such as its law school) that had failed to
comply with the statute.22 Congress amended the Solomon Amendment in
1996 to expand the penalty for non-compliance to include forfeiture of funds
administered by governmental departments other than the DOD (including
the Departments of Education, Labor, Transportation, and Health and
Human Services).23 In 1999, after Congress had modified the statutory
language further,24 the DOD drafted interim regulations, the import of which
was that university-wide DOD funding depended on its law school's (and
every other sub-element's) compliance with the Solomon Amendment.25 By
2001, the DOD and military officers began to notify several law schools that
they would lose DOD and certain other federal funding if they failed to grant

18 See infra text accompanying notes 34-37.
19 10 U.S.C. § 983.
20 10 U.S.C. § 983 (b).
2663 (1994).
military recruiters complete access to career services, students, and law school facilities. In 2004, Congress affirmed the DOD's new informal policy by amending the statutory language once again to require that military recruiters receive access to students that is at least equal in quality and scope to that provided to any other employer. Thus, after this amendment, law schools that deny military recruiters the same access given to other recruiters - including those who have signed statements of compliance with law school anti-discrimination policies - violate the Solomon Amendment, and thereby cause the law schools and their affiliated universities to forfeit certain federal funding.

Two controversies involving the Solomon Amendment are most important to the present litigation. In the first, an association of law schools and law faculties, a society of law teachers, and certain law student associations, law professors and law students sought a preliminary injunction against enforcement of the Solomon Amendment. The United States District Court for the District of New Jersey initially denied relief to these plaintiffs in *Forum for Academic and Institutional Rights, Inc. v. Rumsfeld* ("FAIR I"). However, on appeal, the United States Court of Appeals for the Third Circuit ordered the district court to issue a preliminary injunction against enforcement of the Solomon Amendment. In *Burt v. Rumsfeld*, the United States District Court for the District of Connecticut held that the Solomon Amendment unconstitutionally conditioned federal funding on the surrender of the Yale law professors' First Amendment rights and issued an injunction prohibiting the withholding of federal funds on account of Yale's anti-discrimination policy as applied to military recruiters. While the Secretary of Defense was appealing the decision in favor of the Yale law professors, this Court unanimously upheld the constitutionality of the Solomon Amendment in *FAIR II*. After our *FAIR II* decision, the Secretary of Defense moved for summary reversal of the district court judgment in *Burt v. Rumsfeld*. In view of *FAIR II*, the United

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States Court of Appeals for the Second Circuit ordered the district court to vacate its injunction that had prohibited the DOD from enforcing the Solomon Amendment against Yale.\textsuperscript{34}

Over the past three decades, both before and after the enactment of the Solomon Amendment, most law schools have maintained anti-discrimination policies.\textsuperscript{35} Pursuant to these policies, numerous law schools have refused military recruiters the same access to students and career placement programs enjoyed by other prospective employers.\textsuperscript{36} In the current litigation, law schools (or their affiliated universities) whose exemption from federal income tax are in question fall within three major groups.\textsuperscript{37} The first, the "Vermont Law School Group," consists of law schools that have limited the military's access to recruitment services both before and after the decision of the United States Court of Appeals for the Second Circuit in \textit{Burt v. Gates}.\textsuperscript{38} Second, the "Yale Law School Group" consists of law schools that limited the military's access to recruitment services both before and after this Court's \textit{FAIR II} decision, but not for any significant length of time after the decision of the Second Circuit in \textit{Burt v. Gates}.\textsuperscript{39} The third constellation of law schools, the "Harvard Law School Group," denied military recruiters equal access to career services programs at various times prior to our decision in \textit{FAIR II}, but not thereafter.\textsuperscript{40}

\section*{B \hskip 2em Governing Law}

In \textit{Bob Jones University v. United States},\textsuperscript{41} this Court concluded that an organization claiming exemption from federal income taxation under Code section 501(c)(3) must not have a purpose that is illegal or that violates "established public policy."\textsuperscript{42} We held in \textit{Bob Jones} that two schools maintaining racially discriminatory policies as to students violated

\textsuperscript{34} See \textit{Burt v. Gates}, 502 F.3d 183, 192 (2d Cir. 2007).
\textsuperscript{35} See \textit{supra} notes 1 and 2 and accompanying text.
\textsuperscript{36} See Lederman, \textit{supra} note 3.
\textsuperscript{37} For any law school affiliated with a university, such as the Yale Law School, the exemption of the overall university (not just the law school) is at issue. However, for ease of discussion, this opinion refers to the three groups of educational institutions as groups of "law schools."
\textsuperscript{38} The Vermont Law School prohibits military recruitment on its campus. See Zezima, \textit{supra} note 8, at A15.
\textsuperscript{39} For a brief history of Yale Law School's policies governing military recruitment, see Current Issues: Military Recruitment at Yale Law School (May 4, 2005), \texttt{http://www.law.yale.edu/news/2412.htm}; Kaplan, \textit{supra} note 8, at B4.
\textsuperscript{40} For a concise history of the Harvard Law School's policies governing military recruitment, see Letter from Dean Kagan on Military Recruiting (Sept. 20, 2005), \texttt{http://www.harvard.edu/news/2005/09/20_recruiting.php}.
\textsuperscript{41} 461 U.S. 574 (1983).
\textsuperscript{42} Id. at 591.
established public policy. In so holding, we examined the activity of "all three branches of the Federal Government." Looking to the judiciary first, we observed that since Brown v. Board of Education, case law has established that racial discrimination in education violates fundamental national policy. Further, Congress, through Titles IV and VI of the Civil Rights Act of 1964, has made clear "that racial discrimination in education violates a fundamental public policy." Moreover, even the Executive Branch has sought to purge the country of racial discrimination through presidential executive orders issued in several administrations.

We grounded our analysis in Bob Jones upon our understanding that an organization's entitlement to federal income tax exemption depends upon whether it satisfies common law concepts of charity. We reasoned that Code section 501(c)(3) must be construed within the Code's "framework" and "against the background of the congressional purposes." Identifying parallels between Code sections 501(c)(3) and 170(c) and observing that section 170 authorizes a deduction for "charitable contributions," we discerned a congressional intent to provide tax benefits to organizations serving charitable purposes. We found that Congress exempted organizations described in Code section 501(c)(3) from income tax to promote "charitable" organizations because they serve a salutary public purpose. We further supported our conclusion that an organization satisfies section 501(c)(3) only if it is "in harmony with the public interest" by characterizing taxpayers in general as indirect donors to organizations receiving federal income tax exemption. Consistent with the common law, we concluded in

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43 See id. at 595-96.
44 Id. at 598.
46 See Bob Jones, 461 U.S. at 593.
48 Bob Jones, 461 U.S. at 594.
49 See id. at 594-95.
50 See id. at 586, 588-89.
51 Id. at 586.
52 Code section 170(a)(1) authorizes a deduction for a "charitable contribution," which is defined in Code section 170(c). Under section 170(c)(2), a "charitable contribution" includes a gift to a "corporation, trust, or community chest, fund, or foundation" that satisfies certain requirements. Such requirements include those set forth in Code section 501(c)(3). See I.R.C. § 170(c)(2)(A)-(D) (2008).
53 Bob Jones, 461 U.S. at 586-88.
54 See id. at 587-88 ("Congress sought to provide tax benefits to charitable organizations, to encourage the development of private institutions that serve a useful public purpose or supplement or take the place of public institutions of the same kind.").
55 Id. at 592.
56 See id. at 591.
Bob Jones that "an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."

Our opinion in Bob Jones controls the disposition of the current consolidated cases. In Bob Jones, the fundamental public policy identified by this Court was ending racial discrimination in education. The fundamental public policy at issue in the current litigation, as attested by all three branches of the federal government, is the time-honored policy of maintaining a strong, efficient corps of armed forces, in general and specifically through effective military recruiting. The question that we must answer is whether the law schools before us have violated this fundamental public policy and thereby forfeited their exemption from federal income taxation.

In Parts B.1 through B.3 of this opinion, we discuss the actions of all three branches of the federal government that plainly support the existence of the established public policy of maintaining a strong and efficient corps of armed forces, in general and specifically through effective military recruiting. In Parts C.1 and C.2 of this opinion, we examine whether each group of law schools has violated this fundamental public policy and thereby failed to satisfy the requirements for federal income tax exemption under Code section 501(c)(3).

1 Congressional Policy

We begin by observing established congressional policy. Under the United States Constitution, Congress has the power to "provide for the common Defense," "[t]o raise and support Armies" and "[t]o provide and maintain a Navy." Congress has accepted this constitutional responsibility by supporting the assembly of the most impressive armed forces in the world. One important device that Congress has employed to raise this unequalled military is legislation which promotes successful military recruiting.

As observed by the United States Court of Appeals for the Third Circuit in United States v. City of Philadelphia, Congress "considers access to college and university employment facilities by military recruiters to be a matter of paramount importance." The Third Circuit also correctly noted that Congress has promoted military recruiting in two broad categories. First, Congress has directed the respective branches of the armed forces to "conduct intensive recruiting campaigns to obtain enlistments." Secondly, a review of legislation dating back to the 1960s reveals "the long-standing Congressional

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57 Id. at 586.
59 798 F.2d 81 (3d Cir. 1986).
60 Id. at 86.
61 See id. (citing 10 U.S.C. § 503(a)).
policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters.


In City of Philadelphia, the court properly recognized that Congress considers access to students by military recruiters an integral part of the effort to obtain enlistments, a conclusion supported by the legislative history of the various acts previously cited. In view of this legislation, the United States Court of Appeals for the Third Circuit concluded that an order of the Philadelphia City Commission on Human Relations, which required the Temple University Law School to deny the JAG Corps the use of its placement facilities, obviously conflicted with a "discernable Congressional policy." The court insightfully recognized that the order of the municipal commission "absolutely prohibits the cooperation that Congress intended this legislation to engender," and thereby would have denied military recruiters the type of access that Congress thought was necessary to enable the armed forces to conduct intensive recruiting campaigns.

However, we need not limit our analysis to the authorities cited by the Third Circuit. The statutory text and legislative history of the Solomon Amendment confirm that the congressional policy to maintain a strong, efficient military is the cornerstone of the Solomon Amendment. The Solomon Amendment withholds taxpayer funding of institutions that interfere with the federal government's constitutionally mandated function of raising a military and the correlative task of encouraging recruitment of the most highly qualified candidates. In amending the Solomon Amendment most recently, Congress submitted the following findings:

[At no time since World War II has our Nation's freedom and security relied more upon our military than now as we engage in the global war on terrorism. Our Nation's all volunteer Armed Services have been called upon to serve and they are performing their mission at the highest standards. The military's ability to perform at this standard can only be

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62 See id.
66 See City of Philadelphia, 798 F.2d at 86.
67 See id. at 86-87 (citing H.R. Rep. No. 92-1149, 92d Cong., Sess. 79 (1972)).
68 See id. at 87 (quoting Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 271 (1943)).
69 Id. at 87.
70 Id.
maintained with effective and uninhibited recruitment programs.\textsuperscript{72}

Congress has made its legislative policy very clear. Maintaining a strong, effective military through promoting military recruiting is a well-established public policy advanced by the Congress through legislation for decades. As we opined in \textit{FAIR II}, military recruiting, including that facilitated by the Solomon Amendment, "promotes the substantial government interest in raising and supporting the Armed Forces."\textsuperscript{73} Consistent with our recent opinion in \textit{FAIR II},\textsuperscript{74} we conclude that encouraging military recruiting on school campuses, via the Solomon Amendment and otherwise, is a fundamental public policy of the Legislative Branch.

2

\textit{Executive Policy}

One of the most essential functions of the Executive Department is to maintain a strong, effective military. Of course, the President of the United States serves as the Commander-in-Chief of the armed forces.\textsuperscript{75} This constitutional duty of the chief of the Executive Department is complemented by a long history of Executive Department responsibility for building and maintaining this nation's armed forces. This responsibility dates from 1789, when Congress created the Department of War, an Executive Department, headed by a secretary charged with performing military-related functions assigned by the President.\textsuperscript{76} Numerous subsequent legislative acts created additional military departments or reorganized them, all the while vesting their authority and function within the Executive Branch.\textsuperscript{77}

Of special interest is the National Security Act Amendments of 1949,\textsuperscript{78} which created the DOD as an Executive Department that included the Army, Navy, and Air Force as military departments, rather than as distinct Executive Departments (as they were under prior law).\textsuperscript{79} The Act also placed the authoritative coordination and direction of the branches of the military in the office of the Secretary of Defense, the head of the DOD.\textsuperscript{80} The avowed intent of Congress under the Act was, in relevant part, "to provide for the

\textsuperscript{73} FAIR II, 547 U.S. at 67.
\textsuperscript{74} See id. at 58 (observing the absence of any dispute in the \textit{FAIR} litigation over whether the power of Congress to raise and support armed forces "includes the authority to require campus access for military recruiters").
\textsuperscript{75} U.S. CONST. art. II, §2.
\textsuperscript{76} 1 Stat. 49, 50 (1789).
\textsuperscript{77} For a brief history of the establishment and restructuring of the military branches, see Peter M. Murphy and William M. Koenig, \textit{Whither Goldwater-Nichols?}, 43 NAVAL L. REV. 183, 183-93 (1996).
\textsuperscript{78} Pub. L. No. 81-216, 63 Stat. 578 (1949).
\textsuperscript{79} See id., §§ 2, 4.
\textsuperscript{80} See id., §§2, 4, and 5.
effective strategic direction of the armed forces and ... for their integration into an efficient team of land, naval, and air forces." 81 The substance of this Act remains today, in a statutory provision that is auspiciously entitled "Declaration of Policy." 82 Thus, for nearly 60 years, the DOD, an Executive Department, has been charged with a public policy objective of assembling and directing an efficient corps of armed forces.

In fulfilling its function, the Secretary of Defense must "conduct intensive recruiting campaigns to obtain enlistments in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, and Regular Coast Guard." 83 Further, the Secretary must strive to "enhance the effectiveness of recruitment programs of the Department of Defense" through aggressive "advertising and market research targeted at prospective recruits for the armed forces and those who may influence prospective recruits." 84 Effective defense of this country 85 compels the United States to recruit annually several hundred students to serve in the Judge Advocate General's ("JAG") Corps 86 in

81 Id., §2.
82 See 50 U.S.C. § 401 (2008), which states as follows:
In enacting this legislation, it is the intent of Congress to provide a comprehensive program for the future security of the United States; to provide for the establishment of integrated policies and procedures for the departments, agencies, and functions of the Government relating to the national security; to provide a Department of Defense, including the three military Departments of the Army, the Navy (including naval aviation and the United States Marine Corps), and the Air Force under the direction, authority, and control of the Secretary of Defense; to provide that each military department shall be separately organized under its own Secretary and shall function under the direction, authority, and control of the Secretary of Defense; to provide for their unified direction under civilian control of the Secretary of Defense but not to merge these departments or services; to provide for the establishment of unified or specified combatant commands, and a clear and direct line of command to such commands; to eliminate unnecessary duplication in the Department of Defense, and particularly in the field of research and engineering by vesting its overall direction and control in the Secretary of Defense; to provide more effective, efficient, and economical administration in the Department of Defense; to provide for the unified strategic direction of the combatant forces, for their operation under unified command, and for their integration into an efficient team of land, naval, and air forces but not to establish a single Chief of Staff over the armed forces nor an overall armed forces general staff.
85 The Court is indebted to the JAG Advocates Association for its amicus brief filed in FAIR II, which brought to the attention of the Court the evidence cited in this and the following two paragraphs of the plurality opinion.
86 See Major Gen. Rives Am. Decl. 4, FAIR I.
increasing numbers.\textsuperscript{87} Recent military campaigns in the Middle East have obviously raised the demand for additional corps members.\textsuperscript{88} Failure to recruit effectively for even one year can weaken the structure of the military for a very long time.\textsuperscript{89}

To sustain a viable JAG Corps, our nation's armed forces rely heavily on the ability to recruit students on college campuses. As stated by Brigadier General Walter E. Gaskin,

On-campus recruiting is the preferred and most successful method of establishing contact with interested and potentially qualified applicants... The most effective method of recruiting potential applicants is to meet with them in person and explain to them what a career as a judge advocate would entail and how to go about submitting an application. This exchange is the best tool for recruiting highly qualified judge advocates.\textsuperscript{90}

Indeed, official surveys demonstrate that many law students who had never seriously contemplated joining the JAG Corps are attracted to it through the on-campus interviewing process.\textsuperscript{91} In one recent survey, of 339 newly-commissioned Judge Advocates, 40% stated that they learned about their service branch through the recruiting visit.\textsuperscript{92} In an Army recruiting area that includes New Jersey, Pennsylvania and Delaware, more than 80% of law students who interviewed with JAG recruiters on campus later applied to the JAG Corps.\textsuperscript{93} Nationwide, over 54% of law students who interviewed with JAG recruiters on campus later applied to become an Army Judge Advocate.\textsuperscript{94}

Only the most cynical or ignorant of observers could seriously question that the longstanding policies and operations of the Executive Department plainly reflect an uncompromising objective of maintaining a strong, efficient military. Further, we are satisfied that the Executive Department, through the DOD and the various divisions of the armed forces, has long maintained a policy of utilizing aggressive on-campus recruiting to persuade students to pursue careers in the JAG Corps, and that this policy is well established. Moreover, we are convinced that the military considers the Solomon Amendment essential to its proper functioning, especially during the War on

\textsuperscript{87} See Judge Advocate General's Corps, United States Navy, Report Presented to the ABA 15 (Feb. 2004).
\textsuperscript{88} See Major Gen. Rives Am. Decl. 6; Judge Advocate General's Corps, United States Army, Semiannual Historical Summary of the Judge Advocate General's Corps Presented to the ABA 37-38 (Feb. 2004).
\textsuperscript{89} See Major Gen. Rives Am. Decl. 4.
\textsuperscript{90} Brigadier Gen. Gaskin Decl. 4, FAIR I.
\textsuperscript{91} See id. at 8.
\textsuperscript{92} See Major Gen. Rives Am. Decl. 8.
\textsuperscript{93} See Major Gen. Romig Decl. 8, FAIR I.
\textsuperscript{94} See id.
Terror.\textsuperscript{95} Without the law, the military believes that it would likely recruit from a smaller pool of applicants, thereby hindering its ability to promote legal careers in the armed forces,\textsuperscript{96} and ultimately would find itself with a less qualified JAG Corps.\textsuperscript{97} Hence, the unhindered recruitment of law students on campus for JAG careers is one important component of the Executive Department's thoroughly established public policy of raising and maintaining a strong, efficient military.

3

\textit{Judicial Policy}

Consistent with the legislative and executive policy of maintaining a strong, efficient military is the judicial policy of deferring to the judgment of the other two branches of government on internal military matters. An "unbroken line of cases"\textsuperscript{98} upholds the role of Congress and the Executive Branch in defining, maintaining, and overseeing military practice and procedures, free from intrusive second-guessing by the judiciary. For example, with respect to Congress' authority over national defense and military affairs, we have stated that "perhaps in no other area has the Court accorded Congress greater deference."\textsuperscript{99} Similarly, we have observed that responsibility for the "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force" is vested in the Legislative and Executive Branches, not the Judicial Branch.\textsuperscript{100} Likewise, we have opined that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."\textsuperscript{101}

The judicial deference accorded the Legislative and Executive Branches on military matters is a logical corollary to the government's established policy of maintaining a strong, efficient military. Civilian judges are generally not competent to judge military affairs.\textsuperscript{102} The military functions

\textsuperscript{95} See, e.g., Judge Advocate General's Corps, United States Air Force, Report Presented to the ABA 1 (Feb. 2004).
\textsuperscript{96} See, e.g., Brigadier Gen. Gaskin Decl. 5, FAIR I.
\textsuperscript{97} See, e.g., Major Gen. Romig Decl. 9.
\textsuperscript{98} Bob Jones, 461 U.S. at 593.
\textsuperscript{99} Rostker v. Goldberg, 453 U.S. 57, 64-65 (1981) (holding that the Military Selective Service Act did not violate the Fifth Amendment by requiring the registration of men only); see also id. at 70 (stating that judicial deference to Congress is "at its apogee" when Congress acts under its constitutional authority to raise and support armies).
\textsuperscript{100} Gilligan v. Morgan, 413 U.S. 1, 10 (1973) (holding as non-justiciable a claim seeking judicial review of the training, weaponry and orders of a state's National Guard).
\textsuperscript{101} Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (holding that a Jewish serviceman's First Amendment rights were not violated by an air force regulation that prevented him from wearing a yarmulke).
\textsuperscript{102} See Chappell v. Wallace, 462 U.S. 296, 305 (1983) ("[C]ourts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.").
properly only if it is not hindered by the idle speculations of unelected federal judges who, as a whole, have little expertise in military matters. Hence, in general, there is simply no judicial policy that competes with the public policy advanced by the Legislative and Executive Branches on military matters. The judicial deference extended to the actions of the other branches of government on military affairs practically means that, in all but the most egregious cases of legislative or executive overreaching, the military policy advanced by Congress, the President and those under presidential command is the public policy of this nation on military matters.

FAIR II answered any legitimate question as to whether the Solomon Amendment represented a case of overreaching by Congress in implementing the established public policy of maintaining a strong, effective military. In FAIR II, we held that the Solomon Amendment did not violate the law schools' freedoms of speech or association, because Congress could even require schools to grant equal access to military recruiters.103 The Solomon Amendment imposed the lesser burden of merely withholding federal funding for impeding military recruitment on campus. We upheld the Solomon Amendment in FAIR II after observing the extreme deference due Congress on military matters.104 Thus, at least as of our decision in FAIR II, the conclusion is inescapable that the judicial deference generally due Congress and the Executive Branch on military matters applied as well to the enactment and enforcement of the Solomon Amendment. In other words, since our decision in FAIR II, providing military recruiters equal access to law students on campus has plainly been the public policy of this nation.

C

Application of the Law to the Three Law School Groups

The authorities discussed above provide ample guidance for resolving the current controversies over the federal income tax exemption of the three groups of law schools and universities affiliated with the law schools. Part C.1 discusses the exemption of the schools comprising the Vermont Law School Group and the Yale Law School Group. Part C.2 discusses the exemption of law schools forming the Harvard Law School Group.

103 See FAIR II, 547 U.S. at 70.
104 See id. at 58.
We conclude that each member of the Vermont Law School Group has clearly failed the requirements for maintaining federal income tax exemption as an entity described in Code section 501(c)(3) under the public policy doctrine announced in Bob Jones University v. United States. In Bob Jones, we looked to the actions of all three branches of the federal government to discern the public policy of eradicating racial discrimination in education. Today, we have examined the constitutional duties, official promulgations and settled practices of all three governmental branches to discern the public policy of this nation’s raising and maintaining a strong, efficient military generally, and specifically through military recruiting on school campuses. Given the imperative of raising and maintaining a corps of robust armed forces from our nation’s founding, the public policy of establishing a first-rate military is at least as fundamental as the compelling policy identified in Bob Jones. By denying military recruiters equal access to school-sponsored career services programs, both before and after our decision in FAIR II and the decision of the Second Circuit in Burt v. Gates, the Vermont Law School Group has plainly violated this nation’s fundamental public policy. Consequently, the members of the Vermont Law School Group have forfeited federal income tax exemption under Code section 501(c)(3) for the years in question. Just as the Solomon Amendment denies certain direct federal grants to the members of the Vermont Law School Group, so does Bob Jones deny these schools the federal tax benefits conferred through Code section 501(c)(3).

We further conclude that the same analysis applies to the Yale Law School Group, which denied military recruiters equal access to recruitment programs after our decision in FAIR II. We are unimpressed with Justice Trendspotter’s protest in his dissenting opinion that the injunction issued by the district court in Burt v. Rumsfeld, which remained in force even after our opinion in FAIR II (until the decision of the Second Circuit in Burt v. Gates), should preserve the federal income tax exemption of the Yale Law School Group, or at the very least protect Yale University’s federal income tax exemption. As to the Yale Law School Group generally, Justice Trendspotter asserts that the academic freedom argument of the plaintiffs in Burt v. Rumsfeld had not been judicially rejected until the appellate decision in Burt v. Gates, before which it was not entirely clear that the DOD would

106 See id. at 598.
107 502 F.3d 183 (2d Cir. 2007).
109 See infra Part III.C.
110 See infra note 141.
ever enforce the Solomon Amendment successfully. As to Yale University specifically, Justice Trendspotter argues that, as long as the district court’s injunction remained in force, Yale University was not required to comply with the Solomon Amendment, and therefore could not have violated established public policy by denying military recruiters equal access to recruitment services and facilities.

Justice Trendspotter’s reasoning is flawed. As to his argument applicable to the Yale Law School Group generally, we agree with the United States Court of Appeals for the Second Circuit, which observed in Burt v. Gates that our FAIR II decision left no plausible room for the plaintiffs’ academic freedom argument.\textsuperscript{111} After FAIR II, facilitating unhindered military access to recruitment facilities and services has been the constitutionally sound, established public policy of this nation. FAIR II also stripped Yale University of the legal basis for the shield afforded it by the district court’s injunction in Burt v. Rumsfeld. Certainly, the injunction temporarily prevented the DOD from enforcing the public policy of this nation to the detriment of Yale University. But this fact does not warrant a finding that, because of the injunction, Yale University was complying with established public policy after our decision in FAIR II and before the decision of the Second Circuit in Burt v. Gates. The injunction was based on an opinion that conflicted with the reasoning of FAIR II. The effect of the injunction, later lifted, was simply to prevent the DOD from withholding certain federal funding from Yale University, not to exempt Yale University and the other members of the Yale Law School Group from satisfying the requirements for federal income tax exemption under Code section 501(c)(3). In other words, even while the injunction was in force, the IRS was free to enforce the public policy doctrine of Bob Jones against Yale University, as well as every other institution of higher learning in this country. The injunction simply did not apply to the federal tax benefits conferred through Code section 501(c)(3). Hence, the Yale Law School Group, including Yale University, has forfeited its federal income tax exemption under Code section 501(c)(3) for the years in question.

Justice Trendspotter’s righteously indignant defense of the law school’s anti-discrimination policies\textsuperscript{112} is also misplaced. The public policy at issue in this case is that of raising and maintaining a strong, efficient military. This case is not about the military and congressional policy, enacted as law, which requires the military to deny admission to openly homosexual individuals. The two issues are separate, notwithstanding the dissent’s attempt to link them. The law schools have forfeited their federal income tax exemption because they have deliberately contravened this nation’s established policy of raising and maintaining a strong, efficient corps of armed forces, not because they oppose discrimination based on sexual orientation. Why they have acted contrary to established public policy is irrelevant. In Bob Jones, we did

\textsuperscript{111} See Burt v. Gates, 502 F. 3d 183, 189-92 (2d Cir. 2007).

\textsuperscript{112} See infra Part III.A.
not inquire (nor could we, under settled constitutional law) whether Bob Jones University’s policy against inter-racial dating by students was based on a valid interpretation of Scripture. The school’s motivation for violating established public policy was inapposite. Likewise, we need not scrutinize the motivation of the law schools before us for violating the fundamental public policy of the United States.

Finally, we reject Justice Trendspotter’s argument that application of the public policy doctrine is inappropriate in view of the significant benefits produced by law schools and their affiliated universities. In Bob Jones, we declined to search for the public benefits produced by the schools in question, but instead concluded that “racially discriminatory private schools cannot be deemed to confer a benefit on the public.” The plain import of this language is that some public policy is so fundamental that any violation thereof outweighs any benefit produced by the offending institution as a matter of law. We know of no public policy more fundamental than that of raising and maintaining a strong military. Our nation’s survival depends on this policy. Thus, we decline to explore further Justice’s Trendspotter’s speculations on the benefits produced by the institutions of higher learning in this litigation. They are quite beside the point.

Justice Wisdom’s critique of the public policy doctrine in his lengthy dissent is not completely groundless. It is true that the public policy doctrine features no simple, bright-line rule. The doctrine must be applied with careful judgment. However, even Justice Wisdom’s proposed test that narrows the doctrine’s sweep requires subjective assessments. Indeed, most doctrinal frameworks require judgment, and judgment is precisely what this Court is commissioned to exercise. This Court need not abandon the general doctrinal framework of Bob Jones simply because it requires us to judge. That is our job.

Justice Wisdom’s additional critiques of the public policy doctrine do not persuade the plurality, either. We must tolerate whatever threats the doctrine may pose to the diversity of the charitable sector when the “diverse” actions of charities violate established public policy. Diversity has value, but not in excess of the value of advancing fundamental public policies, such as raising and maintaining a strong, efficient military. Moreover, although the various academic theories explaining income tax preferences for charities are interesting, Justice Wisdom’s review of this Court’s prior decisions endorsing

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113 See United States v. Ballard, 322 U.S. 78, 86 (1944) (“Heresy trials are foreign to our Constitution.”).
114 See infra text accompanying notes 136-37.
115 Bob Jones, 461 U.S. at 596 n. 21.
116 See infra Part IV.
117 See infra Part IV.A.
118 See infra Part IV.D.
119 See infra Parts IV.B&C.
the subsidy theory justify us today in characterizing federal income tax exemption as a tax benefit granted by government. We are not writing on a clean slate. Principles of stare decisis suggest that, at least in applying the public policy doctrine, we should continue to view tax exemption as a form of government subsidy. The Yale Law School Group and the Vermont Law School Group are not entitled to receive this subsidy for the years in issue.

2

Application to the Harvard Law School Group

Unlike the other law schools, the members of the Harvard Law School group granted the military full access to official recruitment services either before or shortly after our decision in FAIR II. We have previously noted that, as of our decision in FAIR II, it has been clear that the judicial deference generally due Congress and the Executive Branch on military matters applies to the enactment and enforcement of the Solomon Amendment.120 Prior to FAIR II, it was unclear whether the Solomon Amendment was a constitutional element of our nation's public policy of raising and maintaining a strong, efficient corps of armed forces. Hence, we cannot say that the members of the Harvard Law School Group violated "established public policy" solely on account of their treatment of military recruiters prior to FAIR II. Accordingly, we hold that the members of the Harvard Law School Group remain exempt from federal income tax as organizations described in Code section 501(c)(3).

II. JUSTICE RIGOR'S OPINION

I join Parts A and B of Chief Justice Orthodoxy's plurality opinion, and concur in the result of Part C.1 of that opinion. However, because I do not agree fully with the rationale of the plurality in Part C.1, and disagree fully with Part C.2, I write separately to explain the proper resolution of these consolidated cases.

I believe that the plurality is afraid to implement fully the Chief Justice's own compelling logic. As Chief Justice Orthodoxy first recognizes, "the military policy advanced by Congress, the President and those under presidential command is the public policy of this nation on military matters."121 The judiciary contributes absolutely nothing to military policy. Our sole role is to determine whether any element of that policy is unconstitutional. We do not have a role in "establishing" military policy, as

120 See supra text accompanying notes 100-101.
121 See supra Part I.B.3.
implied by Chief Justice Orthodoxy in Part C.2, nor do we “sculpt” military policy, as stated by Justice Trendspotter in his dissent.\(^{122}\) Rather, we simply determine, with extreme deference to the Legislative and Executive Branches, whether the military policy established by Congress and the President (and those under the President’s authority) comports with the Constitution. In other words, we do not “establish” any component of military policy; we merely “establish” whether a challenged component of established military policy is constitutional.

As the plurality opinion observes,\(^{123}\) the public policy of raising and maintaining a strong, efficient military was “established” long before FAIR II. Indeed, the public policy of doing so through fostering on-campus military recruiting was also established well before FAIR II.\(^{124}\) In FAIR II, we merely upheld the constitutionality of the Solomon Amendment, itself just one link in the long chain of the public policy of encouraging the assembly of the most impressive fighting forces in the world. Unfortunately, Chief Justice Orthodoxy retreats from the proposition that “the military policy advanced by Congress, the President and those under presidential command is the public policy of this nation on military matters” by misconstruing the import of our decision in FAIR II. Indeed, the Chief Justice goes so far in Part C.2 of the plurality opinion as to conclude that, prior to FAIR II, “whether the Solomon Amendment was a constitutional element of our nation’s public policy” was unclear, and therefore the Harvard Law School Group remains tax-exempt under Code section 501(c)(3). But FAIR II did not “establish” the Solomon Amendment, let alone the general public policy of which it is a part. The Solomon Amendment was part of this nation’s established military policy both before and after FAIR II. To conclude otherwise is to posit that no element of military policy is “established” until this Court rules upon it. Such a position is patently absurd. Was the registration of only men for selective service other than “established” until we upheld it?\(^{125}\) Was the military dress code other than “established” before we upheld it?\(^{126}\) Is the policy of training new soldiers in the rigorous regimen of boot camp other than “established” simply because we have not upheld the constitutionality of requiring repeated push-ups? Of course not!

The role of the judiciary in the context of racial discrimination in education is very different from its role with respect to military affairs. *Bob Jones* properly looked first to the decisions of this Court in discerning the fundamental policy against racial discrimination in this country\(^{127}\) because of

\(^{122}\) See infra Part III.C.

\(^{123}\) See supra Part I.B.1&2.

\(^{124}\) See supra notes 56-67 and accompanying text.


\(^{127}\) See Bob Jones, 461 U.S. at 592-94.
the unique importance of our decision in Brown v. Board of Education. Brown v. Board ended the constitutional blessing of "separate but equal" public facilities for people of color under our holding of Plessy v. Ferguson. In Brown v. Board, we held that segregating students in public education according to race deprived them of the equal protection of the laws guaranteed by the Fourteenth Amendment. Brown v. Board was especially significant because, as we observed in Bob Jones, the "separate but equal" doctrine of Plessy v. Ferguson had imposed "shackles" on this nation, and the "history of efforts to escape" from those shackles testified to this nation's "stress and anguish." Thus, this Court's own opinions had contributed to the sad state of public policies in force in many parts of the country because of its erroneous interpretations of the Constitution. Rectifying that error in Brown v. Board was therefore a critical step in the establishment of a new direction in this nation's policy against racial discrimination in education.

The context of our decision in Fair II is completely unlike that in which we decided Brown v. Board. Fair II is just one among many decisions upholding the acts of Congress or the Executive Branch in formulating and implementing military policy. The public policy of raising and maintaining a strong military is (i) rooted in the literal text of the Constitution; (ii) firmly vested in the Executive and Legislative Branches; and (iii) consistently respected by judicial opinions that defer to the judgment of those charged with implementing military policy. In other words, the judicial role in evaluating the constitutionality of military policy has always been miniscule relative to the judicial role in determining the constitutional limits of state actions that make distinctions among citizens on the basis of race. Thus, whereas it is appropriate to conceptualize the decisions of this Court as important determinants of "public policy" in some contexts (e.g., eradicating racial discrimination in education), it is inappropriate to do so in those contexts – such as the present one involving military policy – in which this Court merely hands down yet another opinion that is consistent with its highly circumscribed role under the constitutional framework and history of constitutional interpretation.

The logic of this analysis compels the conclusion that FAIR II is not of the corpus of this nation's public policy on military matters. Therefore, neither the holding nor the date of our FAIR II decision has any bearing upon the disposition of these consolidated cases. All that is relevant is the military policy established by Congress and implemented by the Executive Branch. Accordingly, each member of every law school group before us has at one

129 163 U.S. 537, 543, 550-51 (1896) (upholding the constitutionality of a state law requiring separate accommodations on railroad cars for white people and people of color).
130 See Brown, 347 U.S. at 494.
131 Bob Jones, 461 U.S. at 595.
time or another deliberately contravened established public policy. Even the law schools in the Harvard Law School Group, each one of which reluctantly excused military recruiters from compliance with the schools’ antidiscrimination policies at some point before or shortly after our decision in FAIR II, violated this nation’s established public policy prior to FAIR II. As such, no law school that is a party to the consolidated cases decided today is entitled to federal income tax exemption under Code section 501(c)(3) for the years in issue.

III. JUSTICE TRENDSPOTTER’S OPINION

I agree with that portion of Chief Justice Orthodoxy’s plurality opinion which concludes that the Harvard Law School Group has not failed the requirements for maintaining federal income tax exemption under Code section 501(c)(3). Hence, I concur in the result of Part C.2 of the plurality opinion, although I do not entirely endorse its reasoning. I disagree with both the result and reasoning of Part C.1 of the plurality opinion, however, for I believe that both of the other law school groups should remain tax-exempt. I write to explain how I believe these cases should be resolved.

A

Why Bob Jones Should Not Apply in General

In general, independent of our decision in FAIR II and the district court’s injunction in Burt v. Rumsfeld, I would hold that none of the law schools in question, including the members of the Vermont Law School Group, have forfeited their exemption from federal income tax under Code section 501(c)(3) on account of having denied military recruiters equal access to official recruitment programs at various times. In Bob Jones, we opined that an “institution’s purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred.”132 We further concluded that racially discriminatory schools “cannot be viewed as conferring a public benefit” under Code section 501(c)(3) and its concept of charity.133 The law schools in question are far removed from the schools at issue in Bob Jones.

Initially, I can hardly imagine a greater, grimmer irony in applying the public policy doctrine of Bob Jones than doing so to the detriment of the law schools before us. Bob Jones struck down the income tax exemption of discriminatory schools; today’s decision strikes down the income tax exemption of schools that have taken a bold stance against discrimination. To apply the public policy doctrine in such a way as to punish law schools that

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132 Id. at 592.
133 Id. at 595–96.
have sought to extend the underlying norm driving our opinion in Bob Jones (eradicating one form of discrimination in education) is to distort the obvious thrust of that opinion. The law schools in question are analogous to those leaders of the civil rights movement who fiercely pressed the federal government to change its tolerance, and even support, of racial discrimination. Eventually, their efforts won the day, for they culminated in the acts of “all three branches of the Federal Government”\textsuperscript{134} that collectively form the public policy against racial discrimination in education. One day, this country will welcome into the military all brave Americans, heterosexual or not, who are willing to sacrifice their lives for their country. And when this policy becomes the “established public policy” of the land, we will look back with chagrin on today’s decision. Today’s decision does not faithfully apply our opinion in Bob Jones. Today’s decision mocks it.

Unlike the schools in Bob Jones, the law schools at issue have not operated in a manner that is “at odds with the common community conscience.”\textsuperscript{135} At the very least, one would search in vain for a “common community conscience” in favor of discrimination on the basis of sexual orientation. Certainly, among the community of law schools, the standard is to renounce discrimination on the basis of sexual orientation—a standard required of all AALS-member schools.\textsuperscript{136} Moreover, as indicated by developments in state law,\textsuperscript{137} we are living in a generation in which legal distinctions based on sexual orientation are increasingly, if gradually, falling into disfavor.\textsuperscript{138} The

\textsuperscript{134} Id. at 598.
\textsuperscript{135} Id. at 592.
\textsuperscript{136} See supra note 1.
\textsuperscript{137} See, e.g., Conn. Gen. Stat. § 46b-38oo (2008) (stating that wherever the terms "spouse," "family," "immediate family," "dependent," "next of kin" or any other term that denotes the spousal relationship are used in the Connecticut general statutes, a party to a civil union is included in such use; stating that the term "marriage" in the Connecticut general statutes generally subsumes a civil union); N.J. Stat. Ann. 26:8A-2 (2008) (stating that all persons in domestic partnerships are entitled to specified rights and benefits extended to married couples under the laws of New Jersey); Goodridge v. Department of Public Health, 798 N.E. 2d 941, 958 (Mass. 2003) (holding that a Massachusetts state law prohibiting gay marriage violated the state constitution).
\textsuperscript{138} Professor Toni Lester describes current and emerging attitudes concerning homosexual unions recognized by law as follows:

With respect to the issue of whether or not gays should be able to marry, a 2005 nationwide poll conducted for the Boston Globe indicated that forty-six percent of the respondents said they were against gay marriage and thirty-seven percent said that they supported it. Forty-six percent of those that the Globe surveyed, however, also indicated that they supported civil unions between gays in which gays could enjoy "some, but not all, of the legal rights of married couples while forty-one percent said that they were opposed" to such unions. This split in American perspectives is tied to age, with Americans thirty-five years old and younger decidedly more pro-gay in their attitudes than their plus sixty-five year old counterparts. It is therefore possible that many of these
law schools in the present litigation limited military recruiters' access to recruitment services and facilities in protest of the congressionally mandated military policy of denying openly homosexual men and women the right to serve in uniform.\footnote{See Forum for Academic and Inst'l Rights, Inc. v. Rumsfeld, 291 F. Supp. 2d 269, 281-82 (D. N.J. 2003), rev'd, 390 F.3d 219 (3d Cir. 2004), rev'd, 547 U.S. 47 (2006).} In taking a stand against this discriminatory policy, the law schools were not offending "the common community conscience."

Further, it is preposterous to conclude that, like the schools in Bob Jones, the law schools before us "cannot be viewed as conferring a public benefit" under Code section 501(c)(3) and its concept of charity.\footnote{Bob Jones, 461 U.S. at 595-96.} The inconvenience the law schools have imposed on military recruiters pales in comparison to the enormous public benefits that these schools—and in many cases their affiliated universities—convey upon society.\footnote{It is telling that, in the FAIR litigation, the government offered no evidence that the failure of law schools to assist military recruiters has adversely impacted military recruitment. See Forum for Academic and Inst'l Rights, Inc. v. Rumsfeld, 390 F.3d 219, 245 (3d Cir. 2004), rev'd, 547 U.S. 47 (2006).} Nobody can seriously maintain, for example, that the inability of military recruiters to coordinate interviews with a handful of Yale 2Ls and 3Ls through Yale's career services office outweighs the public benefit produced by innovative cancer research conducted at the Yale School of Medicine. Nor is it clear that the inconvenience to military recruiters outweighs even the public benefits produced by law schools alone—such as the good produced by equipping students to defend both the large corporation and the death row inmate, to work for a cleaner environment or safer homes for children, to behave ethically and responsibly, or even some day to sit on the bench or serve in Congress. I simply do not believe that denying military recruiters the same access to students that other employers enjoy produces harm comparable to the manifest evil of racial discrimination in education. Therefore, the rationale of Bob Jones does not apply to these consolidated cases.

\section{The Significance of FAIR II}

Even apart from this analysis, I, like the plurality, would readily uphold the tax-exempt status of the members of the Harvard Law School Group. No

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issues will become moot, as younger American voters and policy makers replace their older counterparts over the next few decades. The inevitability of this dynamic is reflected in the Globe study results, which revealed that "whatever their views on gay marriage, most respondents predicted that some or all states would end up legalizing it."\footnote{Toni Lester, Adam and Steve vs. Adam and Eve: Will the New Supreme Court Grant Gays the Right to Marry?, 14 AM. U.J. GENDER SOC. POL'Y & L. 253, 254-55 (2006) (citing Scott S. Greenberger, One Year Later, Nation Divided on Gay Marriage, BOSTON GLOBE, May 15, 2005, at A1).}
public policy is more fundamental in this country than that which is advanced by the Constitution itself. The Constitution reigns supreme over all conflicting laws enacted by Congress,142 and this Court sits as the final arbiter of whether public policies enacted as legislation pass muster under the Constitution.143 Thus, at least when this Court has not yet resolved a serious constitutional question raised by an act of the Legislative or Executive Branch, that act should in no sense constitute "established public policy" within the meaning of our opinion in Bob Jones until this Court has ruled on the question. Only the judiciary, through constitutional interpretation, can "establish" the public policies advanced by Congress and the President, and this Court is the apex of judicial authority.

The constitutionality of the Solomon Amendment was indeed in serious dispute throughout the litigation described in Chief Justice Orthodoxy's plurality opinion.144 Not until our decision in FAIR II did this Court ever consider the constitutionality of the Solomon Amendment. Therefore, prior to our decision in FAIR II, no law school in this country could have violated the public policy doctrine announced in Bob Jones merely by virtue of having denied military recruiters equal access to on-campus services and facilities offered to non-discriminatory employers.

Consequently, the members of the Harvard Law School Group plainly are entitled to remain exempt from federal income taxation under Code section 501(c)(3). Shortly before or after our decision in FAIR II, each member of this group permanently exempted military recruiters from their general non-discrimination policies governing other employers desiring access to on-campus recruitment programs. Because these law schools surely never violated the "established public policy" of this nation on account of their recruitment policies, they have continued to maintain their federal income tax exemption.

C

The Significance of the Injunction in Burt v. Rumsfeld

I would not anchor the application of the public policy doctrine of Bob Jones solely to FAIR II, however. In my opinion, the injunction issued by the district court in Burt v. Rumsfeld, which remained in force well after our opinion in FAIR II, should suffice to preserve the federal income tax exemption of the Yale Law School Group. Each member of this group of law schools complied with the Solomon Amendment shortly after the decision of the Second Circuit in Burt v. Gates. Prior to this decision, no court had yet considered whether our opinion in FAIR II categorically rejected the Burt v.

143 See id. at 173–74, 177–78.
144 See supra text accompanying notes 26–31.
Rumsfeld plaintiffs’ academic freedom argument. Had this argument carried the day, the injunction would have remained in force. I am perplexed that a majority of this Court finds our nation’s public policy on campus recruiting by the military to have been “established” while an injunction preventing the enforcement of that policy was effective, and prior to the time that its possible justification under Supreme Court precedent had been fully evaluated by a single appellate court in this country.

At a minimum, the injunction issued by the district court in Burt v. Rumsfeld should preserve Yale University’s federal income tax exemption. While the district court’s injunction remained in force, Yale University risked no loss of government funding for failing to comply with the Solomon Amendment. And why is this true? The public policy of this nation is to incentivize military recruiting on campus through direct funding, subject to judicial oversight to ensure that Congress has not exceeded its constitutional authority. The judiciary indeed has a role in crafting this public policy, as even the plurality recognizes, and notwithstanding Justice Rigor’s protests to the contrary. The injunction protecting Yale University was actually an element of the nation’s public policy on military recruitment, for it represents the manifestation of the judiciary’s role in shaping public policy in military affairs. As long as Yale University acted within the scope of the protective umbrella of the injunction (as it did), it operated within the scope of this nation’s “public policy” on military recruiting—a policy that encompasses both the legislative and executive agenda of building and maintaining a strong militia, and the judicial duty to ensure that each element of this agenda is constitutional. To conclude, as does the plurality, that Yale University has contravened established public policy is to ignore the important role of the judiciary in sculpting public policy.

IV. JUSTICE WISDOM’S OPINION

Like Justice Trendspotter, I agree with Chief Justice Orthodoxy’s plurality opinion only to the extent of its conclusion that the Harvard Law School Group remains tax-exempt under Code section 501(c)(3). Thus, while I concur in the result of Part C.2 of the plurality opinion, I dissent from its conclusion in Part C.1, and I disagree with the entire analytical approach of the Chief Justice. Further, I believe that Justices Rigor and Trendspotter have unjustifiably assumed the propriety of expansively applying Bob Jones, notwithstanding their contrasting views of how best to resolve these consolidated cases. I write separately to explain why this Court should reform the public policy doctrine so as to limit its scope.

145 The plaintiffs argued that the Solomon Amendment violated their right to academic freedom under the First Amendment, a right that was “not coterminous with the freedom of speech and association” which FAIR II rejected. Burt v. Gates, 502 F.3d 183, 188 (2d Cir. 2007).
A

Why the Bob Jones Framework is Unworkable

Today's opinions by the Chief Justice, Justice Rigor, and Justice Trendspotter naively embrace and perpetuate the analytical framework of our decision in Bob Jones. Although one may identify numerous defects of our reasoning in Bob Jones, these three opinions illustrate the following doctrinal problems with this Court's prior articulation of the public policy doctrine:

1. Whether an organization violates the doctrine depends upon how narrowly or broadly one describes this nation's "public policy";
2. The precise sources of public policy are unclear;
3. The point at which public policy becomes "established" is unknown, perhaps even indeterminable; and

These ambiguities and inherent defects enable, and indeed beg, judges to play games with the public policy doctrine. I begin my dissent by exposing each of these games, and explaining why the public policy doctrine, as articulated in Bob Jones, is unworkable.

1

The Game of Defining Public Policy Strategically

The first game in applying the public policy doctrine is to define or identify "public policy" so as to compel the conclusion that a tax-exempt organization has, or has not, violated it. To illustrate, Chief Justice Orthodoxy identifies the fundamental public policy at issue in this case both generally and specifically. Generally, the Chief Justice speaks of the "time-honored policy of maintaining a strong, efficient corps of armed forces." Specifically, the Chief Justice speaks of the policy of encouraging effective military recruiting via the Solomon Amendment. Presumably, the general policy is articulated as such to lend credence to the conclusion that the relevant policy is "established," or "fundamental," within the meaning of Bob Jones.

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146 For a comprehensive analysis of these defects, see Buckles, supra note 13, at 407–66.
147 Cf. Colombo, supra note 13, at 855 (stating that "the public policy constraint appears to suffer from" the absence of "theoretical grounding and definitional consistency").
148 See supra Part I.B.
149 See id.
150 Bob Jones, 461 U.S. at 586, 591.
151 Id. at 592–94, 596 n. 21, 598.
Surely, the Chief Justice is correct that this general public policy is arguably as thoroughly established as any other in this country. But the plurality would be hard-pressed to conclude that, when a law school merely limits the utilization of its normal recruitment programs by military recruiters, the law school has violated the broad policy of maintaining a strong corps of armed forces. First, I have never heard of a law school that lobbies for a weak military. Moreover, I seriously doubt that any law school fails to admit or expels students who desire to pursue careers in the JAG Corps, or that any law school otherwise overtly discourages service in the armed forces—whether that be legal service, or combat service. Quite to the contrary, law schools often view service in the military as a positive factor in deciding whether to admit an applicant. Bestowing such favor on military service tends to encourage enlistments by those who are contemplating a career in law following active military duty. Finally, one may easily argue that pressuring the military to interview students regardless of sexual orientation is a long-term method of strengthening the armed forces—by encouraging the government to accept the most qualified candidates, not simply the most qualified heterosexual candidates. The nub of the matter is that many factors are relevant in determining whether a broad, general public policy has been violated, and no other Justice writing an opinion in these consolidated cases even pretends to assess these factors. Accordingly, if the "public policy" at issue is the general one identified by the Chief Justice, the plurality's conclusion that two of the law school groups violated this public policy is highly suspect.

If (contrary to my analysis in the preceding paragraph) the Vermont Law School Group and the Yale Law School Group did violate the general policy identified by the plurality, Justice Rigor's opinion that the Harvard Law School Group also failed to satisfy the requirements for federal income tax exemption becomes more plausible. The import of Justice Rigor's opinion, which the plurality ignores, is that the plurality cannot have it both ways. It cannot, on the one hand, rely on the general military policy to make the case for the relevant policy's having been "established," and then, on the other hand, exonerate the Harvard Law School Group on the grounds that the policy of encouraging military recruiting through the Solomon Amendment was not "established" prior to FAIR II. If the policy advanced by the Solomon Amendment is the relevant public policy at issue, then a serious question arises as to whether it is even yet "established" public policy. But if the relevant policy is simply the general one, and if the Vermont Law School Group and the Yale Law School Group violated this general policy by limiting the ability of military recruiters to utilize campus programs, then the Harvard Law School Group also may well have violated this general policy when it refused to grant military recruiters the same access to its official recruitment services enjoyed by other employers.

\footnote{See infra Part IV.A.3.}
In brief, the game of defining the relevant "public policy" enables judges to manipulate outcomes. The propensity for manipulation obviously increases when a judge defines "public policy" inconsistently in the same opinion.

The Game of Invoking Sources of Public Policy

The second game in applying the public policy doctrine is to invoke those sources of "public policy" that suggest a specific resolution of the case. All three opinions illustrate this game. The plurality opinion views the Legislative and the Executive Branches as forming public policy in military matters "in all but the most egregious cases of legislative or executive overreaching."\(^{153}\) Thus, the decisions of this Court, including FAIR II, are part of the nation's public policy on military matters. With this point Justice Trendspotter agrees.\(^{154}\) In contrast, Justice Rigor offers an eloquent argument that the decisions of this Court are not sources of public policy on military matters, but rather constitutional checks on the implementation of military policy by Congress and the Executive Branch.\(^{155}\) Justice Trendspotter adds to the analysis the language of Bob Jones discussing whether an institution has offended "the common community conscience."\(^{156}\) Justice Trendspotter questions whether the laws schools have offended "the common community conscience" in part by examining developments in state laws that expand the rights of homosexuals.\(^{157}\) For Justice Trendspotter, state law is obviously a relevant source of public policy that a court should consider.

These differing approaches demonstrate that the sources which a court considers in discovering established public policy dramatically affect the conclusion as to what "public policy" is. Justice Rigor can conclude that our decision in FAIR II is irrelevant by insisting that judicial opinions are not elements of public policy on military matters. Justice Orthodoxy can resolve this entire litigation on the basis of FAIR II by including it as a source of public policy. Justice Trendspotter can argue for the continued income tax exemption of every single law school in this litigation, in part by invoking trends in state law. One may easily imagine other cases in which the relevant sources of public policy are disputed.\(^{158}\) Our opinion in Bob Jones does little to guide this analysis,\(^{159}\) and today's decision fails to illumine precisely what

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\(^{153}\) Supra Part I.B.3.

\(^{154}\) See supra Parts III.B & C.

\(^{155}\) See supra Part II.

\(^{156}\) Bob Jones, 461 U.S. at 592.

\(^{157}\) See supra note 133 and accompanying text.

\(^{158}\) See Buckles, supra note 13, at 409-32 (discussing the uncertainty surrounding the sources of public policy under Bob Jones).

\(^{159}\) I do observe that Bob Jones emphasized the "national" policy advanced by the "three branches of the Federal Government." See Bob Jones, 461 U.S. at 598. This language
sources do and do not comprise "public policy." The result is that a judge can selectively include and exclude sources from the authorities comprising "public policy" in a way that comports with the disposition that he or she favors. This is not rule by law; it is "I-know-it-when-I-see-it" jurisprudence.

3

The Game of Finding a Public Policy "Established"

The third game in applying the public policy doctrine so as to resolve a case in a certain manner is to choose from a variety of options for deciding whether public policy has been "established." In my judgment, this is perhaps the most gaping hole in the public policy doctrine. All three prior opinions in today's decision illustrate competing approaches.

One metric of "establishment" is the consistency of norms advanced by federal legislation, Executive Branch pronouncements, and judicial opinions interpreting the Constitution as of the years in question. This approach finds some support in Bob Jones, in which we stated that the "Executive, Legislative, and Judicial Branches . . . reach[ed] conclusions that add up to a firm public policy on racial discrimination" and that "the position of all three branches of the Federal Government was unmistakably clear" by 1970. Chief Justice Orthodoxy's opinion, which analyzes the actions of all three branches of the federal government, appears to embrace this metric.

However, it is far from clear that the law schools in this litigation have violated public policy under this metric. By Executive Order, the federal government forbids discrimination on the basis of sexual orientation in hiring civilian federal employees. The policy of this Executive Order obviously contrasts with the congressionally-mandated policy of the military that bars enlisting homosexuals—the same military policy that the law schools protested through their partial defiance of the Solomon Amendment. By violating the conditions for receiving funding under the Solomon Amendment, the law schools before us promoted the federal norm which the Executive Order advances. The inconsistency of federal norms calls into question whether the law schools in these consolidated cases have violated

suggests that the doctrine does not generally take into account state law norms. See Buckles, supra note 13, at 426–32.

160 Others have observed the lack of clarity in the phrase "established public policy." See, e.g., Brennen, supra note 13, at 407–10 ("Although the Court cautiously stated that violation of a given public policy must be 'established,' it set no clear boundaries for the Treasury to determine when a policy other than discrimination against blacks is sufficiently established."); Buckles, supra note 13, at 432–37; Simon, supra note 13, at 166.

161 See Buckles, supra note 13, at 433–35.

162 Bob Jones, 461 U.S. at 598.

163 Id.

164 See supra Parts I.B.1, 2, & 3.

"established" public policy. Obviously, a problem with the "consistency of federal norms" metric is that nobody knows the degree of consistency among the norms advanced by the three branches of the federal government that is necessary to support a finding that the public policy in question is indeed "established."\textsuperscript{166}

Justice Rigor's opinion illustrates another problem with the "consistency of federal norms" metric—it is unclear how it applies to judicial action that merely upholds the actions of the other branches of the federal government. For Justice Rigor, the small role played by the judiciary in the litigation over the Solomon Amendment indicates that our nation's "public policy" is "established" within the meaning of \textit{Bob Jones} merely through the actions of the Legislative and Executive Branches.\textsuperscript{167} But one may just as easily turn Justice's Rigor's analysis on its own head. If Justice Rigor is correct that the judiciary has no role in "establishing" public policy on military matters, than it may very well be true that \textit{public policy on military matters can never be "established" or "fundamental" within the meaning of those terms in Bob Jones.} In \textit{Bob Jones}, we found the public policy against racial discrimination in education to be "fundamental" and "established" precisely because all three branches of the federal government served a major role in advancing that policy. If a public policy exists apart from the significant action of one branch, perhaps the courts should not deem that policy "fundamental" or "established."

A plausible defense of this notion lies in the constitutional posture of the litigation over the Solomon Amendment, and how it differs from the constitutional context of the litigation over discrimination in education. In \textit{Bob Jones}, the judicial opinions that contributed to our nation's policy against racial discrimination in education were those in which we found that the Constitution prohibited discrimination on the basis of race, albeit by state actors. In other words, the nation's policy was grounded in a constitutional mandate. There is no constitutional mandate at issue in this case. In \textit{Fair II}, we held that the Constitution permitted the enactment of the Solomon Amendment, not that the Constitution required it. Nothing in \textit{Fair II} even hints that the Constitution alone requires private law schools to grant military recruiters full access to on-campus recruitment programs. Insofar as no constitutional norm mandates that law schools grant military recruiters the same access enjoyed by other employers, it is far from clear that the specific military policy identified by the plurality opinion is "fundamental" or "established" under \textit{Bob Jones}. Nor will it do to rely upon the general policy identified by Chief Justice Orthodoxy and embraced by Justice Rigor. As discussed above,\textsuperscript{168} although the general policy of raising and maintaining a strong military is indeed grounded in the constitutional text, the evidence

\footnotesize{\textsuperscript{166} See Buckles, \textit{supra} note 13, at 433–35 (analogizing this metric to a game of darts).}

\footnotesize{\textsuperscript{167} See \textit{supra} Part II.}

\footnotesize{\textsuperscript{168} See \textit{supra} Part IV.A.1.}
does not establish that the law schools in this litigation violated this general policy.

A second conceivable metric of whether a public policy is "established" is the consistency of norms advanced by the states and the federal government.\textsuperscript{169} I concede that our opinion in Bob Jones does not bode well for the position that state laws are generally a relevant source of public policy under the public policy doctrine.\textsuperscript{170} However, the plurality opinion does not address this issue directly, and therefore never adequately responds to the analysis of Justice Trendspotter. Justice Trendspotter's opinion demonstrates that conflicting norms are at issue in this litigation. On the one hand, the federal government advances the norm of encouraging on-campus military recruiting through the Solomon Amendment, notwithstanding the federal government's official policy denying openly homosexual men and women the right to serve in the armed forces. On the other hand, in some states, it is illegal to deny homosexuals certain rights and privileges extended to heterosexuals.\textsuperscript{171} Indeed, several states and municipalities prohibit discrimination on the basis of sexual orientation in employment.\textsuperscript{172} The norm of eliminating distinctions on the basis of sexual orientation or sexual conduct, especially in the context of employment, is most certainly in some tension with the norm of encouraging recruiting by an employing entity that maintains distinctions on the basis of sexual orientation or sexual conduct. The plurality quickly dismisses Justice Trendspotter's argument by stating that the only relevant policy at issue is that of encouraging a strong military, and that through on-campus recruiting. However, there are actually conflicting policies in issue. The law schools have advanced one public policy (discouraging discrimination on the basis of sexual orientation in employment) but impeded another (encouraging recruiting efforts by an employing entity that discriminates on the basis of sexual orientation). The competing policies in

\textsuperscript{169} See Buckles, supra note 13, at 435–36 (arguing that state law generally should not serve as authority under the public policy doctrine).

\textsuperscript{170} See supra note 155.

\textsuperscript{171} See supra note 133.

\textsuperscript{172} Professor Martha Minow has observed that "many states and municipalities have enacted laws prohibiting discrimination on the basis of sexual orientation in employment and housing." Martha Minow, Should Religious Groups Be Exempt from Civil Rights Laws?, 48 B.C.L. Rev. 781, 786 (2007) (citing Conn. Gen. Stat. § 46a-81e (2008)). See also Susan J. Becker, Many Are Chilled, But Few Are Frozen: How Transformative Learning in Popular Culture, Christianity, And Science Will Lead to the Eventual Demise of Legally Sanctioned Discrimination against Sexual Minorities in the United States, 14 AM. U.J. GENDER SOC. POLY & L. 177, 184–85 (2006) (stating that the federal government, the District of Columbia and twenty-six states prohibit discrimination on the basis of sexual orientation in public employment, and that seventeen of these states prohibit such discrimination in private employment).
issue suggest that there may be no “fundamental” or “established” public policy that the law schools have violated.173

A third metric of whether a public policy is “established” is its duration.174 In Bob Jones, we described Brown v. Board of Education as the case that “signaled an end” to the “era” of racial segregation in education.175 An “unbroken line of cases” followed this decision.176 We also observed the “myriad Acts of Congress and Executive Orders” that testify to a national policy against racial discrimination in public education “[o]ver the past quarter of a century.”177 In Bob Jones, we also cited the Civil Rights Act of 1964 “and numerous enactments since then.”178 We further noted that the Executive Branch, “over the past three decades”179 and across several presidential administrations, “has consistently placed its support behind eradication of racial discrimination.”180 These statements suggest that a policy becomes “established” over a substantial length of time.

If a public policy becomes “established” only over the course of decades, the plurality has not convinced me that the specific policy that it identifies is the established public policy of this land for purposes of applying Bob Jones. The Solomon Amendment has existed in its current form only since 2004, and was originally enacted only in 1995. The Department of Defense originally opposed the enactment of the Solomon Amendment.181 This Court did not address the constitutionality of the Solomon Amendment until our 2006 decision in FAIR II. Surely the relatively recent dates of these developments should give this Court pause in finding that the public policy identified by the plurality is indeed “established” under our decision in Bob Jones.

Unfortunately, however, the “duration” metric is imprecise. The opinions of the Chief Justice and Justice Trendspotter highlight the difficulties in applying the public policy doctrine under this metric. Justice Orthodoxy finds the specific policy advanced by the Solomon Amendment to have been “established” as of FAIR II, because in that opinion we upheld the constitutionality of the Solomon Amendment in such a way that no real First Amendment questions remained unresolved.182 Under this view, the nation’s

173 Even if one rejects state law as a source of public policy, the same analysis applies with respect to the conflicting federal norms identified previously. See supra text
accompanying note 160.
174 See Buckles, supra note 13, at 436.
175 Bob Jones, 461 U.S. at 593.
176 Id.
177 Id.
178 Id. at 594.
179 Id. at 595.
180 Id. at 594.
182 See supra Part I.B.3.
public policy may be "established" within a relatively brief period, as long as this Court has addressed the public policy at issue. In contrast, Justice Trendspotter argues that the public policy advanced by the Solomon Amendment could not have been "established" prior to Burt v. Gates, because until that decision a district court's injunction prohibiting enforcement of the Solomon Amendment remained in force, and the possibility existed that a court would hold that FAIR II had left one stone of the First Amendment objection to the Solomon Amendment unturned. 183 Some support for Justice Trendspotter's view is our observation in Bob Jones that the position of the judiciary on racial discrimination in education, like that of the other two branches of government, was "unmistakably clear." 184 In contrast, at least until Burt v. Gates, the position of the judiciary on the constitutionality of the Solomon Amendment arguably was not "unmistakably clear." Indeed, following Justice Trendspotter's logic, one could even maintain that the judicial position on the Solomon Amendment is still not "unmistakably clear," insofar as Burt v. Gates is the lone case to consider whether a constitutional objection to the Solomon Amendment may survive FAIR II. Under this view, one must await the passage of time before concluding that the specific policy identified by the plurality opinion is "established" within the meaning of Bob Jones.

How long, then, is long enough to satisfy the "duration" metric? Nobody knows - except the judge applying it.

4

The Game of Finding a "Violation" of Public Policy

Our decision in Bob Jones encourages a fourth game - selecting one, or instead many, activities of an entity and then determining whether the selected activity or activities constitute a "violation" of public policy. 185 The plurality opinion of the Chief Justice and the opinion of Justice Rigor both illustrate how to play this game. Both opinions find violations of this nation's general public policy of encouraging a strong, efficient military and/or the specific policy of encouraging on-campus military recruiting through the Solomon Amendment. Both opinions reason that certain law schools violated the nation's public policy because those schools did not, at one time or another, provide military recruiters exactly the same recruitment services that non-discriminatory employers received. Granted, these schools acted in such a way as to trigger the withholding of federal funds under the Solomon Amendment. But this does not necessarily mean that the schools "violated"

183 See supra Part III.C.
184 Bob Jones, 461 U.S. at 598.
185 Cf. Galvin & Devins, supra note 13, at 1376 ("The Court in Bob Jones University avoided the question of whether an organization providing a public benefit and satisfying the other requirements of section 501(c)(3) could nevertheless be denied tax-exempt status if certain of its activities violated a law or public policy . . . .").
the public policy of the Solomon Amendment – unless, of course, to deviate even the slightest degree from the behavior that the Solomon Amendment targets is to “violate” this nation’s public policy.

We should approach this litigation with common sense. The basic policy of the Solomon Amendment is to encourage on-campus recruiting by the military. The vast majority of the law schools in this litigation complied with this policy to a degree. Many, like Harvard, allowed military recruiters to meet with interested students in university facilities other than those used by civilian employers. Some, like Yale, even permitted interviews on the law school’s physical campus. Many schools retained recruiting literature provided by the military for students, and some allowed groups not affiliated formally with the law school (i.e., veteran groups of alumnatae) to oversee the recruiting of students by the military. To maintain that these schools have “violated” this nation’s public policy notwithstanding their partial support of military recruiting is to elevate form over substance. Literal noncompliance with the terms of a funding statute is not necessarily equivalent to “violation” of the public policy that supports the statute. Indeed, the law schools and their affiliated universities have actually supported the general public policy identified by the plurality opinion—raising and maintaining a strong, efficient corps of armed forces—through their partial facilitation of on-campus military recruitment. Even the DOD has essentially acknowledged this fact.

Only by focusing exclusively on the Vermont Law School Group’s and the Yale Law School Group’s failure to satisfy the literal requirements for maintaining federal funding under the Solomon Amendment can five justices of this Court conclude that these schools have “violated” this nation’s established public policy. These justices never attempt to examine the full scope of the law schools’ behavior towards military recruiters in the context of the broad policy underlying the Solomon Amendment. Sadly, our opinion in Bob Jones permits this chicanery.

B

How the Public Policy Doctrine Stifles Diversity

Today’s decision deeply troubles me for another reason. The nonprofit, charitable sector is extremely diverse, and this diversity is beneficial. By

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187 See id.
188 For example, Boston College retained military recruiting literature in its library. See id.
190 See FAIR I, 390 F.3d at 227.
191 See, e.g., Elizabeth T. Boris, The Nonprofit Sector in the 1990s, in PHILANTHROPY AND THE NONPROFIT SECTOR IN A CHANGING AMERICA 9 (Charles T. Clotfelter and Thomas Ehrlich
denying federal income tax exemption to organizations that supposedly violate some permutation of a judicially discerned public policy, the public policy doctrine pressures private charitable entities to conform to a notion of the public good that is not sufficiently compelling to be mandatory. This pressure is far more objectionable than that exerted by statutes which explicitly condition government funding on engaging in activities that Congress could constitutionally require. The uncertainties surrounding the public policy doctrine prod a charitable entity to conform its policies and practices to those that appear to be most plainly consistent with those that advance "public policy" in analogous contexts. The tax system thereby encourages the charitable sector to mimic other actors upon whom the government has smiled, notwithstanding that no law requires the conduct, and even if the charity receives no federal funding encouraged by legislation. Under such a system, one would expect few, if any, deviations from the governmentally envisioned norm.

Certain expansive language in Bob Jones amplifies this threat to diversity. As Justice Trendspotter observed, Bob Jones states that a charitable organization's "purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." To link tax exemption to "the common community conscience" needlessly invites all kinds of attacks on the diversity of charitable entities. As Justice Powell wrote in his concurrence in Bob Jones, this and other language in Bob Jones reflects a troubling "element of conformity" that "ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints." Examining an organization's operations against the backdrop of the "common community conscience" compromises the ability of the...
nonprofit sector to "limit[] the influence of governmental orthodoxy on important areas of community life" and tends to slight our nation's "tradition of pluralism."\footnote{Id. at 609-10.}

One must understand that the threat to the diversity of the charitable sector posed by the public policy doctrine is a threat to each and every organization, not just those commonly thought to advance "liberal" causes, or those commonly thought to advance "conservative" values. Today, the opinions of Chief Justice Orthodoxy and Justice Rigor may indeed adversely affect institutions of higher education that many perceive to be fairly "liberal." Make no mistake, however; tomorrow's decisions applying the public policy doctrine may strike at the heart of organizations perceived to be "conservative" at some level. For example, let us assume that Congress eventually enacts legislation that denies federal funding to organizations that discriminate on the basis of sexual orientation and conduct in employment. Let us further assume that a local church teaches that homosexual conduct is contrary to Scripture and the will of God. Consistent with its theological views, the church requires every member of its ministerial staff to live in accordance with church teaching on sexual behavior. Accordingly, the church has a policy prohibiting the employment of any self-described homosexual who does not strictly practice celibacy. Does today's decision, coupled with our decision in \textit{Bob Jones}, mean that the church will have violated "public policy" by acting on the basis of its constitutionally protected convictions? Do we really believe that when the "common community conscience" eventually differs so greatly from the religious convictions of this not-so-hypothetical church that the church must forfeit its federal income tax exemption? If the Court taxes Yale University today, what precludes it from taxing the thousands of Main Street Churches of Smallville tomorrow?

Today's decision is no victory for any charitable organization, whatever its political, theological, economic, philosophical, or social perspective may be. Today's decision advances the misconceived notion of \textit{Bob Jones} that federal tax law should conform private charities to non-mandatory public norms—norms that often follow the variable path of a pendulum, and that frequently change when challenged by the very sector that the public policy doctrine tends to stifle.

\section*{C}

\textit{The Debatable Subsidy Premise of Bob Jones}

The plurality opinion predictably relies on language in \textit{Bob Jones} which characterizes federal income tax exemption under Code section 501(c)(3) as a grant of tax benefits.\footnote{See supra Part I.B.} The plurality's approach comports with how \textit{Bob
Jones conceptualizes exemptions (such as the charity income tax exemption under Code section 501(c)(3)) and deductions (such as the charitable contributions deduction under Code section 170) as bestowing vicarious "donor" status on all taxpayers—even those who do not directly fund charities.\textsuperscript{200} This description of the effect of Code sections 170 and 501(c)(3) is just another expression of the subsidy theory—the theory that justifies income tax "preferences" for charity as a form of government aid. The notion is that when government exempts charitable entities from income tax, or grants a charitable contributions deduction to donors, government is "subsidizing" charity by conferring an economic benefit similar to that which would exist if government taxed charities and charitable donors fully and then transferred a portion of tax receipts directly to charities.\textsuperscript{201}

Our decision in Bob Jones is just one in which this Court has affirmed the subsidy theory. In Regan v. Taxation with Representation,\textsuperscript{202} we upheld the constitutionality of Code section 501(c)(3)'s requirement that "no substantial part" of the activities of a tax-exempt charity consist of "carrying on propaganda, or otherwise attempting, to influence legislation."\textsuperscript{203} In so holding, we reasoned that both income tax exemption and the ability to receive tax-deductible contributions are forms of a governmental subsidy.\textsuperscript{204} Similarly, in Texas Monthly v. Bullock,\textsuperscript{205} in which this Court found a state sales tax exemption for sales of Bibles to violate the Establishment Clause, we stated that "[e]very tax exemption constitutes a subsidy."\textsuperscript{206}

However, these cases do not present an unqualified endorsement of the subsidy theory by this Court. In Walz v. Tax Commission of New York,\textsuperscript{207} we held that exempting property owned by religious organizations (among other types of nonprofit organizations) from property tax did not violate the Establishment Clause.\textsuperscript{208} In so holding, we conceded that tax exemption

\textsuperscript{200} See Bob Jones, 461 U.S. at 591.


\textsuperscript{202} See id. at 544–51.

\textsuperscript{203} See id.

\textsuperscript{204} 489 U.S. 1 (1988).

\textsuperscript{205} Id. at 14.

\textsuperscript{206} 397 U.S. 664 (1970).

\textsuperscript{207} See id. at 679–80.
conferred an "indirect economic benefit" on religious entities, but we contrasted this benefit and direct subsidies:

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll."\(^{210}\)

Walz cautions against an unqualified reliance upon the subsidy theory for all purposes of law. In Walz, we declined to reconstruct a legislative body’s determination to abstain from taxing as the universal, functional equivalent of (i) a decision to tax, followed by (ii) a direct governmental grant of tax receipts. To state the matter in the language of today’s controversy, under our rationale in Walz, to grant federal income tax exemption to the three groups of law schools is not tantamount to granting federal money to entities that fail to comply fully with the Solomon Amendment.

One may justify Walz’s refusal to equate tax exemption with a direct governmental grant on numerous grounds.\(^{211}\) For present purposes, we should at least consider whether Walz is correct because the subsidy theory erroneously conceptualizes the normative tax base. Several alternatives to the subsidy theory may justify Code sections 170 and 501(c)(3).\(^{212}\) Under these theories, no “subsidy” flows to tax-exempt entities by virtue of their exempt status, because the income in question is not properly included in the tax base in the first instance.\(^{213}\) The most recognized scholarly work of this ilk

\(^{209}\) Id. at 674.

\(^{210}\) Id. at 675.

\(^{211}\) See, e.g., Johnny Rex Buckles, Does the Constitutional Norm of Separation of Church and State Justify the Denial of Tax Exemption to Churches that Engage in Partisan Political Speech?, 84 IND. L.J. (forthcoming 2009).


\(^{213}\) One alternative to the subsidy theory, which the late Professor Boris Bittker and George Rahdert posited, is that the concept of taxable income is mostly relevant only to profit-seeking taxpayers, with little value in describing the financial activity of nonprofits. Nonprofits often do not earn “receipts” from commercial sales, and they often do not incur “expenses” in order to earn profits. Bittker & Rahdert, supra note, at 307–14. In response to Bittker and Rahdert, Professor Henry Hansmann argues that (i)
is Professor William Andrews' defense of the charitable contributions deduction.\textsuperscript{214} Professor Andrews argues that a properly conceived "income" tax reaches a taxpayer's "aggregate personal consumption and accumulation of real goods and services and claims thereto."\textsuperscript{215} For Andrews, if income means consumption plus accumulation, a deduction is proper whenever a taxpayer pays for items that are not personal consumption or accumulation.\textsuperscript{216} The former consists of the consumption "by one household" of "divisible, private goods and services" which "precludes enjoyment by others."\textsuperscript{217} A taxpayer's consumption of "collective goods whose enjoyment is nonexclusive" does not count as taxable consumption, nor do the "nonmaterial satisfactions" that flow from a taxpayer's donations.\textsuperscript{218} Because charitable contributions do not constitute personal consumption under these principles, they should be deductible in computing income.\textsuperscript{219}

Another noteworthy theory advanced by a leading scholar in the field of nonprofit organizations law and policy is Professor Evelyn Brody's "sovereignty" theory.\textsuperscript{220} Professor Brody explains that charities historically have been regarded as limited co-sovereigns with the state.\textsuperscript{221} Because they are qualified co-sovereigns,\textsuperscript{222} the government has generally viewed many nonprofits receive no or little income from donations, but rely instead on commercial sales; (ii) even donations to organizations providing services to third parties can be characterized as "purchases" (that generate revenues to the nonprofit donees) of such services on behalf of the ultimate beneficiaries; and (iii) the costs of providing services would then be deductible "business-related" expenses of the charities. See Hansmann, supra note, at 58–62. Although Bittker's income measurement theory may try to prove too much, it explains why the subsidy theory is not essential to explain the income tax exemption of at least some charities.

\textsuperscript{214} See William D. Andrews, Personal Deductions in an Ideal Income Tax, 86 HARV. L. REV. 309, 312 (1972) (stating that the ideal income tax must be "refined to reflect the intrinsic objectives of the tax," and that it is "imperative to consider carefully whether a provision can be defended by reference to intrinsic matters of tax policy before evaluating it as if it were something else."). For critiques of Professor Andrews' theory, see, e.g., Colombo, supra note 197, at 679–82; Mark G. Kelman, Personal Deductions Revisited: Why They Fit Poorly in an "Ideal" Income Tax and Why They Fit Worse in a Far from Ideal World, 31 STAN. L. REV. 831, 831–58 (1979); Stanley A. Koppelman, Personal Deductions under an Ideal Income Tax, 43 TAX L. REV. 679, 688–90 (1988).

\textsuperscript{215} Andrews, supra note, at 313.

\textsuperscript{216} See id. at 325.

\textsuperscript{217} See id. at 314–15.

\textsuperscript{218} See id. at 315.

\textsuperscript{219} Professor Andrews justifies a deduction for contributions to non-redistributive charitable donees because they generally produce public goods that contributors do not enjoy in proportion to their contributions. See id. at 358–59.


\textsuperscript{221} See id. at 585–96.

\textsuperscript{222} Charities are "qualified" co-sovereigns because the state views charities with suspicion, and refuses to recognize their co-sovereignty for all purposes of law. See id. at 629.
charitable entities as improper objects of taxation. From this perspective, when government "exempts" the income of charitable, religious, and educational institutions from taxation, it does so not to subsidize charity, but to recognize charity's sovereign prerogative to operate free from governmental intrusion.

A third alternative to the subsidy theory, which extends the thesis of Professor William Andrews, is the "community income theory" of the charitable contributions deduction and the charity income tax exemption.223 Recently articulated by Professor Johnny Rex Buckles, this theory argues that current law properly excludes from the federal individual income tax base numerous forms of benefits enjoyed by taxpayers because they are more appropriately attributed not to individual community members,224 but to the community itself.225 Further, the theory reasons that the community itself is conceivable best viewed as properly exempt from taxation because government exists primarily to promote the welfare of the community (rather than that of only selected individuals).226 The exemption of charities derives from their relationship to the community, a relationship that did not escape our attention in Bob Jones.227 Functioning properly, charities exist to benefit the community228 (i.e., to generate community income), and therefore may be viewed as community agents. Federal income tax law attributes to a principal whatever income an agent earns for the principal.229 Hence, if the law properly exempts the principal (i.e., the community) from taxation, so should the law exempt from taxation the income earned by the community's agent (i.e., a charity). A similar analysis may justify the charitable contributions deduction.230

These academic theories provide us with viable alternatives to the subsidy theory as we seek to understand the charity income tax exemption and the charitable contributions deduction.231 Rather than imparting a

224 See id. at 970–74.
225 See id. at 973.
226 See id.
227 See id. at 977–79.
228 See Bob Jones, 461 U.S. at 591 ("Charitable exemptions are justified on the basis that the exempt entity confers a public benefit . . . ."); id. at 590 n. 16 ("The common law requirement of public benefit is universally recognized by commentators on the law of trusts."); Treas. Reg. § 1.501(c)(3)-1(d)(1)(ii) ("An organization is not organized or operated exclusively for one or more [exempt purposes] unless it serves a public rather than a private interest.").
230 See Buckles, supra note 219, at 979–84.
231 As Professor Buckles has observed, see Buckles, supra note 219, at 978, the community income theory of the charity income tax exemption and the charitable contributions deduction complements Professor Evelyn Brody's sovereignty perspective by partially explaining why charities have been regarded as co-sovereigns. Both government and
governmental subsidy, Code sections 170 and 501(c)(3) may simply preclude the federal government from taxing that which theoretically should not be taxed—community income. Once we question the subsidy theory of the charity income tax provisions, we begin to understand why an expansive application of the public policy doctrine is unjustified. The opinions of Chief Justice Orthodoxy and Justice Rigor support the taxation of income received by many law schools notwithstanding that their income is excludible from the normative tax base. In other words, under today’s decision, the government is not simply denying “public money” to these law schools on account of their treatment of military recruiters. Rather, the government is imposing a draconian monetary penalty on these law schools. The government essentially has fined law schools for refusing to conform to what the government believes is the proper way to relate to military recruiters—notwithstanding the complete absence of any explicit congressional authorization to do so.

This analysis further illuminates the flaws in the public policy doctrine in general, and today’s decision in particular. In general, the public policy doctrine does not merely encourage conformity; it penalizes non-conformity. This conclusion highlights the threat that the doctrine presents to the salutary pluralism of the charitable sector. Moreover, this analysis demonstrates that today’s decision is in tension with our reasoning in FAIR II. In FAIR II, we observed that, by enacting the Solomon Amendment, Congress “chose to secure campus access for military recruiters indirectly” through the funding mechanism, rather than through “a mandate on universities.” If FAIR II correctly describes the intent of Congress—to implement its goals for encouraging military recruiting through its Spending Clause power—today’s decision extends the law beyond congressional intent. Under the various alternative theories of the charity income tax exemptions described above, today’s decision does not merely indirectly deny federal funding to the law schools before us. Today’s decision fines them for their conduct. The effect is to move the law governing military recruitment from an incentive system based on funding to a mandate enforced through fines. This result is inconsistent with our understanding of congressional intent in FAIR II.

D

Reforming the Public Policy Doctrine

For all of these reasons, I reject any broad application of the public policy doctrine to the three groups of law schools. However, I believe that some version of the doctrine is worth salvaging. Rather than repudiating the

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232 FAIR II, 547 U.S. at 58.
233 Id. at 59.

charities exist for the community. If community income is not properly included in the tax base, the income of charities and government should be excluded from the tax base as long as they represent and embody the community.
doctrine entirely, I would favor limiting it. In my judgment, when an entity is not engaging in an activity prohibited by state or federal law, a court should deny the entity's exemption from federal income tax only when the following three conditions exist: (1) the entity's activities in question are not constitutionally protected from outright governmental prohibition; (2) the entity's activities in question are carried on within a sphere of operations that serve as a substitute for state-operated or state-funded programs; and (3) the entity's continued engagement in the activities in question (considered not in isolation, but in the context of all activities of tax-exempt entities that may follow suit) significantly undermines the ability of government to advance its compelling interests through such state-operated or state-funded programs.\textsuperscript{234}

This highly limited application of the public policy doctrine is justified under both the community income theory of the charity income tax exemption and the perspective that charities are qualified co-sovereigns with the state. It is reasonable to view a charitable entity as having acted outside the scope of its agency for the community when the charity significantly hinders the other major community agent—government—from performing a vital role. If a charitable entity consistently acts in a manner that is plainly inconsistent with the scope of its agency, the rationale for exempting its income from taxation under the community income theory dissipates. Similarly, insofar as charities are merely qualified co-sovereigns with the state under Professor Brody's sovereignty theory, one may view the suggested test as setting forth some reasonable criteria for determining the limits of charitable sovereignty. Thus, our opinion in Bob Jones reached the correct result, insofar as schools that maintain racially discriminatory policies as to students fail the proposed test.\textsuperscript{235}

The proposed test suggests a different disposition of the consolidated cases that we decide today. After FAIR II, the first factor of this proposed test plainly applies to all law schools. The second factor also applies, for there are many public and publicly-funded universities with law schools offering an academic experience similar to that which the private law schools in this litigation provide. But the third factor does not apply to any law school in this litigation, for the following reasons. First, the vast majority of law schools now exempt military recruiters from their general anti-discrimination policies, and they will likely continue to do so in order to ensure that funding is not jeopardized under the Solomon Amendment. Thus, even if "equal access" to recruitment programs by military recruiters is as important as the

\textsuperscript{234} This test is one of the proposals of Professor Johnny Rex Buckles for reforming the public policy doctrine. See Buckles, supra note 13, at 474.

military believes it to be, the widespread compliance with the Solomon Amendment renders the maverick actions of the Vermont Law School Group inconsequential. Secondly, the period during which the other two law school groups did not comply fully with the Solomon Amendment was brief. I have no reason to find that their actions have damaged our armed forces on the record before us. Finally, even while the members of the Yale Law School Group and the Harvard Law School Group were not complying with the Solomon Amendment, many of these schools facilitated on-campus military recruitment to some degree. Thus, I doubt that the activities of the Yale Law School Group and the Harvard Law School Group "significantly undermined" the ability of the federal government to advance its compelling interest in raising and maintaining a strong military. Accordingly, on the basis of the available record, I conclude that no law school (and no university affiliated with a law school) before us has violated the requirements for exemption under Code section 501(c)(3).

CONCLUSION

Whether law schools forfeit federal income tax exemption by denying military recruiters complete access to career services recruitment programs depends upon whether and how the public policy doctrine of Bob Jones is applied. This article's hypothetical case of Yale University v. Commissioner presents three fictitious judicial opinions that apply the doctrine differently, and a fourth opinion which both exposes the elusiveness of the doctrine and suggests a revised framework for limiting the doctrine. Two judicial opinions illustrate how a court could uphold the revocation of several law schools' federal income tax exemption, and two others demonstrate how a court could find in favor of every law school's continued tax exemption.

This article does not purport to resolve the tension among the competing visions of Chief Justice Orthodoxy, Justice Rigor, and Justice Trendspotter for applying the public policy doctrine in the hypothetical litigation. That this article refrains from urging a specific application of the doctrine in the hypothetical case is deliberate. Justice Wisdom's opinion thoroughly explains why the doctrinal framework of Bob Jones is unworkable, dangerous, and based on a contestable rationale for the charity income tax exemption. Although Bob Jones reached the proper result, to strive to apply the public policy doctrine in the language of Bob Jones is to embrace and perpetuate its flawed doctrinal framework. Consequently, attempting to demonstrate the "correct" application of the public policy doctrine of Bob Jones is not simply futile; it is misguided and counter-productive.

The prospect of a judicial finding that numerous law schools have forfeited exemption from federal income tax on account of their policies governing military recruiters will likely strike many as a harrowing thought. The hazards of expansively applying the public policy doctrine to other organizations described in Code section 501(c)(3) are equally disconcerting.
The vibrancy and character of the charitable sector are at stake. The public policy doctrine, as announced in Bob Jones, is unacceptable. Courts should follow the path of Justice Wisdom and carefully limit the scope of this pernicious doctrine.