

Saint Louis University Public Law Review

Volume 24
Number 1 *Out of the Closet and Into the Light:
The Legal Issues of Sexual Orientation (Volume
XXIV, No. 1)*

Article 11

2005

Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights

Elvia R. Arriola
Northern Illinois University

Follow this and additional works at: <https://scholarship.law.slu.edu/plr>



Part of the [Law Commons](#)

Recommended Citation

Arriola, Elvia R. (2005) "Democracy and Dissent: Challenging the Solomon Amendment as a Cultural Threat to Academic Freedom and Civil Rights," *Saint Louis University Public Law Review*: Vol. 24 : No. 1 , Article 11.

Available at: <https://scholarship.law.slu.edu/plr/vol24/iss1/11>

This Sexual Orientation: Law and Policy is brought to you for free and open access by Scholarship Commons. It has been accepted for inclusion in Saint Louis University Public Law Review by an authorized editor of Scholarship Commons. For more information, please contact [Susie Lee](#).

**DEMOCRACY AND DISSENT: CHALLENGING THE SOLOMON
AMENDMENT AS A CULTURAL THREAT TO ACADEMIC
FREEDOM AND CIVIL RIGHTS**

ELVIA R. ARRIOLA*

Some day people will look back on the period we are living in and see that the meaning of American liberty was tested. Every question presented since September 11, 2001¹ about the government's right to restrict civil rights in regard to speech, dissent and association with different religions, races, cultures, or ideas challenges the belief that American citizenship is the symbol of freedom and equal opportunity. The heart of that concept has rested in the notion that we as citizens of a republic democracy define the limits of government power and authority through representative politics and by vigilance over the basic rights of freedom of speech, thought, belief, practice, and association.²

A primary contemporary context for the battle over who gets to define the limits of our freedom to speak or dissent over public policy has surfaced in the national debate over the war against Saddam Hussein in Iraq. Protests abound for varied reasons. Older citizens recall the horrors of a nation in an unjust war in Vietnam. A younger generation is divided by ideology as well as by class because it is those who cannot afford training or higher education on their own who will most likely end up as combat soldiers and risk injury or death. Social

* Associate Professor of Law, Northern Illinois University College of Law. The thoughts in this essay were delivered as either speeches or panel commentaries at various campuses in the fall of 2003 or spring of 2004 on the impact of the enforcement of the Solomon Amendment on law school recruiting and gay/lesbian rights. I am grateful to the organizers of relevant events at Harvard Law School, University of Connecticut Rainbow Center, University of Connecticut School of Law, and Southern Methodist University School of Law. My service as a member of the Board of Governors of the Society of American Law Teachers, as well as 2003 Chair-Elect and 2004 Chair of the AALS Section on Sexual Orientation and Gender Identity Issues, has given me access to insights, materials, and discussions surrounding the enforcement of the Solomon Amendment and efforts to oppose generally the military's Don't Ask Don't Tell policy. I am indebted to the College of Law for the summer research grant that allowed me to work on this essay and to Cathy Chapaty and my colleague Mark Cordes for remarks on the initial draft.

1. Throughout this essay I will refer to the events of September 11, 2001, when the World Trade Center was destroyed by the attacks of extremist Muslims, as "September 11."

2. See ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (Phillips Bradley ed., Alfred A. Knopf, Inc. 1953) (1835).

critics decry the unfair impact in the death toll on America's working class.³ However, as the war in Iraq continues, regardless of the official withdrawal of command troops and the installment of an Iraqi governing council,⁴ it becomes more difficult to justify the breadth of government policy aimed at supporting the United States' global stance on democracy. One of those policies is highly relevant to the recruiting needs of the military, which have been in dire straits.⁵ More specifically, the military's Don't Ask Don't Tell ("DADT") policy,⁶ which prohibits the enrollment of openly gay men and women, is under scrutiny, especially since there is now a shortage of volunteer troops.⁷

The DADT policy, which emerged during the Clinton era, has been criticized for failing to prevent the arbitrary discharge of individuals perceived as being gay or lesbian.⁸ The history of litigation seeking dignity and protection of individuals ousted because of their sexual orientation abounds with efforts to establish protections as a matter of privacy, equality, and freedom of expression.⁹ But as civil rights lawyer and scholar Nan Hunter has argued, it is in the First Amendment, the hallmark of American democracy and freedom, that gay civil rights law has found its strongest support.¹⁰ Though the Supreme Court's recent decision in *Lawrence v. Texas*¹¹ recognized the humanity of same-sex intimacy and relationships, the ruling is vulnerable to strident judicial criticism and politics.¹² Hailed by conservatives as the door opener to gay marriage, the ruling has unleashed screams of indignation by arch social and moral conservatives.¹³ The promise of gay marriage has polarized citizens. Even President George W. Bush has been unable to detach

3. See, e.g., FAHRENHEIT 9/11 (Lions Gate Films 2004).

4. Edmund Sanders, *Interim Iraqi Government Is Installed*, L.A. TIMES, June 2, 2004, at A1.

5. See, e.g., Esther Schrader, *Guard to Miss Its Recruiting Targets*, L.A. TIMES, Sept. 24, 2004, at A18.

6. See 10 U.S.C.A § 654 (1994).

7. See, e.g., Mike Mount, *Rarely Used Reservists May Go to Iraq*, CNN ONLINE NEWS (June 24, 2004), at <http://www.cnn.com/2004/US/06/24/pentagon.troops/>; Robert Kagan & William Kristol, *Too Few Troops*, WKLY. STANDARD, Apr. 26, 2004, at 7.

8. See JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 1-2 (1999).

9. A tight history of the theoretical developments is in chapter seven of PATRICIA A. CAIN, RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT 185-202 (2000).

10. Nan D. Hunter, *Identity, Speech and Equality*, in SEX WARS: SEXUAL DISSENT AND POLITICAL CULTURE 123 (1995).

11. 539 U.S. 558 (2003).

12. See, e.g., *id.* at 586 (Scalia, J., dissenting).

13. See Gerard V. Bradley, *Stand and Fight: Don't Take Gay Marriage Lying Down*, NAT'L REV., July 28, 2003, at 26; Frank J. Murray, *Sodomy Law Struck Down: Decision Sparks Marriage Worries*, WASH. TIMES, June 27, 2003, at A1.

himself from the Christianizing momentum of his re-election campaign,¹⁴ giving just enough support to the anti-gay marriage advocates to appease the potential voter. But, in the background of the highly publicized battle over the exclusivity of marriage rights to heterosexuals, a quieter political battle between the federal government and academic institutions is being waged on the surface over expressive rights and with a subtext of the citizenship rights of lesbians, gays, bisexuals, or transgenders (“LGBTs”).

The battle over the enforcement of the Solomon Amendment,¹⁵ an obscure statute which requires all institutions of higher education that receive federal funding to provide military recruiters with equal access to student names during the hiring season,¹⁶ may appear somewhat removed from explicit homophobic policy. It might also seem tangential to the broader questions of free speech or liberty associated with, for example, rallies to oppose U.S. involvement in the wars in Afghanistan or Iraq. In fact, the current battle over the Department of Defense’s (“DOD”) ability to strong-arm universities into allowing military recruiters on campus under threat of losing federal funding, regardless of the fact that military jobs are not available to openly gay students, is a symbolic tug of war over how narrowly or broadly one may understand the meaning of being an American citizen who is entitled to equal protection under the law.

In this essay I will argue that the meaning of American democracy and liberty is being tested and that civil liberties are threatened by a range of government policies justified by the war against terrorism. I will argue that the culture of fear that supports these policies threatens the right of dissent under the First Amendment.¹⁷ The struggle between universities and the DOD over compliance with the Solomon Amendment may be about policy and politics. The recently filed lawsuit by law professors who oppose the use of their university’s career services by employers who blatantly discriminate may resolve the questions under obscure and elusive notions of constitutional doctrine.¹⁸ I, however, am interested in viewing the larger context of the battle

14. Ken Fireman, *On the Conservative Side Vying for Catholic Vote, Bush Reiterates Views and Promises More Funding for Religious Charities*, *NEWSDAY* (N.Y.), Aug. 4, 2004, at A18. This essay went to press after the 2004 election which re-elected President Bush and approved of his campaign’s moral agenda that included strong opposition to same-sex marriage.

15. The Solomon Amendment is actually a series of amendments to various budget appropriations acts by Congress. I will be referring to the body of legislation in the singular as the “Solomon Amendment.” The complete legislative history is available at www.solomonresponse.org.

16. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-10 (1999).

17. To compare this to the Vietnam War era, see *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969).

18. *Forum for Acad. & Inst’l Rights v. Rumsfeld*, 291 F.Supp. 2d 269 (D. N.J. 2003).

for academic freedom rights and the right to oppose discrimination against all social minorities. The more the government tries to justify a range of policies as anti-terrorist, including the threat to cut off funds to universities that merely question the interpretation of Solomon, the greater the battle over the meaning of democracy, equality, and citizenship. The posture of government officials responding to dissent with powerful threats is an unfortunate reminder of another time when the culture of fear of communism was used to engage in widespread government abuse and scapegoating that were damaging to the constitutional freedoms of liberty and free expression.

In Part I, I will describe the principles at stake in the lawsuit filed by the Forum for Academic and Institutional Rights (“FAIR”) and the Society of American Law Teachers (“SALT”), among others, against Secretary of Defense Donald Rumsfeld and the DOD to oppose the Draconian enforcement of the Solomon Amendment against some universities and law schools.¹⁹ In Part II, I will provide some historical context for the emergence of this battle over ideas between universities and the military and suggest that it is the culture of fear that has produced the uncompromising attitude toward law schools that dare to question whether and how they must comply with the requirement of equal access by military recruiters. In this section, I briefly summarize the recent historical context for Solomon as exemplary of past periods of repression. I draw upon the anti-Communist hysteria of the 1950s to encourage watchfulness that we not let history repeat itself by allowing the government to use the rhetoric of anti-terrorism to destroy the basis of American democracy in the freedom to engage in diverse viewpoints, ideas and dissent. In Part III, I will conclude with some observations of the discourse on freedom that has surrounded the movement to oppose gay marriage and its ironic relationship to the broader discourse on war and global democracy.

I. THE LAWSUIT TO DEFEND ACADEMIC FREEDOM

One of my formative experiences as a young college student involved campus protests against the war in Vietnam. If I had been born male, I might have been drafted because I was the oldest of my siblings. Fortunately, none of my brothers faced the draft because the U.S. pulled out as they came of age. Although my family did not suffer losses, we knew families that did. My best friend lost her husband. They had married only days before he reported for

19. As this essay went to press the Third Circuit reversed the lower court’s denial of a preliminary injunction stating that the plaintiffs had presented a likelihood of success on the merits of their complaint that current enforcement of the Solomon Amendment violates their rights of expression under the First Amendment. *See FAIR v. Rumsfeld*, 390 F.3d 219 (3d Cir. 2004).

duty. Though her brother returned from the Vietnam War physically unharmed, he was afflicted with a severe case of postwar traumatic stress disorder and addicted to drugs and alcohol. When I think about the days of protesting on campus, I recall a wonderful feeling of freedom and liberty to speak out. I may have been too young to completely understand what I was marching against, but because I had just returned to the U.S. from a restrictive education in a Mexican-Catholic boarding school, I understood that my engagement in campus radicalism was a mark of American-style freedom. I fondly remember the day a group of students camped out in the University President's office, demanding that our college allow the black Communist activist Angela Davis to speak at a rally, or the day that my philosophy professor, exercising his academic freedom, conducted a teach-in on the war and ethics and taught me my first political slogan – Freedom: Hard Work. I came to understand from this activism that universities have always played an important role in the theory and practice of American-style democracy.

In fact, the proposition of the university as a symbol of academic freedom was made in the Supreme Court's recent decision on the constitutionality of affirmative action.²⁰ There, Justice O'Connor eloquently spoke of the presumed right of universities to make policies that further educational diversity, including policies that consider race as a plus factor in the admissions process.²¹ Academic freedom in this context becomes a lofty goal for the betterment of society as a whole. If students are exposed to people from different cultures, races, ethnicities, religions, and sexualities, it is argued they will better learn how to function in a multicultural and diverse world.²²

Certainly this theory that education is enhanced and improved by diversity of people and ideas argues for the public university's role in promoting the free expression of ideas. Because universities and colleges are the training ground for citizenship and leadership roles, their officials should promote academic freedom through tolerance, free speech, and non-discrimination policies. That is presumably the heart of the dispute in a lawsuit filed last summer by a few professors, several law schools, and SALT, charging that the DOD has denied their rights of academic freedom through threats of losing federal research funds for their opposition to the DADT policy.²³

20. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

21. *Id.* at 336-37.

22. *Id.* at 308 (citing *Sweatt v. Painter*, 339 U.S. 629, 634 (1950)). In a different forthcoming essay I have examined the question of how the rhetoric of diversity is used to marshal support for economic activities that actually hinder a functional, multicultural society and global economy. See Elvia R. Arriola, *Coffeehouse Musings on Post-Grutter Ironies: Promoting Diversity to Enhance Globalization*, 7 SCHOLAR (forthcoming Dec. 2004).

23. *Forum for Acad. & Inst'l Rights*, 291 F.Supp. 2d at 274-75; see also Second Amended Complaint at 15, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)). All complaints,

What is at stake in this lawsuit? Is this just politics over how the federal government decides to spend taxpayers' money? Or is it about the DOD using its power to force universities to give up their deeply held beliefs about the equality of all their students regardless of social background or identity? The Solomon Amendment has had many versions. The earliest, promoted by Representative Gerald Solomon in 1994, attempted to penalize DOD funded institutions if they barred military recruiters from campus.²⁴ Later versions sought to penalize more institutions, threatening the loss of Department of Education funds if military recruiters were barred or if an institution prevented the establishment of an ROTC unit.²⁵ A 1999 amendment created an exemption for student financial aid funding.²⁶ The most Draconian effect emerged from the 1999 DOD Appropriations Act that consolidated all earlier versions of Solomon into one piece of legislation that denied funding to an entire university even if only a "sub-element" (e.g., a law school) of the institution denied access to the military.²⁷

Of course, these provisions apply regardless of any other state law or policy that may require a university not to discriminate on the basis of sexual orientation.²⁸ Certainly since the civil rights movement and the enactment of the Civil Rights Act of 1964,²⁹ universities have had to enforce policies of nondiscrimination under either Title VI³⁰ or Title IX,³¹ which prohibit discrimination in federally funded programs on the basis of race or sex, respectively. Consequently, when law schools began to abide with the membership policy of the Association of American Law Schools ("AALS") requiring nondiscrimination on the basis of sexual orientation,³² they did so as part of their commitment to the idea of equality and their right to shape

briefs, memorandums and declarations filed in *Forum for Acad. & Inst'l Rights v. Rumsfeld* are available at <http://www.law.georgetown.edu/solomon>.

24. Sean Roaney, Comment, *Discrimination Under Law: The Solomon Amendment*, 6 HUM. RTS. BRIEF 21, 29 (1999); National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-10 (1999).

25. Roaney, *supra* note 24, at 21.

26. Department of Defense Appropriations Act, 2000, Pub. L. No. 106-79, § 8120, 113 Stat. 1212, 1260 (1999).

27. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 609-10 (1999).

28. States with sexual orientation anti-discrimination laws include California, Indiana and Minnesota. LAMBDA LEGAL, STATES WHICH PROHIBIT SEXUAL ORIENTATION EMPLOYMENT DISCRIMINATION, at <http://www.lambdalegal.org/cgi-bin/iowa/states/antidiscrimi-map> (last visited Nov. 15, 2004).

29. The Civil Rights Act of 1964, 42 U.S.C. §§ 2000 et seq. (2004).

30. *Id.* § 2000d.

31. 20 U.S.C. §§ 1681-1688 (2004).

32. The AALS policy of nondiscrimination is available in ASSOCIATION OF AMERICAN LAW SCHOOLS, 2004 HANDBOOK § 6-3, at 33-34 (2004).

educational policy or to provide non-discriminatory learning environments.³³ In fact, plaintiffs have alleged in the FAIR/SALT complaint that law schools cannot possibly teach students about advocacy for equality and respect for the law if they witness fellow students being treated as second-class citizens.³⁴ If nondiscrimination epitomizes freedom in a democratic society, then surely institutions of higher education must be allowed to shape educational policy, including contact with students by employers, that is consistent with the core belief in equality.³⁵ The trial evidence in the case against the DOD may reveal that for most of the history of exclusion of military recruiters from some law schools, recruiting goals have not suffered.³⁶ Instead, the change in attitude by DOD officials suggests a policy shift motivated by the ideological tensions surrounding the nation's reaction to the September 11 attack, the war against terrorism, and the war in Iraq. In the next section I will explain why I believe DOD officials suddenly became more defensive and aggressive in their interpretation of Solomon to the point that one university was threatened with the loss of more than \$300 million in research funds because its law school refused military recruiters equal access to the career services office.³⁷

II. PRESIDENT CLINTON'S FAILED EFFORT TO MAKE THE MILITARY GAY FRIENDLY AND THE EMERGENCE OF SOLOMON

The case against the DOD will question whether the military actually suffered at the hands of the few schools that barred recruiters from their campuses.³⁸ Most schools accommodated the military by setting up alternate ways for them to meet students.³⁹ The plaintiffs have not alleged harm to the military's ability to recruit.⁴⁰ Yet any evidence of an amicable accommodation under Solomon came to a halt after September 11, 2001, when Islamic extremist terrorists destroyed the World Trade Center. In the period since, federal authorities have threatened to cut off funds when a law school merely asked whether a changed policy for recruiters was in compliance with the

33. *See id.* § 6-1, at 33.

34. *See* Second Amended Complaint at 16-17, *Forum for Acad. & Inst'l Rights v. Rumsfeld* (No. 03 Civ. 4433 (JCL)).

35. *See id.* at 16.

36. *See id.* at 20.

37. Open Letter from Matthew Spitzer, Dean, USC Law School, to the USC Law School Community (Aug. 19, 2002) (*available at* <http://www.law.georgetown.edu/solomon/USCdean.pdf>).

38. *See* Second Amended Complaint at 21, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)).

39. *Id.* at 19-20.

40. *Id.* at 21.

Solomon Amendment.⁴¹ As further alleged by the plaintiffs, the military began not only to demand access, but also to demand active participation in military recruiting.⁴² If the military complained about a law school's prior conduct to bar recruiters, the institution was not offered guidance to determine whether its new recruitment policies were in compliance with Solomon.⁴³ These exchanges reached a culminating point in the fall of 2003, when virtually every law school in the nation had permanently suspended any nondiscrimination policy to the military under threat of loss of federal funds to the entire university.⁴⁴ To accommodate these developments, the AALS had to suspend its requirement of compliance with the non-discrimination policy.⁴⁵

What might explain the government's posturing on a homophobic policy and opposition to a policy grounded on nothing but the power to exclude the undesirable gay or lesbian soldier? Where does Solomon fit in the larger picture of developing attitudes for and against the inclusion of the sexual minority to the halls of actual citizenship? Two stories help me answer these questions. One begins about ten years ago with the widely publicized events in early 1993: President Bill Clinton sought to repeat a glorious moment in history when Harry S. Truman desegregated the U.S. Armed Forces on the

41. Complaint at 14, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); see also Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 35, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Reply Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 7, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)).

42. Complaint at 14, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 17-18, 20, 25, 29, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Reply Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 1, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Second Amended Complaint at 20, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Reply Brief for Appellants at 2, 5-6, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)).

43. Complaint at 14, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 14-15, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Reply Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 1, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Second Amended Complaint at 20, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)).

44. Complaint at 14-15, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Reply Declarations in Support of Plaintiffs' Motion for Preliminary Injunction at 2, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); Second Amended Complaint at 21, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)).

45. Memorandum 98-23 on Amelioration from Bari Burke, AALS Deputy Director, to Deans of Member and Fee-Paid Schools (May 14, 1998) (available at <http://www.aals.org/98-23.html>).

basis of race in 1948.⁴⁶ As Commander in Chief, Clinton wanted to issue an executive order to the military to eliminate the rule that homosexuality is “incompatible with military service.”⁴⁷ Would Clinton have had more luck with the Joint Chiefs of Staff had he served in the military? In any event, the Joint Chiefs balked at his suggestion and demanded public hearings on the issue, hearings which turned into a circus and debacle for the pro-gay President.⁴⁸ Whether intended or not, the offensive to prevent the open inclusion of gays and lesbians as citizen-soldiers appeared strong, defensive, and organized. Where one might have envisioned obeisance to the Commander in Chief,⁴⁹ instead one heard the stinging testimony of individuals such as African-American General Colin Powell, who demolished the idea that the issue of racism in the military resembled that of homosexuality.⁵⁰

American literature on sexuality and the military is replete with analyses of how the Clinton administration failed to force the nation’s largest employer to accept changing attitudes toward homosexuality or homosexuals.⁵¹ As noted by critics of the DADT policy, the previous rule, which made homosexuality “incompatible with military service,” was replaced with one that might be as bad or worse, producing an incredibly high number of discharges, contributing

46. See Exec. Order No. 9981, 13 Fed. Reg. 4313 (July 26, 1948), available at <http://www.trumanlibrary.org>.

47. FACTS ON FILE NEWS SERVICES, GAYS IN THE MILITARY: ISSUES & CONTROVERSIES ON FILE (Mar. 6, 1998), at <http://www.facts.com/icof/i00062.htm>; NAT’L DEF. RESEARCH INST., SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT, at xix, available at <http://www.rand.org/publications/MR/MR323/mr323.execsum.pdf> (last visited Oct. 10, 2004).

32 C.F.R. § 41, app. A, pt. 1, para H (1992) (eff. Jan. 16, 1981, original version at 46 Fed. Reg. 9577 (1981), subsequent version at 46 Fed. Reg. 31,667 (1981)) is the directive enacted in the Reagan era which required each applicant for the military to reveal his/her sexual preference; under this policy homosexuals could be discharged without any display of disruptive sexual conduct, if “by their statements, [they] demonstrate a propensity to engage in homosexual conduct.”

48. FACTS ON FILE NEWS SERVICES, *supra* note 47.

49. U.S. CONST. art II, § 2.

50. Gary L. Lehring, *Constructing the ‘Other’ Soldier: Gay Identity’s Military Threat*, in GAY RIGHTS, MILITARY WRONGS: POLITICAL PERSPECTIVES ON LESBIANS AND GAYS IN THE MILITARY 269, 279 (Craig A. Rimmerman ed., 1996) (anthology assessing impact of the DADT policy).

51. The most comprehensive collection of articles and books on sexuality and the military, including studies focusing exclusively on DADT, is held at the Center for the Study of Sexual Minorities in the Military. See CENTER FOR THE STUDY OF SEXUAL MINORITIES IN THE MILITARY, at <http://www.gaymilitary.ucsb.edu/ResearchResources/ResearchLibrary.htm> (last visited Nov. 15, 2004).

to a form of sexual harassment against women called “lesbian baiting,”⁵² and sending the clear message that the queer soldier is not welcome. I need not detail other problems aptly covered in the literature about DADT. It discriminates, authorizes abuse of discretion, turns speech into conduct, and turns participating in a gay pride march or attending a gay wedding (if it is your own) into “propensity” to engage in homosexuality.⁵³

The result of that public battle over gays in the military concerning a policy that makes little improvement to the prior incompatibility rule sheds light on the highly righteous behavior by those who have the authority to cut off federal funds under Solomon. Since the first battle over gay rights in the military was lost, on what grounds would those who oppose DADT stand? Even if a bare majority of Supreme Court justices now think that gay sex is protected by the fundamental right to privacy,⁵⁴ its vulnerability to doctrinal criticism or the hysterical belief that it requires gay marriage at best puts the pro-gay advocate on a higher moral, not necessarily legal, ground. But another very troubling aspect of the military’s demand for equal access pursuant to Solomon is that it communicates an arrogance and power that dangerously reminds one of another period of governmental abuse and repression known as McCarthyism.

My second story begins just a few months ago when I had my students view a portion of the recently released documentary *Brother Outsider*,⁵⁵ based on the life of Bayard Rustin, the intelligent and energetic peace activist and executive producer of the 1963 March on Washington for Jobs and Freedom. Rustin is the man who taught Dr. Martin Luther King, Jr. how to engage in nonviolent mass activism.⁵⁶ Rustin’s name, however, disappeared from the

52. Michelle M. Benecke & Kirstin S. Dodge, *Lesbian Baiting as Sexual Harassment: Women in the Military*, in *HOMOPHOBIA: HOW WE ALL PAY THE PRICE* 167, 168 (Warren J. Blumenfeld ed., 1992).

53. Under the DADT, enacted in 1992-93, the U.S. government will separate service members from the military under three conditions: a) engagement in or solicitation to engage in a homosexual act or acts; b) stating that one is a homosexual bisexual, or words to that effect; or c) marriage or attempted marriage to a person of the same biological sex. See National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571(a), 107 Stat. 1670 (1993); 10 U.S.C. § 654 (b)(1)-(3) (1994). See generally Christin M. Damiano, *Lesbian Baiting in the Military: Institutionalized Sexual Harassment Under “Don’t Ask, Don’t Tell, Don’t Pursue,”* 7 AM. U. J. GENDER SOC. POL’Y & L. 499 (1999) (discussing challenges that female homosexual service members face in the military).

54. See *Lawrence v. Texas*, 539 U.S. 558 (2003).

55. *BROTHER OUTSIDER: THE LIFE OF BAYARD RUSTIN* (Corporation for Public Broadcasting 2003). All facts in the subsequent two paragraphs not otherwise footnoted are taken from this documentary.

56. JOHN D’EMILIO, *LOST PROPHET: THE LIFE AND TIMES OF BAYARD RUSTIN* 230 (2003); see also TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1998).

history of the civil rights movement for one primary reason: he was not only black and an extremely effective teacher of civil obedience tactics, but also openly gay at a time when there was no such thing as a gay rights movement.

Part of Rustin's story centers on the way the government used two facts from his personal history against him to exploit the pressure being put on society and government to respond to the movement for racial justice. During his college days he had been briefly involved with the Communist Party. He also was once arrested on a lewdness and indecency charge for engaging in public sex with two men in a parked car. The charge appeared on the police record as "sex perversion," which was how homosexuality was referred to then.

Recalling the 1950s and the period following *Brown v. Board of Education*, which ordered desegregation of public schools,⁵⁷ it was an era fraught with political activism and social resistance. FBI surveillance and exploitation of negative information about racial injustice movement leaders were common strategies to discredit activists or deflect attention.⁵⁸ The 1950s presented a mixed bag of events: a powerful Supreme Court ruling on the issue of institutional racism,⁵⁹ massive and violent resistance to school integration as exemplified in the Little Rock, Arkansas incident,⁶⁰ a year-long bus boycott in Montgomery, Alabama that exposed the second-class treatment of blacks throughout the South,⁶¹ the Cold War and the public's association of communist fears with nuclear attack by Soviet Russia,⁶² all along with a growing postwar social awareness of the existence of homosexuality.⁶³ The 1950s is also a decade that we associate with the images of powerful Senator Joe McCarthy using congressional resources to hunt down alleged communists, of outspoken individuals appearing before the House Un-American Activities Committee, and of innocent individuals and ideas being

57. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495-96 (1954).

58. See Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA Patriot Act in the Context of Cointelpro and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1090-91 (2002).

59. *Brown*, 347 U.S. 483.

60. This event is best captured in the documentary EYES ON THE PRIZE (PBS Home Video 1995).

61. JO ANN GIBSON ROBINSON, *THE MONTGOMERY BUS BOYCOTT AND THE WOMEN WHO STARTED IT* 8 (David J. Garrow ed., 1987).

62. See JOHN D'EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA* 288-95 (Rick Hermann ed., 1988) (summarizing the panic of the era and the harassment and firings of homosexuals in government that ensued from the panic over their potential link to Communist attack).

63. See JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970*, at 24 (1983).

labeled as threats to national security.⁶⁴ The wreckage on people's lives and careers wrought by McCarthyism has filled history texts.⁶⁵ People charged with communist association risked losing their careers and families. History also reveals the widespread discrimination suffered by closeted homosexuals in government who lost their jobs out of fear they would be blackmailed by communist spies.⁶⁶ Their ouster was justified by the stereotypes that saw homosexuals as criminals, deviants, or, at best, mentally ill.⁶⁷ Thus, linking sex perversion to national security was common. The government's spying on citizens and the pressuring of the civil rights movement's leaders toward a more conformist line was not unusual.⁶⁸

Some would say that a range of contemporary government behavior post September 11, 2001 echoes too much of the McCarthy era and its culture of fear. People such as Bayard Rustin were primary targets for government abuse because they exposed the injustices of continued racial segregation. They were not afraid to take action to fight the establishment. With black and white comrades, friends, and lovers, Rustin engaged in repeated nonviolent freedom rides and sit-ins long before Rosa Parks boarded the seats reserved for whites in Montgomery, Alabama.⁶⁹ What is remarkable about Rustin's story is that he was not ashamed about his homosexuality at a time when the closet was the norm, at a time when prevailing attitudes had young people doped, drugged, or electro-shocked by their parents into attempted heterosexual recovery. By the late 1950s, with the nation's pulse on racial justice, opponents in power could manipulate the public's fears and prejudices over communism and sexual perversion to undermine the movement's effectiveness. And so they did with Rustin because he was a major movement leader. That single public indecency charge kept him out of the limelight of the civil rights movement.

As I sat in the darkened classroom watching the Rustin documentary, which flashed to actual police records for his antiwar protests—the result of FBI surveillance of his personal and public life during civil rights rallies—I began to think about the lessons we learn in times of political crisis. Since September 11, the sense of freedom in America has dramatically changed. The culture of fear is prominent and is being used to shape a new understanding of

64. See JOHN G. ADAMS, *WITHOUT PRECEDENT: THE STORY OF THE DEATH OF MCCARTHYISM* (1983); FRED J. COOK, *THE NIGHTMARE DECADE: THE LIFE AND TIMES OF SENATOR JOE MCCARTHY* (1971); ROBERTA STRAUSS FEUERLICHT, *JOE MCCARTHY AND MCCARTHYISM: THE HATE THAT HAUNTS AMERICA* (Marie Shaw ed., 1972); TED MORGAN, *REDS: MCCARTHYISM IN TWENTIETH-CENTURY AMERICA* (2003).

65. See *supra* note 64.

66. D'EMILIO & FREEDMAN, *supra* note 62.

67. *Id.*

68. Saito, *supra* note 58.

69. See BROTHER OUTSIDER, *supra* note 55.

democracy, freedom, and equality that may dangerously confine it to very narrow categories of people. Therefore, I view the Solomon Amendment under a set of historical lenses: one directed to the past, to another period of political repression in this country; and one to the future, where we might ask: How will this period of struggle for activism on behalf of rights for sex and gender minorities be viewed by history? How will history judge the environment in which the culture of fear shaped public policy, law, and government conduct, testing the promise of liberty in our Constitution?

The lawsuit against the DOD would have us look at the enforcement of Solomon from the standpoint of the academic freedom of universities to shape educational policy, and of the right to voice dissent over blatantly discriminatory regulations. But there may be more at stake than the right of a few law schools and universities to express their public opposition to the military's anti-gay policies. It might also be a very public battle over the meaning we give to basic American and constitutional values such as equality and nondiscrimination or free speech and dissent. Accordingly, ten years ago, when the military won the battle over the open inclusion of gays in the military, the stage might have been set for future bigger battles. It is in this light that I place the emergence of Solomon. Not just as the "message over the wall of the ivory tower," the intent reflected in the bill submitted by pro-military/anti-gay legislators,⁷⁰ but also as the beginning of a movement to restrict the meaning of equality for all time. Therefore, I argue that once the DADT policy became effective, a much larger battle was initiated by social conservatives to ensure not only that heterosexism in the military would not be threatened, but also that any meaning of equal treatment under the law or free expression of one's self and identity would be limited to the narrowest of interpretations – certainly not one granting the right to announce one's membership as LGBT in the heterosexist and masculinist environment of military employment.

The crux of my argument is as follows: the Solomon Amendment, proposed in 1994, the first year following national discourse over DADT, simply re-enacted the homophobic actions of those who made it impossible for Clinton to have it his way, that a person's sexual orientation and gay or lesbian identity would become irrelevant to one's loyalty and competence to serve in the military. Second, as enforced by the DOD, the Solomon Amendment turns the principle of equality inside out – placing the demand for equal access and treatment that belongs to citizens in the hands of a branch of the government. In other words, the message to law schools and universities is that the principle of nondiscrimination as applied to sexual orientation is meaningless to the military. Third, the Solomon Amendment, and continuing efforts to strengthen

70. Complaint at 4, *Forum for Acad. & Inst'l Rights v. Rumsfeld* (No. 03 Civ. 4433 (JCL)).

its enforcement,⁷¹ is a symbolic instrument of war in a public battle between the ivory tower and the military over the meaning of equality and the right to express opposition to inequality. Like a sword, it has cut deeply into the struggle to preserve freedom and equality and created divisive camps between those who believe in an inclusive and broad meaning of equality that would treat one's sexuality as any one of the litany of traits deemed irrelevant to a person's moral worth, versus a narrowly defined and applied principle of nondiscrimination. A narrow definition of equality ignores prejudice and bigotry as the basis for equal treatment, and demands that people seeking protection prove that they are in the small category of citizens who merit equal protection under the law.

This is the line of thinking that I believe would support the intimations by Gen. Colin Powell in the 1993 hearings that race and sexuality are not the same issue for the military. Supported by an abundance of gay stereotypes, Powell could marshal an overwhelming heterosexual consensus against the discovery of who among every rank in the military was gay, lesbian or bisexual, and against the certain discomfort of having to confront those stereotyped beliefs about others or their own sexuality. I offer only one view of the emergence of the Solomon Amendment and ongoing revisions of it that may help us see it as an opposition force under a pro-gay administration that undoubtedly supported the universities' efforts to expose the wrongness of DADT by barring military recruiters or sending them off to far corners of the campus to conduct job interviews.

Viewed in this light, the statutory developments around the restriction of funds throughout the 1990s take on the character of a publicly-waged battle over policies that define values such as equality and citizenship. Though liberals and conservatives fought over counter-amendments, such as the Frank-Campbell provision exempting student loan monies from the potential loss under Solomon,⁷² another battle began to brew on law school campuses over the military's exclusionary policy. By the 1997 amendments, which targeted the loss to any "sub element" of an institution,⁷³ only a handful of schools, obviously those that could afford it, prioritized principle over money and

71. See SOLOMON AMENDMENT RESPONSE AND PROTEST, PENDING SOLOMON LEGISLATION, at <http://www.law.georgetown.edu/solomon/PendingLegislation.html> (last visited Nov. 15, 2004).

72. Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 9, 10 & n.2, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)); News Release From Barney Frank, Frank-Campbell Bill Would Remove Restrictions on Federal Student Aid Programs, at <http://www.house.gov/frank/solomon99.html> (last visited Nov. 15, 2004).

73. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 549, 113 Stat. 512, 610 (1999); see also Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 10, *Forum for Acad. & Inst'l Rights* (No. 03 Civ. 4433 (JCL)).

continued to bar military recruiters.⁷⁴ However, after the Frank-Campbell amendment, the DOD hurriedly passed interim regulations, making it clear that all “institutions of higher education” might be threatened with a loss of funds if they were perceived as hostile to the armed forces.⁷⁵ Around this time, gay and lesbian students on several law school campuses, with the assistance and support of SALT, began to organize in defense of their right to equal citizenship and to be protected by a university policy of nondiscrimination.⁷⁶ When it was clear that law schools would have to cave into letting military recruiters on campus for fear of losing a penny for noncompliance with Solomon, SALT produced pamphlets that educated law deans and career services staff on the importance of “amelioration” activities to show their opposition to the discriminatory DADT policy.⁷⁷

So we come to the current environment defined by a culture of fear, where Solomon has by now become a symbolic weapon in the war over the righteousness of an arm of the government to exempt itself from the mandates to treat all citizens equally. In the post September 11 environment, Solomon has become one of two powerful pieces of legislation (the other being the Patriot Act⁷⁸) that can be used to discipline the unruly masses: those individuals and institutions who openly protest the loss of civil liberties in the war against terrorism. The targets can then be those who advocate peace, or who protest against unfair detentions of non-white Muslims,⁷⁹ or who oppose the social constructions of hysteria and fear to deflect attention away from the domestic forms of terrorism including lost jobs; monitoring of e-mails and library use;⁸⁰ airport searches; and arrests of “unpatriotic” protestors of wars waged in the name of global democracy.⁸¹

74. See Memorandum of Law in Support of Plaintiff’s Motion for Preliminary Injunction at 9, *Forum for Acad. & Inst’l Rights* (No. 03 Civ. 4433 (JCL)).

75. Defense Federal Acquisition Regulation Supplement; Institutions of Higher Education, 65 Fed. Reg. 2056 (Jan. 13, 2000) (to be codified at 48 C.F.R. pts. 209, 243, 252).

76. SOCIETY OF AMERICAN LAW TEACHERS, RESISTING SOLOMON’S DIVIDES: A PARTIAL LISTING OF RESOURCES, at <http://www.saltlaw.org> (last visited Oct. 10, 2004).

77. *Id.*

78. Uniting and Strengthening America by Providing Appropriate Tools Required to Interrupt and Obstruct Terrorism (USA Patriot Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) [hereinafter Patriot Act]; see also John W. Whitehead & Steven H. Aden, *Forfeiting “Enduring Freedom” for “Homeland Security”*: A Constitutional Analysis of the USA Patriot Act and the Justice Department’s Anti-Terrorism Initiatives, 51 AM. U. L. REV. 1081 (2002).

79. See Jeff Eckhoff & Mark Siebert, *Undercover Agents Monitored D.M. Peace Meeting*, DES MOINES REG., Feb. 28, 2004, at 1A; Randy Essex, Commentary, *Why This Story Mattered*, DES MOINES REG., Feb. 22, 2004, at 1O.

80. See Patriot Act § 215.

81. For an analysis of the dilemma between U.S. expansionism and civil libertarian opposition, see Max Fraad Wolff & Richard D. Wolff, *The Empire Strikes Iraq*, FOREIGN POLICY

From a historical standpoint, the current environment in which the DOD is positioned to defend all aspects of military policy gives no leeway whatsoever, even to law schools that have sought to comply with Solomon and with the principle of equality by offering recruiters limited but still effective forms of access. Instead, enforcement of the policy is more rigid than ever.⁸² The mere hint of failure to accommodate like other employers engenders a charge of mistreatment and threats of a university-wide loss of millions of dollars in research funds.⁸³ This collective attitude is what begins to resemble the 1950s when the fear of Communism, like today's antiterrorism "orange alerts" issued by the Department of Homeland Security,⁸⁴ justified losses of civil liberties, repression of free speech and scapegoating of anyone associated with socialism, pinkos, or perverts who threatened the nation's security.

This is the context in which we must evaluate the need for and the method of enforcing the Solomon Amendment. The military now demands equal access,⁸⁵ pretending that its recruiters are like citizens who stand similarly situated to other citizens when in fact they are representatives of the government who are required by the Constitution to guarantee equality of treatment.⁸⁶ Opposition to the policy, amid a war against terrorism and a culture of fear, deems the protestor to be unpatriotic.⁸⁷ In the few months after September 11, I, as a member of the SALT Board of Governors, and many of my colleagues, received numerous e-mails from mostly male citizens who were furious upon reading SALT's pamphlet on Solomon and equated it with taking an "un-American" anti-war stance on the attack on the people of Afghanistan. Our individual and collective response was that it is entirely American and patriotic to dissent, to voice opposition to war, and to take a stand for peace. I never received a response to my return e-mails, making me believe that my viewpoint fell on deaf ears, as have the communications earnestly made by university officials in seeking compliance with Solomon

FORUM, Apr. 19, 2003, at http://www.foreignpolicyforum.com/view_article.php?aid=73 (last visited Oct. 11, 2004).

82. See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, § 514, 110 Stat. 3009-233 (1996).

83. *Id.*

84. CHRISTOPHER COX & JIM TURNER, U.S. GEN. ACCOUNTING OFFICE, HOMELAND SECURITY ADVISORY SYSTEM: PRELIMINARY OBSERVATIONS REGARDING THREAT LEVEL INCREASES FROM YELLOW TO ORANGE (Feb. 26, 2004), available at <http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=gao&docid=f:d04453r.pdf>.

85. See Memorandum of Law in Support of Plaintiffs' Motion for Preliminary Injunction at 34, *Forum for Acad. & Inst'l Rights v. Rumsfeld* (No. 03 Civ. 4433 (JCL)).

86. U.S. CONST. amend. XIV, § 1.

87. Kate Holloway, *What Is Patriotism? That's Open to Debate*, STAR PRESS (Muncie, Ind.), July 4, 2004, at 1A.

while also adhering to the principle of nondiscrimination on behalf of their gay and lesbian students.

What is revealed in the position of the DOD is a different motive for such rigid interpretations of Solomon. The issue is no longer about access or about filling posts in the JAG corps. Universities and the military are engaged in a symbolic war, one where the fear and hatred of homosexuals codified in DADT is being shoved down the metaphorical throat of university officials so as to stifle dissent. This then is about repression of the voice of opposition over the right of government to arrogate unto itself a policing function over contested social values, such as sexual morality. It is about a battle over how broadly or narrowly this nation will define equality for all citizens. It is about the irrational linking of nonconforming expressive speech with illegality and attempts to sleep with the enemy. This, then, is a time of war over values, freedom, equality, and citizenship.

III. PRACTICING WHAT WE PREACH? DEMOCRACY ABROAD, WAR, AND DEMOCRACY AT HOME

Earlier this year, the Massachusetts Supreme Judicial Court surprised the nation by ruling that the State had to provide marriage licenses on an equal basis to all citizens regardless of their gender.⁸⁸ Some might have seen the development as an obvious consequence of the Supreme Court's ruling in 2003 that sodomy laws serve only the purpose of licensing unjust discrimination and violations of the individual's right to privacy.⁸⁹ Therefore, at least in Massachusetts, what has followed is the inevitable consequence: the State's official recognition of gay marriage. Soon after, a number of municipalities began issuing marriage licenses to gay couples.⁹⁰ The mayor of San Francisco subsequently announced that according to California constitutional law, marriage licenses could not be denied to same-sex couples.⁹¹ More than 4,000 same-sex couples swarmed the Golden Gates to be married.⁹² So much for the impact of a mid-1990s federal law, the Defense of Marriage Act ("DOMA") that intoned a public policy against defining marriage as anything other than a

88. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 974 (Mass. 2003).

89. *See Lawrence v. Texas*, 539 U.S. 558 (2003).

90. Associated Press, *Gay Couples Exchange Vows in Massachusetts*, May 18, 2004, available at <http://www.msnbc.msn.com/id/4991967/> (last visited Oct. 5, 2004).

91. Rachel Gordon, *Newsom's Plan for Same-Sex Marriages, Mayor Wants to License Gay and Lesbian Couples*, SAN FRANCISCO CHRON., Feb. 11, 2004, at 1A, available at <http://www.sfgate.com> (last visited Oct. 5, 2004).

92. Suzanne Herel et al., *Numbers Put Face on a Phenomenon: Most Who Married Are Middle-Aged, Have College Degrees*, SAN FRANCISCO CHRON., March 18, 2004, at 1A, available at <http://sfgate.com> (last visited Oct. 5, 2004).

civil union between a man and a woman.⁹³ DOMA, criticized repeatedly by scholars as a dumb piece of legislation,⁹⁴ has stood as a symbol of the resistance to the equalizing movement for full-fledged gay citizenship, but apparently only at the federal level and in limited contexts.⁹⁵ Though some states have made huge advances in the recognition of the queer relationship and family, it is clear that gay citizenship remains qualified in this country despite the developments in the law.

Of course, what followed the announcements and developments in Massachusetts has not been surprising. An outcry by moral conservatives produced a movement to pass a federal constitutional amendment limiting marriage to opposite-sex individuals.⁹⁶ The irony of such an amendment, if it passes, is that it turns inside out the very meaning of having a constitution and a democratic form of government. It is basic to the founding political theory that liberty was seen by the rebelling colonialists as fragile and that to secure liberty, the powers of the government would have to be limited.⁹⁷ Therefore, as all students of the law learn early in their training, the role of the Constitution is to set limits on government behavior so as to prevent abuses of authority, while the purpose of amendments should be to further secure citizens' freedoms and liberty. This is why amendments seeking to restrict freedom have met a quick death.⁹⁸ Meanwhile, the movement to expand marriage rights by same-sex couples is likely to take a wayward course, illustrating once again the strength of this nation with its system of dual federalism to reflect diversity of people, attitudes, and bodies of state law. In fact, some states will act according to their citizens' wishes and limit marriage to heterosexuals. In others the trend will undoubtedly be one of openness, expansion, and adherence to the constitutional value of full faith and credit to the laws of other sovereign states,⁹⁹ although the struggle will be long and hard, as witnessed by the California Supreme Court's recent rejection of the San Francisco mayor's views.¹⁰⁰

93. See Defense of Marriage Act, Pub. L. No. 104-199, § 3(a), 110 Stat. 2419, 2419 (1996); see also I.R.C. §§ 106, 401(a)(11), 401(a)(13), 417(a), 4980B (West 2004).

94. See Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act Is Unconstitutional*, 83 IOWA L. REV. 1 (1997).

95. See Anthony C. Infanti, *The Internal Revenue Code as Sodomy Statute*, 44 SANTA CLARA L. REV. 763 (2004).

96. See Gordon, *supra* note 91.

97. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

98. See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

99. U.S. CONST. art. IV, § 1.

100. The California Supreme Court ruled only that the Mayor was not authorized to be the final interpreter of the Constitution. *Lockyer v. City & County of San Francisco*, 95 P.3d 459, 473 (Cal. 2004).

What is most ironic about the reactions to the developments in Massachusetts over gay marriage rights is the concurrent reality in another part of the world, where in the name of American democracy and freedom for all, the United States has waged war against a nation because it presumably denied freedom to its citizens. I do not wish to argue the pros and cons of Muslim culture's treatment of women or sexual minorities, or even why it might have been appropriate to topple the regime of Saddam Hussein. What is of interest to me is the irony of those who went to war to defend freedom globally at the very moment that efforts were being made domestically to constitutionalize the very opposite of freedom.¹⁰¹ In another time, the U.S. justified its warring actions in the name of freedom and received praise from the world. Possibly seeking to reclaim that glorious role in history, the U.S. waged war in Afghanistan following the attack on the World Trade Center. The war in Iraq has provided opportunities for politicians to proclaim that we are the freest country in the world¹⁰² and that other countries should have a system just like ours. It would be much easier to defend that claim were it not for this embarrassing development to restrict the rights of gay and lesbian citizens to enjoy such simple rights as equal employment opportunity or the right to marry one's life partner.

And yet, young American soldiers are still being injured and dying in the name of a global democracy that in theory means representative politics, fair and open elections,¹⁰³ and the production of laws that expand the rights of all. It is truly ironic that we are using violence to make the point that our system is better and freer, that when examined more closely there are those in government and society who do not believe sexual minorities are entitled to citizenship rights, and who will do whatever they can either to deprive them of their loyalty and intent to join the military, or their human rights to love, happiness, and equality under the law.

101. See Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 1997, Pub. L. No. 104-208, § 514, 110 Stat. 3009 (1996); Patriot Act, Pub. L. No. 107-56, 115 Stat. 272 (2001).

102. See Holloway, *supra* note 87.

103. *But see* Gore v. Bush, 531 U.S. 98 (2000).

