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Of Heterosexism, National Security, and Federal Preemption: Addressing the Legal Obstacles to a Free Debate about Military Recruitment at Our Nation's Law Schools

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ARTICLE

OF HETEROSEXISM, NATIONAL SECURITY, AND FEDERAL PREEMPTION: ADDRESSING THE LEGAL OBSTACLES TO A FREE DEBATE ABOUT MILITARY RECRUITMENT AT OUR NATION'S LAW SCHOOLS

Roberto L. Corrada[*]

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I. INTRODUCTION

Iraqi "Scud" missiles had barely been introduced to the American public in the Gulf War when the media reported that the University of Virginia Law School had chosen to prohibit military recruitment on its campus.[1] The ban, presum-

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1. *See Law School to Ban CIA from Campus Recruiting*, CHARLOTTESVILLE DAILY PROGRESS, Feb. 6, 1991, at B1; *see also* W. Stevenson Hopson, IV, Address at the National Association for Law Placement Annual Conference, Keystone, Colorado (June 28, 1991) [hereinafter Speech] (transcript on file with the *Houston Law Review*) (recalling the University of Virginia's attempt to implement a new AALS requirement that law schools must ban employers who discriminate on the basis of sexual orientation). Since the original draft of this article in the Summer of 1991, various law review articles written by law students have been directed at some portion of the military recruitment issue. These articles raise a variety of cogent and interesting points which are addressed at appropriate points in this article. Readers

ably imposed to send a moral message of disapproval to the military for its admitted policy of discrimination on the basis of sexual orientation,[2] was rescinded when an incensed public

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may wish also to consult these articles. They are: Laurie J. Falik, Comment, *Exclusion of Military Recruiters from Public School Campuses: The Case Against Federal Preemption*, 39 UCLA L. REV. 941 (1992); Christopher J. Kalil, Note, *Suny Buffalo & Military Recruiters: Funding Unconstitutional Conditions?*, 39 BUFF. L. REV. 891 (1991); Steven Wyllie, Comment, *The Unruh Civil Rights Act: A Weapon to Combat Homophobia in Military On-Campus Recruiting*, 24 LOY. L.A. L. REV. 1333 (1991).

2. A statement of the military's policy can be found in Army Regulation 140-111, Table 4-2, Rule E ("Rule E"), which provides for non-waivable disqualification from the Army. The rule defines "disqualifying behavior" as

> questionable moral character, history of antisocial behavior, sexual perversion, homosexuality (includes an individual who is an admitted homosexual but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service, or has committed homosexual acts), or having frequent difficulties with law enforcement agencies.

Id. at n.1. The policy further defines "homosexual acts" as

> bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification, or any proposal, solicitation or attempt to perform such an act. Individuals who have been involved in homosexual acts in an apparently belated episode, stemming solely from immaturity, curiosity, or intoxication, and absent other evidence that the individual is a homosexual, normally will not be excluded from service. A homosexual is an individual, regardless of sex, who desires bodily contact between persons of the same sex, actively undertaken or passively permitted, with the intent of obtaining or giving sexual gratification. Any official, private, or public profession of homosexuality may be considered in determining whether an individual is an admitted homosexual.

Id.

A review of cases involving the military's rule suggests that the CIA and the FBI have also discriminated on the basis of sexual orientation. *See, e.g.*, Ashton v. Civilett, 613 F.2d 923, 926 (D.C. Cir. 1979) (noting the FBI's policy of dismissing all employees who are admitted homosexuals); Doe v. Webster, 769 F. Supp. 1, 5 (D.D.C. 1991) (involving the dismissal of a CIA employee upon an admission of homosexuality). The CIA, which, for the purposes of this article, is generally included in the meaning of the word "military," seems to have continued the practice. *See* Dubbs v. CIA, 866 F.2d 1114, 1119 (9th Cir. 1989) (concluding that "the CIA considers all persons who engage in homosexual activity to be unacceptable security risks"); *Webster*, 769 F. Supp. at 5 (holding that the firing of an avowed homosexual employee solely because of sexual orientation is violative of the employee's substantive and procedural due process rights). However, it is unclear whether the FBI has continued such a policy, even though the FBI has been banned from campuses because of discrimination on the basis of sexual orientation as recently as 1989. *See FBI Recruiters Barred at Two Law Schools*, UPI, Feb. 22, 1989, *available in* LEXIS, Nexis Library, UPI File (describing the University of Michigan's denial of use of placement facilities for FBI recruiters based on a school policy against discrimination); *Students Bar FBI Recruiters at Law School*, UPI, Apr. 18, 1989, *available in* LEXIS, Nexis Library, UPI File (describing efforts of SUNY at Buffalo students to block FBI recruiters from entering the university's law school). Both CIA and FBI officials have publicly stated that they do not discriminate on the basis of sexual orientation. John W. Anderson, *U-Va. Rethinks Recruiting Ban on CIA, FBI and Military*, WASH. POST, Feb. 13, 1991, at D7.

The stated reasons for the military's policy are detailed in a legal memorandum, with no indicated author or date, [hereinafter Army Memorandum] which the Army sends to individuals who inquire about the Army's employment standards. According to the Army memorandum,

and state legislature forced the President of the University of Virginia to reconsider.[3] The Virginia experience is not unique. The clash between the military's policy and the appropriate institutional response has sparked considerable controversy on law school campuses across the country. While neither federal civil rights laws nor the United States Constitution, as interpreted by the Supreme Court, protects against discrimination on the basis of sexual orientation,[4] various state and local laws have expressly forbidden such discrimination.[5] In addition, Association of American Law Schools (AALS) by-laws comprehensively forbid recruiter discrimination on the basis of

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[a]ll judge advocates serve under the same general conditions as other Army officers in their military units and are subject to the rigors of field training and combat environments . . . . All judge advocates therefore must meet the special standards applicable to military service[, which are] established to maintain "force readiness," that is, the Army's ability to immediately and effectively carry out its world-wide military missions.

Army Memorandum, *supra*, at 1. The Army states in the memorandum that force readiness entails various considerations, including "morals." *Id.* With respect to the Army's exclusion of gays and lesbians from military service, the memorandum provides that

[t]he Army and the Judge Advocate General's Corps must comply with [a] DoD determination [that homosexuality is incompatible with military service]. The exclusion of homosexuals from the military is predicated on practical military requirements. Soldiers are required to live and work under entirely different conditions than civilians. Soldiers must often sleep and perform personal hygiene under conditions affording minimal privacy. The presence of homosexuals in such an environment tends to impair unit morale and cohesion as well as infringe upon the privacy of other soldiers. Furthermore, homosexual conduct is a crime under the Uniform Code of Military Justice, the statute defining crimes for the military services . . . .

Id.

For a more in-depth analysis of military policies concerning gays and lesbians, see UNITED STATES GEN. ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY, Report No. 92-98 (June 1992) [hereinafter GAO REPORT]; KATHERINE BOURDONNAY ET AL., FIGHTING BACK: LESBIAN AND GAY DRAFT, MILITARY AND VETERANS ISSUES (1985); Judith H. Stiehm, *Managing the Military's Homosexual Exclusion Policy: Text and Subtext*, 46 U. MIAMI L. REV. 685 (1992); Lynne Duke, *Homosexuals: Military's Last Social Taboo*, WASH. POST, Aug. 19, 1991, at A1.

3. Refer to text accompanying note 13 *infra*. Because Virginia's controversial decision was rescinded in February of 1991, similar policies have been repealed at other Virginia state institutions. *See Wahoo for Free Speech*, WASH. TIMES, Apr. 5, 1991, at F2 (applauding the rescission of a recruiting ban as a triumph of free speech and national security interests); Speech, *supra* note 1 (stating that because of political and administrative pressure, no Virginia law school currently follows the AALS requirement).

4. *See* Bowers v. Hardwick, 478 U.S. 186, 189-90 (1986) (deciding that the constitutional right of privacy does not include acts of homosexual sodomy); Dillon v. Frank, 952 F.2d 403 (6th Cir. 1992) (text available on Westlaw) (noting that all circuits agree that discrimination based on sexual orientation is not proscribed by Title VII).

5. Refer to notes 27-30 *infra*.

sexual orientation.[6] These by-laws have been interpreted as precluding law schools from offering their facilities to admitted discriminators like the military.[7]

Various law schools have already acted on the AALS policy.[8] For example, the University of Chicago Law School, by action of Dean Geoffrey R. Stone, banned the military from recruiting on Chicago's campus as of October 1, 1990.[9] Even though the ban conflicted with the university's access policies, the law school was granted an exemption because of the AALS policy.[10] At Iowa, Dean Hines reached an accommodation with the military: the military would not recruit on campus but instead would conduct interviews in government buildings or at ROTC Headquarters.[11] At UCLA Law School, the dean was ordered by the university's president to allow military recruiters on campus, causing significant student agitation.[12] As previously mentioned, at the University of Virginia, President John Casteen revoked the law school's ban on military recruiters after receiving a stinging letter from fifty-three Virginia legislators who called the policy "offensive to the taxpaying people of Virginia."[13] As of November 20, 1990, some fifty-two

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6. ASSOCIATION OF AM. LAW SCHS., ASSOCIATION HANDBOOK, bylaw, art. 6, § 6-4 (1992) [hereinafter AALS HANDBOOK] (requiring member schools to inform employers of the AALS policy that forbids discrimination on the basis of sexual orientation).

7. *See Ways & Means*, CHRON. HIGHER EDUC., Feb. 27, 1991, at A15 (requiring 158 institutions to ban recruiters if the recruiters are engaged in sexual orientation discrimination).

8. *See* Ken Myers, *It Gets Harder to Do the Right Thing: Recruitment by Military Causes Woe*, NAT'L L.J., Dec. 31, 1990, at 17 (noting the difficulties that schools are experiencing in attempting to comply with AALS rules).

9. *Id.*

10. *Id.*

11. *Id.* Since Dean Hines' action was taken in late 1989, Iowa's policy has been reviewed by the faculty. Currently, it is the author's understanding that military job notices at Iowa are posted with an explanation of why the military is excluded from conducting interviews at the law building. The military may, however, interview in other Iowa campus buildings, such as the school's ROTC offices.

12. *Id.*

13. *Ways & Means*, *supra* note 7, at A15. President Casteen has questioned the authority of the AALS "to control campus policies on employment interviews." *Id.*; *see also Proposal to Ban Military Recruiters is Overruled*, N.Y. TIMES, Feb. 17, 1991, § 1 (Magazine), at 56 (describing the accreditation requirement as "at odds with the concepts of free speech and free expression . . . "). The authority of specialized accrediting agencies to dictate campus actions has been questioned increasingly by administrators who have become frustrated over the costs of institutional compliance. *See generally* Courtney Leatherman, *Specialized Accrediting Agencies Challenged by Campus Officials*, CHRON. HIGHER EDUC., Sept. 18, 1991, at A1 (noting that campus officials are taking steps to limit the clout of specialized accrediting agencies and to look at regionalized agencies with renewed interest).

law schools, according to the Army, had prohibited on-campus military recruiting.[14]

The controversy is not merely a private spat between law schools and the AALS. In 1986, for example, the Philadelphia Commission on Human Relations, acting pursuant to a local ordinance, ordered the Temple University Law School to ban military recruiters from campus as a result of the military's discriminatory policy.[15] In 1991, the New York State Executive Department Division of Human Rights' Office of Gay and Lesbian Concerns issued a similar order to the State University of New York at Buffalo,[16] although that order was later

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14. Those 52 law schools, described in an untitled Army document, are American, Arizona, Arizona State, Boston College, California-Western, Case Western Reserve, Chicago, City University of New York, Cleveland Marshall, Columbia, Drake, Duke, Duquesne, Emory, Franklin Pierce, Georgia, Golden Gate, Harvard, Hawaii, Hofstra, Houston, IIT Chicago-Kent, Iowa, Miami, Minnesota, Missouri (Columbia), New York Law School, New York University, Northeastern, Northwestern, Northern Illinois, Ohio State, Oregon, Pennsylvania, Richmond, Rutgers (Newark), San Francisco, Seton Hall, Southern California, Stanford, Syracuse, Touro, Tulane, Vermont, Virginia, Washburn, Washington University, Wayne State, Western New England, Whittier, William Mitchell, and Yale. A 1991 poll of AALS member law schools by the AALS's Section on Gay and Lesbian Legal Issues, however, reveals that thirty-seven law schools have chosen since 1990 to interpret their nondiscrimination policies as excluding military recruiters. *See* Letter from Professor Gene P. Schultz, St. Louis University School of Law, to Dean Dennis O. Lynch, University of Denver College of Law (Sept. 6, 1991) (on file with author). Those thirty-seven law schools are American, California-Western, Case Western Reserve, City University of New York, Cleveland Marshall, Columbia, Drake, Duke, Duquesne, Georgia, Golden Gate, Harvard, Hawaii, Hofstra, Iowa, Loyola (Ill.), Minnesota, New York Law School, Northeastern, Northwestern, Richmond, St. Louis, San Francisco, Southern California, Southwestern, Stanford, Syracuse, Touro, Tulane, Vanderbilt, Vermont, West Virginia, Washington University, Wayne State, Whittier, William Mitchell, and Yale. In addition, many law schools in 1991 conducted reviews of their placement policies according to the poll, including Arizona State, Arkansas at Little Rock, Baltimore, Denver, Dickinson, Hamline, Maryland, Miami, Missouri (Columbia & Kansas City), North Carolina (Chapel Hill), Northern Kentucky, Utah, Washington & Lee, and Wyoming. *Id.*; *see also* Kalil, *supra* note 1, at 895 n.15 (containing an Air Force Judge Advocate General (JAG) Corps list of law school campus recruitment policies). The issue continued to plague American law schools in 1992. *See* Nomi v. Regents for the Univ. of Minn., 796 F. Supp. 412 (D. Minn. 1992) (rejecting a law student's First Amendment challenge to the University of Minnesota Law School's ban on military recruitment); Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992) (issuing a preliminary injunction barring military recruitment on the law school campus pursuant to a Connecticut Gay Rights law); Allison Becker, *Hastings to Consider Recruitment Ban*, RECORDER, June 12, 1992, at 4.

15. *See* United States v. City of Philadelphia, 798 F.2d 81, 84 (3d Cir. 1986) (affirming a lower court ruling that the commission's cease and desist order was preempted by federal policy).

16. *See* Doe v. State Univ., No. 90-09, New York State Executive Department Division of Human Rights Office of Gay and Lesbian Concerns, Sept. 19, 1991 (ordering the university to cease and desist allowing the JAG to participate in on-campus recruiting in light of a contrary state executive order). That decision was re-

overturned by the New York State Commissioner of Human Rights. In June of 1992, a federal district court judge upheld the University of Minnesota Law School's policy of excluding military recruiters despite a student's arguments that the ban violated the First Amendment of the U.S. Constitution.[17] In October of 1992, a Connecticut state court judge preliminarily enjoined the military from recruiting at the University of Connecticut Law School pursuant to the state's gay rights law.[18] Moreover, protests at Dartmouth, Rutgers, and Johns Hopkins in 1991 have caused the media to dub military recruitment "the hottest controversy on campuses."[19] In Canada, similar public pressure has resulted in a change of policy regarding sexual orientation in the Canadian Army.[20] Indeed, as a direct result of mounting pressure here in the United States, various congressional representatives submitted a resolution in the House of Representatives on November 6, 1991, followed by a formal bill on May 19, 1992, urging the President to rescind the Defense Department directive that bans gay, lesbian, and bisexual Americans from military service.[21]

The issue is not only heated but also complex. Law school placement directors, faculty, and administrators are debating with increasing frequency the issues arising from the military's policy and are considering appropriate responses. The debate generally pits the forces of liberal morality against those conservatives who feel unconditional loyalty to the armed services of our country, which in their role as employers have created jobs for scores of law graduates over the years. Indeed, many

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versed by the New York State Commissioner of Human Rights in 1992. *See* Robert D. McFadden, *SUNY Access for Military is Upheld*, N.Y. TIMES, Apr. 18, 1992, at 21; *"New York Allows Military Recruiting at SUNY, Despite Armed Forces' Refusal to Recruit Gays,"* CHRON. HIGHER EDUC., Apr. 29, 1992, at A26. The State Commissioner's decision in the SUNY case is being challenged in court by the Lambda Legal Defense and Education Fund. *See* Leonard, *"SALT to File Amicus Brief in Military Recruitment Case,"* EQUALIZER, Aug. 1992, at 5; *see also SUNY's Gay Rights Dilemma*, N.Y. TIMES, Oct. 3, 1991, at A24.

17. Nomi v. Regents for the Univ. of Minn., 796 F. Supp. 412 (D. Minn. 1992).

18. Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992).

19. Larry Tye, *Students Attack ROTC for Ban on Gays and Lesbians*, DENVER POST, Oct. 6, 1991, at 8A.

20. *See* Clyde H. Farnsworth, *Canada Ending Anti-Gay Army Rules*, N.Y. TIMES, Oct. 11, 1991, at A3 (noting the movement of the Canadian government to end its ban on gays in the military in response to recent court cases).

21. *See* H.R. Res. 271, 102d Cong., 1st Sess. (1991) (noting that the Department of Defense directive results in the discharge of approximately 1,000 men and women per year); H.R. 5208, 102d Cong., 2d Sess. (1992); *see also* GAO REPORT, *supra* note 2, at 43.

faculties include professors who have benefitted directly from practicing law in the military.

Despite the intensity of the debate, law school personnel are often not informed of the legal implications of any particular law school response because several sources of uncertainty exist. First, faculty and administrators alike are at best unsure about the extent to which the AALS can and will enforce its demand that member schools completely prohibit the military from recruiting on campuses. Second, faculty and administrators are uncertain about the effect of a government regulation that on its face appears to allow the Department of Defense to block research funds to law schools that bar military recruitment. Finally, those individuals who are in a position to formulate an official law school response are often concerned about the implications of the increasing number of state, local, and private measures forbidding sexual orientation discrimination.

These legal uncertainties, which can become obstacles to any meaningful campus debate on the merits of military recruitment on law school campuses, are the subject of this article. In an attempt to resolve the legal uncertainties, this article examines the strength of military concerns and gay/lesbian legal protections in order to analyze and draw conclusions about which interests will prevail in any campus clash. Part II of the article explores legal sources of protection for the interests of the conflicting views. Part III then examines how a clash between the legally protected interests of the parties is likely to be resolved in court under a number of scenarios in which such a conflict may arise. This article concludes that despite a government regulation that may be used to block research funds to schools which ban the military from recruiting on campus, and despite state, local, and private measures that seek to protect against sexual orientation discrimination, the issue of access for military recruiters at the nation's law schools ultimately should be resolved by the law schools themselves as a matter of fairness and ethics, not as a matter of law.

II. Exploring Legal Sources Of Protection For Gay/Lesbian Interests And For Military Concerns

Underlying the debate about military recruitment on law school campuses are two conflicting interests. State and local governments and private organizations, like the AALS, have an interest in eradicating employment discrimination that is

based on sexual orientation. On the other hand, the military—an acknowledged discriminator—has claimed that it has an interest in access to law schools for recruiting purposes. This section outlines the legal protections for these two conflicting interests.[22]

A. Legal Protection Against Discrimination on the Basis of Sexual Orientation

Currently there is no federal constitutional or statutory prohibition against discrimination on the basis of sexual orientation. To fill the void, however, state and local governments and some private organizations have adopted laws or policies condemning such discrimination. If current trends hold, law schools will increasingly confront both types of regulation: state/local laws and the by-laws of private organizations, such as the AALS, which have already been interpreted to preclude law school involvement of any kind in the military's recruitment of law students.[23]

The question for law schools that continue to allow military recruiters full use of placement facilities is exactly what type of enforcement activity can be pursued by state and local actors (like civil rights agencies) and by private organizations (like the AALS). Some states and many localities have acted recently to strengthen legal protections against employment discrimination on the basis of sexual orientation. In addition, the Supreme Court has aided state and local efforts in employment discrimination by its extreme hesitancy to find federal preemption in the area.[24]

This section of the article isolates the legal protections for gay and lesbian employment interests, which will be balanced against military recruitment concerns in Part III. Necessarily intertwined with a discussion of the various legal protections is an analysis of the important role of preemption in safeguarding or overriding the relevant interests.

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22. This article refers to the competing interests in a narrow sense—military versus state and local governments. Of course, gay student interest in the enforcement of state and local laws against sexual orientation is naturally included in the discussion of state and local government prerogatives. Likewise, the interest of students who wish access to the military in on-campus interviews is included in the discussion of military concerns.

23. Refer to notes 7-20 *supra* and accompanying text.

24. *See* California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 282 (1987) (holding that a state statute which proscribed certain forms of discrimination on the basis of pregnancy is not preempted by Title VII because it is neither inconsistent with the purposes of Title VII nor does it require the doing of an act which is unlawful under Title VII).

1. Statutory protection: local government nondiscrimination activity and the slowly emerging trend of state protection. Although most states have enacted broad statutes paralleling the protection of federal antidiscrimination laws, such as Title VII and the Age Discrimination in Employment Act, very few states have extended their laws to prohibit employment discrimination on the basis of sexual orientation.[25] After a strong setback in California in 1991, which was reversed in 1992,[26] the slow trend is in favor of increasing protection at the state level.[27] The lack of legislative response at the state

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25. *See* ARTHUR SMITH ET AL., EMPLOYMENT DISCRIMINATION LAW 151 n.1 (3d ed. 1988) (surveying efforts by states to expand statutory coverage to proscribe discrimination based on categories such as age, physical and mental disabilities, and marital status). Title VII expressly allows states to enact antidiscrimination legislation as long as no state action makes lawful what Title VII prohibits. 42 U.S.C. § 2000e-7 (1988). State laws expanding Title VII rights and even adding new categories of protection have been upheld by the Supreme Court. *See, e.g., Guerra*, 479 U.S. at 292.

26. California Governor Pete Wilson, citing added costs to California businesses, vetoed a measure on September 29, 1991, that would have provided certain private employment protection to gays and lesbians. *See California Governor Vetoes Gay-Rights Bill*, HOUS. CHRON., Sept. 30, 1991, at A4. The veto incensed the national gay community and generated substantial controversy in California. *See* Robert Reinhold, *Many Sense Politics in Gay Rights Veto*, N.Y. TIMES, Oct. 1, 1991, at A16 (reporting that angry gay leaders denounced the Governor's veto as a political ploy and vowed to work towards his defeat); *Stanford Celebrates Its Birth*, N.Y. TIMES, Oct. 2, 1991, at B8 (reporting jeers by angry gay rights demonstrators during the Governor's university celebration speech). As a result of the controversy, Governor Wilson finally signed a weaker version of the law, which provides protection against sexual orientation discrimination in employment and housing but limits damages in any case to $50,000. *See California Governor Signs Legislation Barring Employment Discrimination Against Gays*, 189 Daily Labor Report (BNA), Sept. 29, 1992, at A11.

27. *See generally* THE EDITORS OF THE HARVARD LAW REVIEW, SEXUAL ORIENTATION AND THE LAW 157 n.49 (1990). At the time of this writing, only five states (Wisconsin, Massachusetts, Hawaii, Connecticut, and California) and the District of Columbia had enacted laws prohibiting employment discrimination on the basis of sexual orientation. *See* Act of May 1, 1991, 1991 Conn. Acts 91-58 (Reg. Sess.); D.C. CODE ANN. § 1-2501 (1992); HAW. REV. STAT. § 368-1 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1992); WIS. STAT. ANN. § 111.31 (West 1991); *California Governor Signs Legislation Barring Employment Discrimination Against Gays*, *supra* note 26, at A11 (reporting the signing of the California bill). In fact, three of those states, Hawaii, Connecticut, and California, passed such legislation as recently as 1991 and 1992. *See* Act of May 1, 1991, 1991 Conn. Acts 91-58 (Reg. Sess.); HAW. REV. STAT. § 368-1 (Supp. 1991); *California Governor Signs Legislation Barring Employment Discrimination Against Gays*, *supra* note 26, at A11. Progress at the state level has been slow for gays and lesbians, who only in 1991 finally succeeded in moving a gay rights bill through the California Assembly, one of the nation's more progressive legislative bodies. *See* Jerry Gillam, *Assembly OKs Bill to Ban Gay Bias in Housing, Jobs*, L.A. TIMES, June 29, 1991, at 30 (pointing out that the measure passed despite virtual unanimous Republican opposition); Elaine Herscher & Vasmin Anwar, *Freedom Day Parade Draws Huge Crowd—and Protests by Gays*, S.F. CHRON., July 1, 1991, at A14 (noting the California Assembly's passage of legislation

level has resulted in very little case law analyzing potential conflicts between state antidiscrimination provisions and military recruitment on law school campuses because most of the very few states that do offer protection have done so only recently.[28]

City and county ordinances forbidding employment discrimination on the basis of "sexual orientation," however, have been adopted in more than seventy-five localities across the nation.[29] These laws and ordinances pervasively follow Title VII's example in placing independent nondiscrimination obligations on "employment agencies."[30]

2. Federal judicial protection by interpretation: state/local antidiscrimination laws and federal preemption. Even though no federal law directly protects against sexual orientation discrimination, state and local protection for gays and lesbians may nonetheless rise to the level of a quasi-federal interest, given the way that state and local laws fit uniquely into the federal antidiscrimination scheme. A review of the

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that expanded statutory protection for gays by amending the State Fair Housing and Employment Act). Success in Connecticut was achieved only when gays chose to involve the Catholic Church in the drafting of the proposed legislation, which includes exceptions accommodating church concerns. *See* David Tuller, *Drive for New Laws—Broader Support for Gay Rights*, S.F. CHRON., Apr. 12, 1991, at A1 (citing the Catholic Church's neutral stand on the sexual orientation discrimination bill which was written in consultation with the Hartford Archbishop).

In addition to the five state laws that now broadly forbid sexual orientation discrimination, eight states have issued executive orders forbidding such discrimination in state employment. *See* Lambda Legal Defense & Educ. Fund, Inc., *A National Summary of Antidiscrimination Laws: A Listing of Legal Protection for Lesbians and Gay Men Re: Employment, Housing, and Public Accommodations* (June, 1991) [hereinafter *National Summary*]. These states and the years in which they issued the orders are California (1979), Minnesota (1986), New Mexico (1985), New York (1983), Ohio (1983), Pennsylvania (1988), Rhode Island (1985), and Washington (1985). *Id.*

28. Refer to note 27 *supra*. Indeed, the first case to invoke a state law prohibition against sexual orientation discrimination to prevent military recruitment on a law school campus was decided in Connecticut on October 24, 1992. *See* Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992). An earlier case, premised on New York's executive order banning sexual orientation discrimination in state employment, was reversed. *See* Doe v. State Univ., No. 90-09, New York State Executice Department Division of Human Rights Office of Gay and Lesbian Concerns, Sept. 19, 1991.

29. *See National Summary*, *supra* note 27, at *introduction* (stating that "approximately 78 cities and/or counties have ordinances that protect lesbians and gay men against employment, housing, and public accommodation discrimination"); Tuller, *supra* note 27, at A1 (estimating that about 80 cities and counties in addition to San Francisco have ordinances that protect sexual orientation).

30. The "employment agency" language in these statutes serves to place independent antidiscrimination obligations on law school placement offices. Refer to note 86 *infra*.

Supreme Court's 1987 decision in *California Federal Savings & Loan Ass'n v. Guerra*[31] reveals that state and local antidiscrimination efforts were important to Congress in enacting Title VII.[32] Moreover, express language in the statute's legislative history,[33] Title VII's strong nonpreemption provision,[34] and the result in favor of state legislation in *Guerra*[35] all suggest that articulated federal interests must be significant to displace state and local antidiscrimination efforts which have existed virtually on a parallel plane with federal Title VII initiatives against discrimination since 1964. Indeed, general deference to state antidiscrimination legislation may be the only *federal* policy today that can be cited to support gay/lesbian arguments against sexual orientation discrimination in employment.

The *Guerra* case presented the Court with a conflict between Title VII's protection against sex discrimination and a California state law requiring certain pregnancy benefits.[36] In determining whether the California statute was preempted by Title VII, the Supreme Court stated that its sole task was to ascertain the intention of Congress.[37] The Court emphasized that there are three ways by which federal law may supersede state law: first, by express statutory terms;[38] second, by congressional intent to supplant state authority in a given field, as evidenced by the comprehensiveness of a particular federal

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31. 479 U.S. 272 (1987).

32. Reliance on *Guerra* may be somewhat risky today given that the majority included Justices Brennan and Marshall and that the majority opinion itself was penned by Justice Marshall. Justice White, a dissenter in *Guerra* along with Chief Justice Rehnquist and Justice Powell, has played a significant role in the development of status discrimination jurisprudence since 1989. See the majority opinions, penned by Justice White, in Gilmer v. Interstate Johnson/Lane Corp., 111 S. Ct. 1647 (1991) (holding that the Age Discrimination in Employment Act does not preclude compulsory arbitration pursuant to an agreement in a securities registration application) and Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (holding that the statistical disparity between the racial balance of the unskilled and skilled workforces was not sufficient to establish a prima facie Title VII disparate impact claim without showing that the imbalance was the result of one or more of the employer's non-justifiable employment practices). However, the strength of congressional statements about the importance of state and local antidiscrimination efforts, along with the current Court's seeming preference for nonfederal initiatives, probably means that the *Guerra* precedent will be preserved. *See Guerra*, 479 U.S. at 282 n.12 (discussing congressional efforts to insure the validity of the states' antidiscrimination laws from federal preemption).

33. *See Guerra*, 479 U.S. at 282.

34. *See id.*

35. *See id.* at 292.

36. *Id.* at 274-77.

37. *Id.* at 280.

38. *Id.* (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).

regulatory scheme;[39] and third, even when Congress has not displaced state regulation, state law may be preempted to the extent it actually conflicts with federal law.[40] Though not important in *Guerra*, which involved a state law, the same preemption analysis applies regardless of whether the law in question is state or local.[41]

The *Guerra* Court concluded that Title VII could only preempt state or local law when an actual conflict exists between laws.[42] According to the Court, Congress' intent not to allow Title VII preemption on any other grounds is expressly set out in Sections 708 and 1104 of the title, which provide that state law will be preempted only if the state law "require[s] or permit[s] the doing of any act which would be an unlawful employment practice under [Title VII]."[43] Therefore, instead of preempting state law, Title VII's provisions leave state antidiscrimination statutes largely undisturbed.[44]

In addition to acknowledging that state laws are simply left undisturbed by Title VII, the Court emphasized that the express Title VII provisions limiting any preemptive effect were significant to Congress, which felt that a multitude of laws, federal and state, would best achieve Title VII's goals.[45] The Court's conclusion regarding Congress' intent to allow dual legal systems to protect equal employment opportunity suggests that, at a minimum, state and local antidiscrimination laws and their foreseeable growth are an integral part of Title VII itself. This view is supported by a review of the way in which state civil rights offices interact with Equal Employment Opportunity Commission (EEOC) offices in deferral states. For example, many state offices have entered into "worksharing" agreements with the EEOC which, among other things, delineate the way in which work involving similar discrimination claims before both agencies will be shared.[46] These agree-

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39. *Id.* at 280-81 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

40. *Id.* at 281 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963)).

41. For purposes of the Supremacy Clause, local ordinances are reviewed in the same fashion as state laws. *See* Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2482 (1991) (citing Hillsborough v. Automated Medical Lab. Inc., 471 U.S. 707, 713 (1985)).

42. *Guerra*, 479 U.S. at 281.

43. *Id.* at 281-82.

44. *Id.* at 282 (citing Shaw v. Delta Air Lines, 463 U.S. 85, 103 n.24 (1983)).

45. *Id.* at 282-83 (stating that "[t]he narrow scope of preemption available under §§ 708 and 1104 reflects the importance that Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity").

46. *See* EEOC v. Commercial Office Prods., 486 U.S. 107, 112 (1988) (noting

ments also specify circumstances under which one agency will defer or yield to another on a particular discrimination matter.[47]

The Supreme Court's holding in *Guerra* firmly establishes a strong presumption that state and local antidiscrimination laws are valid. Applying Title VII preemption principles in *Guerra*, the Court upheld the California state law requiring employers to allow pregnant workers up to four months of unpaid maternity leave.[48] The Court found the state pregnancy law to be valid despite claims the law results in discrimination against men.[49] In rejecting such claims, the Court noted that Title VII and the Pregnancy Disability Act[50] do not preclude states from granting greater protection than federal law, which currently does not require employers to provide pregnancy leave.[51]

More importantly, the Court found no collision between state and federal law arising from the state act's provision of maternity leave despite the fact that no similar provision accommodating male temporary disabilities was included.[52] According to the Court, the state law does not compel preferential treatment for pregnant workers; it merely establishes minimum benefits that must be provided to pregnant workers.[53] The Court's position seems impractical at first blush because

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that the EEOC has used its statutory authority to enter worksharing agreements with three-quarters of authorized state and local agencies).

47. *See id.* at 112, 117-18. For example, the Court found the EEOC's interpretation that even an untimely state claim will operate to extend the federal statute of limitations on a Title VII claim from 180 days to 300 days to be consistent with Title VII's express call for "formal cooperation between the EEOC and state and local agencies." *Id.* at 122.

48. *See Guerra*, 497 U.S. at 275-76 (analyzing the California Fair Employment and Housing Act, CAL. GOV'T CODE § 12945(b)(2) (West 1980 & Supp. 1992)).

49. *Id.* at 280.

50. 42 U.S.C. § 2000e(k) (1988)

51. *See Guerra*, 497 U.S. at 285 (stating that "we agree with the Court of Appeals that Congress intended the [Pregnancy Disability Act] to be 'a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise' "). State laws that supplement federal efforts have been upheld by the Court. *See, e.g.*, Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 6 (1987) (upholding a state severance pay requirement because it did not constitute a "plan" within the meaning of ERISA); Colorado Antidiscrimination Comm'n v. Continental Air Lines, 372 U.S. 714, 722 (1963) (refusing to invalidate a state statute, identical in purpose to a federal statute, unless the federal statute "would to some extent be frustrated by the state statute"); Parker v. Brown, 317 U.S. 341, 354 (1943) (finding that the state's adoption of an adequate program may effectuate the policies of a federal statute); *see also* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-26, at 491-97 (2d ed. 1988) (detailing the Court's evolution away from its early "undifferentiated hostility" toward supplemental state laws).

52. *Guerra*, 479 U.S. at 291.

53. *Id.*

the only way for an employer to avoid Title VII liability would be to provide similar leave benefits to men; however, the Court explained that employers are free to provide comparable benefits to other disabled employees.[54] Thus, because compliance with both Title VII and California law is "theoretically possible," the Court found no direct, actual conflict between Title VII and California's law.[55]

The "actual conflict" test of federal preemption seems to require in the employment discrimination arena, especially after *Guerra*, that there be absolutely no room for any federal/state accommodation prior to a judicial finding of federal supremacy in any given case.[56] This view of "actual conflict" preemption has been consistently validated by the Supreme Court in other areas as well.[57] In the few recent cases in which the Court has found some "actual conflict"—cases that have typically involved state attempts to regulate interstate commerce, the finding of actual conflict has followed a Court ruling that Congress intended to "occupy the field" or that the interest at issue was "uniquely federal," a narrow doctrine

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54. *Id.*

55. *Id.* At least one commentator has criticized the *Guerra* majority for deciding more than was required. According to Laurence Tribe, a more appropriate analysis would have been Justice Scalia's concurring approach to limit the holding to a statement that the California law at issue does not even remotely purport to allow unequal treatment to other nonpregnant but similarly situated workers. *See* TRIBE, *supra* note 51, § 6-26, at 482-83 n.8.

56. *Guerra*, 479 U.S. at 282-83 n.12.

57. *See, e.g.*, Wisconsin Pub. Intervenor v. Mortier, 111 S. Ct. 2476, 2486-87 (1991) (holding that a local ordinance promotes goals of federal pesticide regulation); English v. General Elec. Co., 110 S. Ct. 2270, 2280 (1990) (finding that a nuclear facility employee's state law tort claim is not preempted by the Federal Energy Reorganization Act of 1974); Northwest Cent. Pipeline Corp. v. State Corp. Comm'n, 489 U.S. 493, 515-16 (1989) (finding that state regulation of natural gas production did not interfere with federal regulation of gas pipelines, even though some "jurisdictional tensions" did exist); California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580-81 (1987) (holding that state coastal-zone management policies may be enforced on mineral leases under federally-owned lands); Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 252-53 (1984) (affirming the availability of state tort-law remedies to an employee of a federally-licensed nuclear power plant); Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 218-19 (1983) (finding a state-imposed licensing moratorium valid on federally-regulated nuclear power plants); Edgar v. MITE Corp., 457 U.S. 624, 631-32 (1982) (requiring the offeror in a corporate takeover to comply with state, as well as federal, notification requirements); Ray v. Atlantic Richfield Co., 435 U.S. 151, 158-59, 165, 168 (1978) (limiting the state's ability to impose pilotage restrictions on oil-tanker pilots to the areas in which they do not conflict with federal authority). *But cf.* International Union, UAW v. Johnson Controls, Inc., 111 S. Ct. 1196, 1202 (1991) (suggesting that the Court's Title VII ruling against corporate fetal protection policies may preempt state tort laws because of an "obvious conflict" with federal law).

requiring more than the usual protection against state encroachment.[58]

Given the express language of *non*preemption in Title VII, and in particular the Supreme Court's acknowledgement that state and local nondiscrimination efforts are effectively counted as weapons in the federal arsenal for combatting bias, it is improbable that Title VII will preempt local efforts against discrimination in employment unless an "actual conflict" between laws is identified. Even in those cases, however, the Court's narrow view of "actual conflict" preemption will find federal law overriding state and local laws in only the most extraordinary of cases.[59]

The *Guerra* decision has certainly breathed new life into state and local antidiscrimination efforts. The Court embraced Congress' substantial approval of state and local antidiscrimination protection, echoing Congress' feelings that state and local enforcement are as important to the federal scheme of antidiscrimination enforcement as the federal enforcement mechanisms themselves. Ironically, then, a federal law that does not directly protect against discrimination on the basis of sexual orientation, may, through its strong accommodation of state and local interests, serve to counter the military's claims that its federal interests should outweigh the actions of state and local civil rights agencies. Only the strength of the military's legally protected interests, which will be reviewed in section II.B, will determine whether there is preemption in the recruitment context.

3. Protection by private action: The Association of American Law Schools (AALS) and The American Bar Association (ABA) and sexual orientation. State and local government action has not been the only source of support for gay and lesbian rights. Some private organizations have chosen to act as

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58. *See, e.g.*, Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 310 (1988) (citing the "imminent possibility" of collision between the Michigan natural gas pricing statute and federal regulation under the Natural Gas Act as a basis for preemption); Boyle v. United Technologies Corp., 487 U.S. 500, 512 (1988) (finding "significant conflict" where the Virginia common law duty of care differs from the duty imposed by government contract in the "uniquely federal" field of United States military equipment procurement); International Paper Co. v. Ouellette, 479 U.S. 481, 493-95 (1987) (finding "serious interference" where Vermont common law imposes nuisance liability on a point source located in another state and occupied by the Clean Water Act). *But cf.* Ingersoll-Rand Co. v. McClendon, 111 S. Ct. 478, 485 (1990) (noting that for a federal regulatory scheme to preempt state law, it must contain "special features" which indicate that preemption is warranted).

59. *See Guerra*, 479 U.S. at 281. In delineating "actual conflict" preemption, the Court emphasized that this type of preemption "is not to be lightly presumed." *Id.*

well. The two private organizations of most immediate concern to law schools allowing or preventing military recruitment on campus are the AALS, which has the power to exclude from membership schools that violate AALS policies and requirements, and the ABA, whose power over law school accreditation significantly influences law school actions. Of the two organizations, the AALS has been the more active in seeking law school bans of military recruiters. However, the specific authority of each organization, and how that authority might be marshalled to dictate law school policy with respect to military recruitment, is detailed below.

a. AALS. The AALS was established in 1900 as a law school association with thirty-two charter members.[60] The AALS, whose purpose is to improve the legal profession through legal education,[61] was incorporated in 1971 and is now recognized by the Council on Post Secondary Accreditation as one of only two national accrediting agencies for law.[62] Of the 176 ABA-approved law schools, 158 are AALS members.[63]

The AALS has adopted the following broad nondiscrimination policy, incorporated into its by-laws, to which it expects member schools will adhere:

> 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, handicap or 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.[64]

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60. AALS HANDBOOK, *supra* note 6, at 1.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 23 (emphasis added). For a detailed discussion of the history and rationale for By-law 6.4(b) and its accompanying interpretive regulations, see AALS Memorandum 91-47 (Attachment B) (June 14, 1991). While there was some question immediately after adoption of expanded By-law 6.4(b) about the extent to which the sexual orientation prohibition would be applied to law schools with a religious affiliation or purpose, the AALS later clarified its position. In May 1991, the Executive Committee amended Executive Committee Regulation 6.17 to prohibit religiously affiliated law schools from adopting practices which discriminate on the basis of "age, handicap or disability, or *sexual orientation.*" AALS HANDBOOK, *supra* note 6, at 38 (emphasis added).

In August of 1990, the AALS adopted Executive Committee Regulation 6.19 which interprets its nondiscrimination by-law. That regulation provides that

> a member school shall inform employers of its obligation under 6-4(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 By-Law 6-4(b). A member school has a further obligation to investigate any complaints concerning discriminatory practices against its students to assure that placement assistance and facilities are made available only to employers whose practices are consistent with the principles of equal opportunity stated in By-Law 6-4(b).[65]

More recently, the AALS further clarified both By-law 6.4(b) as well as Regulation 6.19. In a March 25, 1991, memorandum to Deans and Law Placement Officers of member schools, the AALS clarified how the rule and regulation should be implemented. The AALS stated, for example, that policies underlying the rule and regulation include: 1) giving employers actual notice that if they discriminate in hiring, "they will be prohibited from using the school's placement facilities"; 2) giving students notice that the school requires recruiting employers to comply with nondiscrimination principles; and 3) encouraging students to use school complaint procedures if they feel an employer has violated the nondiscrimination requirements.[66] Although the AALS recognized that it was more difficult for law placement offices to secure assurance of nondiscrimination from employers who merely used the office to post for jobs rather than interview on campus, it emphasized that it would only consider By-law 6.4(b) requirements fulfilled if those employers were notified that a posting is "deemed" to be an assurance that the employer agrees with the nondiscrimination policy.[67]

Precious little public information is available regarding AALS use of sanctions to enforce its by-laws and regulations. Indeed, the AALS Handbook, which lists all by-laws and regulations, merely states in Article 7 (Sanctions) that

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65. AALS HANDBOOK, *supra* note 6, at 38; *see also* AALS Memorandum 90-47 (August 10, 1990).

66. AALS Memorandum 91-28 (March 25, 1991). The Memorandum was revised on April 2, 1991, to clarify that the AALS nondiscrimination policy prohibits more than just "unlawful" discrimination. *See* AALS Memorandum 91-33 (April 2, 1991).

67. *Id.*

> if a member school has materially failed to meet the requirements of membership but is currently in compliance, it shall be *censured*. If a member school is materially failing . . . but is taking steps that will bring it in compliance in a reasonable time, it shall be *placed on probation*. If a member school is materially failing . . . , [yet] is taking steps that will bring it in compliance but these steps may not be completed in a reasonable time, it shall be *suspended*. If a member school is materially failing . . . and is taking no steps designed to bring it in compliance in a reasonable time or it lacks the capacity to do so, it shall be *excluded* from membership.[68]

AALS censure, probation, suspension, and exclusion are all triggered by a particular law school's "material" failure to meet AALS requirements. The Association Handbook does not specify the level at which a law school materially fails to meet AALS requirements. Moreover, a review of AALS Proceedings since 1977 sheds little light on the question of "material" failure. Annual reports by the Executive Director and the Accreditation Committee (since 1983) mention only the number, and sometimes the names, of schools required to file progress reports without any specificity as to the nature of the breach involved.

The AALS has yet to state exactly what consequences law schools will face for refusing to adhere to the AALS nondiscrimination policy by allowing military recruitment on campus. It may or may not be comforting to law school deans that the most serious action that may be undertaken by the AALS alone is an expulsion from AALS membership. However, it is unlikely that even expulsion will result if a law school abides by AALS policy in every other way and has no history of discrimination problems. Moreover, for law schools that do encounter problems, it is more likely that AALS will attempt some sort of conciliation with less drastic consequences than expulsion. In addition, for law schools expelled from membership, an argument exists that a "fee-paid" relationship, which allows schools to participate in certain AALS activities without having to adhere to its requirements, may serve to diminish the penalty of nonmembership. Nonetheless, one commentator has recently suggested that AALS accusations of discrimination in accreditation-related materials, even mere correspondence, can serve to stigmatize law schools that are so accused.[69]

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68. AALS HANDBOOK, *supra* note 6, bylaw, art. 7, § 7-1.

69. Paul Carrington, *Accreditation and the AALS (The Boalt Affair)*, 41 J. LEGAL EDUC. 363, 364 (1991). *But see* Betsy Levin, *The AALS Accreditation Process and Berkeley*, 41 J. LEGAL EDUC. 373 (1991); Marjorie M. Shultz, *Debating P.C. on "PC,"*

b. ABA. In addition to its capacity to issue sanctions that may jeopardize AALS membership, the AALS also plays a role in the ABA accreditation process. Unfortunately, the extent of AALS involvement in the accreditation process is not well-publicized.[70] With respect to whether a law school risks accreditation by allowing military recruitment on campus, the ABA is certainly the more significant organization because it is a largely ABA-selected site evaluation team that determines a law school's accreditation status.[71] Accreditation is important to law schools because all states and the District of Columbia recognize ABA accreditation as satisfying the educational requirements for the practice of law.[72] In fact, most states restrict the practice of law to those who have graduated from an ABA-approved law school.[73] Given the critical relationship between accreditation and a law school's ability to attract students, it is important to understand the ABA's position with respect to sexual orientation and military recruitment on campus.

The ABA has publicly declared its opposition to sexual orientation discrimination in housing and employment, but that position has been the subject of controversy among ABA members.[74] At the ABA's mid-year meeting in 1989, the House of Delegates, the ABA's policy-setting body, ignored the recommendation of its Board of Governors and called upon federal, state, and local governments to ban discrimination on the basis of

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41 J. LEGAL EDUC. 387 (1991).

70. A direct request for additional information about AALS involvement in the accreditation process yielded no useful response. *See* Letter from Betsy Levin, Executive Director, AALS, to Roberto Corrada (Sept. 30, 1991) (on file with author) (explaining the difficulty of responding to document requests with a small staff and no guarantee that appropriate records even exist). However, since the time of my letter in 1991, Ms. Levin did clarify AALS's role in accreditation by her article in a recent issue of the *Journal of Legal Education*. *See* Levin, *supra* note 69.

71. ABA SECTION OF LEGAL EDUC. & ADMISSION TO THE BAR, *The American Bar Association's Role in the Law School Accreditation Process*, 32 J. LEGAL EDUC. 195, 196 (1982). *But cf.* Levin, *supra* note 69, at 375 ("Each member of the team is a representative of both the ABA and the AALS, and the site evaluation report is a single report prepared by the entire team. In most cases, however, the AALS apponts only one member to the team.").

72. *See* Memorandum from James P. White, Consultant on Legal Education to the American Bar Association, to Members of a Site Evaluation Team (Sept. 1991) (on file with author) (discussing suggestions for the conduct of a site evaluation visit). Although ABA action has been characterized as private action in this article, a number of arguments can be made that ABA action is "state action." Refer to notes 104-05 *infra* and accompanying text.

73. Memorandum, *supra* note 72, at 1.

74. *American Bar Association Mid-Year Meeting*, 57 U.S.L.W. 2478, 2478-79 (Feb. 21, 1989).

sexual orientation in employment, housing, and public accommodation.[75] However, the measure passed only after being voted down in 1983 and again in 1985.[76] In addition, the House of Delegates voted this year to declare that federal funds should not be withheld from educational institutions that bar military recruitment as a result of the military's policy on sexual orientation.[77]

Despite such actions, the ABA continues to demonstrate reluctance with respect to sexual orientation issues. For example, while the House of Delegates was voting to condemn the possibility of federal funding cut-offs to schools that prohibit military recruiting on campus, it was also confronting a move by some delegates to bar specialty groups, including the National Lesbian and Gay Law Association, from representation in the House of Delegates.[78] The National Lesbian and Gay Law Association was denied affiliation with the ABA in 1991.[79]

Perhaps as a result of ABA ambivalence, the ABA Section of Legal Education and Admissions to the Bar does not comment with any particularity on the importance of enforcing sexual orientation nondiscrimination policies as part of the accreditation process.[80] A review of ABA materials sent to members of ABA site evaluation teams reveals only very general inquiries about institutional nondiscrimination policies, even in the lengthy site evaluation questionnaire to be completed by the inspected institution.[81] Thus, in considering how to handle the military recruitment issue, law schools (at least at the present) probably should not be overly concerned about losing ABA

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75. *Id.*; *Lawyers Back Bias Ban*, NEWSDAY, Feb. 7, 1989, at 16.

76. Terry Carter, *The ABA Comes In From the Cold; Gay Measure Wins Handily*, NAT'L L.J., Feb. 20, 1989, at 22.

77. *ABA Adopts Lawyer Discipline Model, But Resists Call for Greater Openness*, 60 U.S.L.W. 2490, 2492 (Feb. 11, 1992). The vote was 203 to 159. *Id.*

78. Robert Elder, *ABA Delegates Seeking to Oust Specialty Bars*, RECORDER, Feb. 13, 1992, at 3.

79. Steve Albert, *Lesbian/Gay Bar Group Will Wait Till Next Year*, RECORDER, Sept. 3, 1991, at 2. The National Lesbian and Gay Law Association was finally accorded affiliate status by the ABA House of Delegates in August of 1992 by a vote of 318 to 123. *See* Gail Appleson, *ABA Allows Gay Group as Affiliate*, Reuters, Aug. 11, 1992, *available in* LEXIS, Nexis Library, Reuters File.

80. *See* 1991-1992 SECTION OF LEGAL EDUC. & ADMISSIONS TO THE BAR, AMERICAN BAR ASS'N, LAW SCHOOL SITE EVALUATION QUESTIONNAIRE (on file with author). Although the questionnaire solicits information concerning student organizations like BALSA, MALDEF, and the Women's Caucus, it does not make particular mention of any gay/lesbian groups. *See id.*

81. *See id.* at 20. The questionnaire's inquiries about special programs focus on opportunities for "racial and ethnic minorities," again failing to solicit specific information about gay and lesbian organizations and policies. *Id.* at 21.

accreditation should they decide to allow the military to recruit on campus.

4. *The sexual orientation vacuum: federal refusal to protect against discrimination on the basis of sexual orientation.* Despite the protections afforded against sexual orientation discrimination by some state and many local governments, as well as by the AALS and the ABA, there is a distinct void at the federal level. Under current judicial interpretation, Title VII's prohibition against discrimination on the basis of "sex" does not include sexual orientation.[82] Moreover, as currently interpreted by the Supreme Court, the United States Constitution seems to afford no protection against sexual orientation discrimination.[83]

a. Sexual orientation and Title VII: public and private law school obligations. Title VII prohibits employers from failing or refusing to hire any individual on the basis of race, color, religion, sex, or national origin.[84] The Act applies directly to most private and public employers, including law schools.[85] It also independently applies to law school placement offices, which are considered employment agencies for Title VII purposes.[86]

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82. *See* DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979) (explaining that Title VII's prohibition against sex discrimination applies only to sex).

83. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (concluding that constitutional protection of fundamental rights does not extend to homosexual acts).

84. *See* 42 U.S.C. § 2000e-2(a)(1) (1988 & Supp. I 1990). Title VII defines "employer" as

> a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject by statute to procedures of the competitive service . . . or (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

Id. § 2000e(b).

The term "person" is defined as "one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers." *Id.* § 2000e(a).

85. *See, e.g.*, Kaplowitz v. University of Chicago, 387 F. Supp. 42, 46 (N.D. Ill. 1974).

86. 42 U.S.C. § 2000e(a). This section of Title VII defines "persons" covered by

Title VII does not specifically list sexual orientation as a trait upon which employment discrimination is forbidden.[87] However, because the legislative history regarding the Act's prohibition of discrimination on the basis of "sex" is scant,[88] it is not surprising that courts have been required to determine whether sexual orientation is included within the statute's meaning of "sex." The vast majority of courts confronting the issue have rejected the extension of Title VII to protect sexual orientation.

In *DeSantis v. Pacific Telephone & Telegraph Co.*,[89] for example, the United States Court of Appeals for the Ninth Circuit dismissed in short order every Title VII theory proposed by gays and lesbians who alleged employment discrimination on the basis of sexual orientation.[90] The alleged victims of discrimination in *DeSantis* argued first that Title VII's prohibition of "sex" discrimination must include discriminatory acts based on sexual orientation.[91] The court found, however, that Title VII's "sex" discrimination prohibition was intended to place

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the Act to include state and local government agencies. Thus, law schools affiliated with state governments are governed by the Act's prohibitions.

College and law school placement offices, which do not generally hire, facilitate access to employers. Nevertheless, Title VII imposes independent obligations on them as employment agencies. *Id.* § 2000e(c). Title VII defines "employment agency" broadly as "any person regularly undertaking with or without compensation to procure employees for an employer or to procure employees opportunities to work for an employer and includes an agent of such a person." *Id.* Under the definition, law school placement offices have been found to be employment agencies for Title VII purposes. *See, e.g., Kaplowitz*, 387 F. Supp. at 46 (using a liberal construction of the term employment agency); EEOC Decision 84-2, 33 Fair Empl. Prac. Cas. (BNA) 1893, 1896 (1983) (focusing on the university's "regular" involvement). Indeed, the term "employment agency" as defined in Title VII and other employment discrimination laws has been interpreted broadly and has even been applied to individuals who regularly refer students for employment. *See, e.g.*, City Comm'n on Human Rights v. Boll, 8 Fair Empl. Prac. Cas. (BNA) 1139, 1141 (N.Y. Sup. Ct. 1974) (finding an individual liable for employment discrimination as an "employment agency" under New York human rights law which uses the same definition of "employment agency" as is found in Title VII).

Section 703(b) of the Act bars employment agencies from failing or refusing *to refer* any individual for employment on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(b). In addition, Section 704(b) prohibits the printing or publishing of any notice or advertisement "indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, or national origin," unless the limitation is a bona fide occupational qualification (BFOQ) for employment. *Id.* § 2000e-3(b).

87. *See* 42 U.S.C. § 2000e-2.

88. General Elec. Co. v. Gilbert, 429 U.S. 125, 143 (1976) (stating that the "legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity").

89. 608 F.2d 327 (9th Cir. 1979).

90. *Id.* at 329.

91. *Id.*

women on an equal footing with men and therefore could only be construed to prohibit discrimination based on physical traits.[92] The gay and lesbian plaintiffs then argued that because discrimination on the basis of sexual orientation disproportionately affects men, gays should be allowed to recover on a "disparate impact" theory of discrimination under Title VII.[93] In particular, the plaintiffs in *DeSantis* pointed to the greater incidence of homosexuality among males and the greater likelihood that gay men rather than lesbians will be discovered by an employer.[94] The court disagreed with this reasoning, however, citing previous failed attempts to convince Congress to amend Title VII to prohibit sexual orientation discrimination.[95] The court emphasized that it would not do by judicial "construction" what Congress had consistently refused to do by legislation.[96] Gay and lesbian attempts to invoke Title VII protection on a number of other theories were also dismissed by the court.[97]

Most commentators cite *DeSantis* as the last word on the applicability of Title VII protection to gays and to lesbians,[98] suggesting that any extension of Title VII to include sexual orientation discrimination must come from Congress in the form of statutory amendment.[99] Judicial failure to find that

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92. *Id.* at 329-30 (relying on Holloway v. Arthur Andersen & Co., 566 F.2d 659, 662-63 (9th Cir. 1977)).

93. *Id.* at 330; *see* Griggs v. Duke Power Co., 401 U.S. 424, 431-32 (1971) (claiming that Title VII is directed at the consequences of discrimination, not the motivation). The disparate impact theory established in *Griggs* was first modified by the Supreme Court's decision in Wards Cove v. Atonio, 490 U.S. 642, 651-52 (1989), and was recently modified again by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). The current law is more consistent with *Griggs*.

94. 608 F.2d at 330.

95. *Id.*

96. *Id.*

97. *Id.* at 331-32. The theories that the court dismissed included differences in employment criteria, interference with association, and effeminacy stereotyping. *Id.*

98. *See, e.g.*, Mark D. Hoerrmer, *Fire at Will: the CIA Director's Ability to Dismiss Homosexual Employees as National Security Risks*, 31 B.C. L. REV. 699, 713 n.81 (1990). Since the *DeSantis* decision in 1979, the Supreme Court has embraced more completely the view that gender stereotypes can serve as evidence to support claims under Title VII. *See, e.g.*, Price-Waterhouse v. Hopkins, 490 U.S. 228, 238-41 (1989). This action has meant, to at least one commentator, that "sex stereotyping" analysis, when properly applied by courts, may yet allow for sexual orientation claims under Title VII. *See* I. Bennett Capers, Note, *Sex(ual Orientation) and Title VII*, 91 COLUM. L. REV. 1158, 1179-84 (1991) (equating discrimination based on sexual orientation with sex stereotyping).

99. *See, e.g.*, Pamela L. Perry, *Balancing Equal Employment Opportunities with Employers' Legitimate Discretion: The Business Necessity Response to Disparate Impact Discrimination Under Title VII*, 12 INDUS. REL. L.J. 1, 4 (1990) (discussing Congress' intent to clarify legislation regarding Title VII); Capers, *supra* note 98, at 1176 (noting that courts are unwilling to find discrimination based on sexual orien-

Title VII protects against discrimination on the basis of sexual orientation means that law school placement offices face no Title VII risk if they accommodate employers who discriminate against gays and lesbians. As noted in Section II.A.2, however, state and local laws may extend antidiscrimination protection. Further, those states and localities that have chosen to protect gays and lesbians from employment discrimination have also adopted Title VII's statutory structure, meaning that placement offices may still face independent liability at the state or local level in their capacity as "employment agencies."[100] Thus, there may still be reason for concern, again depending on the extent to which military interests override state and local actions.

b. Sexual orientation and the United States Constitution: public law school obligations.

i. Lack of protection for gays and lesbians under the Fourteenth Amendment. Advocates of gay and lesbian rights unable to convince courts that Title VII protects against sexual orientation discrimination have had no easier time maintaining that the United States Constitution protects against classifications on the basis of sexual orientation.[101] The task has been particularly difficult when sexual orientation conflicts with military regulations. Even if a skilled practitioner could convincingly argue a constitutional basis for the protection of sexual orientation before a receptive judicial panel, the courts' historical recognition of, and deference to, the military's "special" needs concerning discipline and morale will likely preclude a finding of liability.[102]

On constitutional grounds, "state action" requirements also present barriers. Unlike Title VII, which applies equally to both private and public institutions at the state and local level, any constitutional restraints or protection would apply only to public institutions through the Fourteenth Amendment.[103] While it may be possible to argue that private law schools are acting

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tation).

100. Refer to note 86 *supra* and accompanying text.

101. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 191 (1986) (refusing to apply the Due Process Clause of the Fourteenth Amendment to gays who engage in sodomy); High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 571 (9th Cir. 1990) (holding that gays are not a "suspect or quasi-suspect class" entitled to strict scrutiny under the Fifth Amendment).

102. *See, e.g.*, Dronenburg v. Zech, 741 F.2d 1388, 1392 (D.C. Cir. 1984) (justifying higher personnel restrictions in the military than in civilian society).

103. U.S. CONST. amend. XIV.

on behalf of or in conjunction with the state,[104] the United States Supreme Court has not been receptive to that argument.[105]

With respect to public institutions, however, the approach of the higher federal courts has generally been to refuse to find that gays and lesbians constitute a suspect or even quasi-suspect class for Fourteenth Amendment equal protection purposes.[106] Due process arguments have fared no better.[107] And when the courts concede that a law or rule aimed at gays or lesbians must have some rational basis, the minimal scrutiny engaged in by the courts has sometimes failed to require even an articulation of the state interest involved.[108] In addition, various federal circuit courts have denied strict or intermediate scrutiny analysis to gays and lesbians only to then explain that the groups would not be protected under a heightened scrutiny analysis in any case. A good example of such a federal circuit case is *Rich v. Secretary of the Army*.[109]

In *Rich*, the United States Court of Appeals for the Tenth Circuit found that the Army's discharge of an individual on the basis of sexual orientation without a hearing did not violate constitutional due process, equal protection, or First Amendment rights.[110] Roger Rich, an army medical specialist, had responded that he was not gay when questioned on an application form "whether [he had] ever engaged in homosexual activi-

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104. The American Bar Association's Section of Legal Education and Admissions to the Bar is a recognized national accrediting agency for legal education institutions. Most of the nation's law schools are ABA-approved. Accordingly, to ensure professional competence, many states condition a license to practice law on graduation from an ABA-approved and certified law school. Law schools certainly benefit from ABA and state endorsement and therefore could conceivably be equated with state government.

105. *See* Rendell-Baker v. Kohn, 457 U.S. 830, 832, 844 (1982) (deciding that a private school receiving 90% of its funding from public sources was not acting for the state in discharging teachers).

106. *See, e.g.*, High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 570-71 (9th Cir. 1990) (denying gays/lesbians strict or heightened scrutiny standards of review); *Dronenburg*, 741 F.2d at 1397-98 (stating that a rational basis exists for excluding gays from the Navy).

107. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186, 190-94 (1986) (holding that the Due Process Clause of the Fourteenth Amendment does not confer a fundamental right upon gays to engage in consensual sodomy).

108. *See, e.g.*, ben-Shalom v. Marsh, 881 F.2d 454, 463 (7th Cir. 1989) (utilizing a deferential standard of scrutiny), *cert. denied*, 494 U.S. 1004 (1990); *Dronenburg*, 741 F.2d at 1398 (discussing the military's rationales for the exclusion of gays); Rich v. Secretary of the Army, 735 F.2d 1220, 1227-28 (10th Cir. 1984) (relying on Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981)).

109. 735 F.2d 1220 (10th Cir. 1984).

110. *Id.* at 1226-29.

ty."[111] However, some months later, and while on active duty, Rich was hospitalized for an illness caused by an emotional crisis stemming from uncertainty about sexual identity.[112] Rich later approached his surgical nursing supervisor, an Army officer, and announced to her in the presence of patients and staff that he was homosexual and would resist efforts to discharge him.[113] Rich was dishonorably discharged under Chapter 14 of Army regulations for fraudulently denying homosexuality in the enlistment process.[114]

Although the Tenth Circuit affirmed the Army's decision on the basis of fraud, it addressed, in *dictum*, Rich's constitutional arguments.[115] The court perfunctorily dismissed Rich's procedural due process claims on the ground that military service does not present a cognizable property interest and that any liberty interest in reputation was extinguished by Rich's self-publicized homosexuality.[116] The substantive due process claim was dismissed[117] on the strength of a 1980 Ninth Circuit case, *Beller v. Middendorf*,[118] in which a Navy policy applied to discharge gays was upheld on the basis of military necessity. The court also dismissed a privacy right claim, stating that even if the Constitution protected private consensual homosexual conduct among adults, the government's compelling interest in a strong military force outweighed any private interest.[119] First Amendment arguments that Rich's rights to associate freely and to admit homosexuality openly were considered and discarded by the court because of the fraud involved in this case and, again, on the basis of military need.[120]

The critical part of the opinion for similar constitutional cases now unfolding in federal courts[121] dealt with Rich's equal protection claims. Rich's equal protection arguments were dismissed by the court primarily on the ground that classification based upon sexual orientation is not constitutionally suspect.[122] In addition, the court stated that even if heightened

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111. *Id.* at 1223.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 1226-27.
116. *Id.*
117. *Id.* at 1227.
118. 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).
119. *Rich*, 735 F.2d at 1228.
120. *Id.* at 1229.
121. *See, e.g.*, Steffan v. Cheney, 780 F. Supp. 1, 8 (D.D.C. 1991) (stating that regulations prohibiting gay sexual orientation did not deny the plaintiff equal protection rights).
122. *Rich*, 735 F.2d at 1229.

scrutiny were mandated with respect to discrimination based on sexual orientation, the compelling special needs of the Army in maintaining discipline and morale validate any sexual orientation classification.[123]

Two years after *Rich*, in the 1986 case *Bowers v. Hardwick*,[124] many hoped that the Supreme Court would settle the question of constitutional protection for gays and lesbians. *Hardwick* involved a gay man's challenge of a Georgia statute criminalizing sodomy.[125] Rather than clarify the constitutional issues, however, the Supreme Court fueled the debate with its statements and holding. Although the Court found that there was no connection between constitutionally protected privacy interests in family, marriage, or procreation on the one hand and homosexual activity on the other,[126] the Court's holding can fairly be described as a finding against the constitutional protection of sodomy rather than a constitutional statement on homosexuality.[127] Even though at least one commentator views *Hardwick* narrowly as a result of the Court's unwillingness to entertain any equal protection arguments in upholding the Georgia sodomy statute,[128] others have suggested that the Court's statements throughout the decision implicitly address equal protection challenges to sexual orientation discrimination.[129] In particular, the Court's handling of gay and lesbian due process arguments regarding a rational basis for

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123. *Id.* Federal circuit court deference to military explanations has been virtually absolute. *See* Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (asserting that "[t]he effects of homosexual conduct within a naval or military unit are almost certain to be harmful to morale and discipline"); *see also* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (stating that "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest").

124. 478 U.S. 186 (1986).

125. *Id.* at 187-88.

126. *Id.* at 191.

127. *See id.* at 192-94 (noting the common law roots of criminal laws against sodomy). *But see* Hinkle v. State, 771 P.2d 232, 233 n.1 (Okla. Crim. App. 1989) (arguing that the *Hardwick* decision was expressly limited to the question of whether homosexuals have a fundamental right to engage in sodomy, and thus finding that heterosexual sodomy is protected by the right to privacy and could survive any *Hardwick*-based challenge).

128. *See Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1568-70 (1989) (stating that *Hardwick* only dealt with a substantive due process challenge and that the Court never reached the equal protection question).

129. *See* Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1165 (1988) (noting that although *Hardwick* did not address challenges on equal protection grounds, the decision not to deal with unanswered questions has powerful implications).

the Georgia sodomy law[130] dims any hopes that federal circuit courts will be constitutionally sympathetic to gay and lesbian claims under the equal protection clause.[131]

Federal circuit courts confronted with gay and lesbian challenges of the military's policy since 1986 have consistently denied any constitutional protection in the form of heightened scrutiny.[132] However, the findings of conservative circuit court panels are likely to continue to be challenged by some of the more progressive district court judges. For example, in *Jantz v. Muci*,[133] a federal district court in Kansas found that discrimi-

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130. *See Hardwick*, 478 U.S. at 196. In answering petitioners' challenge that the Georgia law was based solely on morality and social acceptability and was therefore not rational, the Court stated that "[t]he law is . . . constantly based on notions of morality" and proceeded to refuse to acknowledge that sodomy laws should be invalidated because they are supported merely by moral sentiments. *Id.*

131. Indeed, a panel of Ninth Circuit judges has since declined to find that the Constitution protects gays and lesbians from classifications based on sexual orientation under equal protection principles. *See* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); *see also* Steffan v. Cheney, 780 F. Supp. 1, 12-13 (D.D.C. 1991) (arguing that a Department of Defense directive banning gays and lesbians from military service does not violate equal protection because the ban is rationally related to government interests in morale and discipline and in protecting armed forces from the AIDS epidemic). However, since *High Tech Gays*, another Ninth Circuit panel has at least accepted the notion that a complaint alleging an unconstitutional classification on the basis of sexual orientation may not be dismissed for failure to state a claim. *See* Pruitt v. Cheney, 963 F.2d 1160, 1164 (9th Cir. 1992). Gays or lesbians dismissed from the military, who can prove discrimination on the basis of "status" as opposed to "conduct," are entitled to require the particular military branch involved to offer a rational basis for its regulation. *See id.* at 1164-66; *see also* Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 97 (1991) (maintaining that the best argument for equal protection extension to sexual orientation is not "suspect class" but the "fundamental rights" strand of equal protection); Harris R. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 797-98 (1984) (arguing for heightened scrutiny on the basis that sexual orientation classifications should be suspect). *But see* Arthur S. Leonard, *Gay/Lesbian Rights: Report From the Legal Front*, NATION, July 2, 1990, at 14 (stating that "[s]ince the Court always shows extreme deference to the 'professional judgment' of the Pentagon, it seems unlikely that it will overrule policies excluding gays from the services, even if it were to subject those policies to heightened scrutiny").

132. *See, e.g.*, ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (holding that the Constitution confers no fundamental right upon gays to engage in sodomy), *cert. denied*, 494 U.S. 1004 (1990); Watkins v. United States Army, 875 F.2d 699, 708-09 (9th Cir. 1989) (holding that the Army was estopped from barring a gay man from reenlistment when his homosexuality had been known to the Army for fourteen years, and thus finding it unnecessary to consider his constitutional claims). *See generally* Craig W. Stedman, Comment, *The Constitution, the Military, and Homosexuals: Should the Military's Policies Concerning Homosexuals be Modified?*, 95 DICK. L. REV. 321 (1991) (surveying judicial decisions involving gay and lesbian constitutional claims against the military).

133. 759 F. Supp. 1543 (D. Kan. 1991), *rev'd*, No. 91-3245, 1992 WL 267503 (10th Cir. Oct. 9, 1992).

nation on the basis of sexual preference is subject to heightened scrutiny under the Fourteenth Amendment's equal protection clause.[134] The *Jantz* court found that because homosexuality is an immutable trait, discrimination on that basis is invidious and the product of "demonstrably false" stereotyping.[135] The Kansas district court's decision followed a line of district court decisions, many such as *Jantz* overturned by courts of appeals, that have provided some measure of constitutional protection to gays and lesbians.[136] Thus, the possibility exists that ultimately some federal trial court judge, upheld on appeal, will conclusively establish the principle that sexual orientation is a constitutionally protected interest. Until that day, however, protection of gay and lesbian interests will continue to involve complex analyses of federal preemption of state and local statutes, the proper role of state and local actions in the Title VII scheme, and the balancing of gay and lesbian interests outlined above with military interests.

ii. Limited protection for military interests under the First Amendment. Although public law schools are not required to afford protection against sexual orientation discrimination under the current interpretation of the United States Constitution, gay and lesbian interests may be further threatened if the Constitution is read to protect military recruiting under the First Amendment. The argument would be that the First Amendment requires public institutions to provide an open forum to all recruiters, including the military, who wish to communicate with students about their companies or organizations. The first test of this argument came in the summer of 1992 when a law student at the University of Minnesota Law School challenged the law school's ban on military recruitment

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134. *See id.* at 1551 (holding that discrimination based on sexual orientation is suspect and entitled to heightened scrutiny).

135. *Id.* at 1548.

136. *See, e.g.*, ben-Shalom v. Marsh, 703 F. Supp. 1372, 1377, 1380 (E.D. Wis.) (holding that a regulation was facially violative of the First Amendment and that homosexuals constitute a suspect class for purposes of the equal protection doctrine), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); High Tech Gays v. Defense Indus. Sec. Clearance Office, 668 F. Supp. 1361, 1368 (N.D. Cal. 1987) (finding that homosexuals are a quasi-suspect class entitled to heightened scrutiny under the equal protection clause), *rev'd*, 895 F.2d 563 (9th Cir. 1990); Martinez v. Brown, 449 F. Supp. 207, 212 (N.D. Cal. 1978) (concluding that mandatory exclusion of homosexuals from military service violates due process); Saal v. Middendorf, 427 F. Supp. 192, 202-03 (N.D. Cal. 1977) (stating that due process requires that fitness to serve be evaluated by all relevant factors and not by a policy of mandatory exclusion of homosexuals), *rev'd*, 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

on campus.[137] In *Nomi v. The Regents for the University of Minnesota*,[138] the federal district court upheld the University of Minnesota Law School's ban on military campus recruitment by finding that recruiting is commercial speech subject to reasonable restrictions furthering substantial government interests. In so doing, the court granted summary judgment to the University and denied the plaintiff law student's claim for injunctive relief under section 1983.[139]

In reaching its conclusion, the court first characterized military recruitment as "commercial" speech.[140] The court found speech is "commercial" if it proposes a commercial transaction in the nature of a statement such as "I will sell you X at Y price."[141] According to the court, recruitment is commercial speech because the purpose of recruiting is to reach an agreement under which services are exchanged for compensation.[142] The court was not convinced by plaintiff's argument that military recruitment is not commercial because military service results in a "status" change that cannot be viewed as purely contractual.[143] According to the court, a commercial speech finding does not hinge on whether the parties involved propose a contract or even whether the parties negotiate or bargain.[144] Rather, speech is commercial when one party seeks to exchange a commodity for a price.[145] Therefore, recruitment is commercial speech because an individual offers his or her services for a salary and benefits.[146]

Having concluded that recruitment is commercial speech, the court then analyzed whether the law school's nondiscrimination policy was an inappropriate infringement on that speech. The court found that commercial speech protections under the First Amendment are not as substantial as those afforded to other protected forms of expression.[147] In particu-

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137. The University for Minnesota Law School policy provides that " '[t]he University of Minnesota is committed to the policy that all persons shall have equal access to its programs, facilities, and employment without regard to race, religion, color, sex, national origin, handicap, age, veteran state [sic], or sexual orientation.' " Nomi v. Regents for the Univ. of Minn., 796 F. Supp. 412, 414 (D. Minn. 1992).

138. *Id.*

139. *Id.* at 419-20.

140. *Id.* at 416-17.

141. *Id.* at 416 (citing Board of Trustees v. Fox, 492 U.S. 469, 482 (1989); Virginia Pharmacy Bd. v. Virginia Consumer Council, 425 U.S. 748, 761 (1975)).

142. *Id.* at 417.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* (citing Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S.

lar, if the governmental interest served by the restriction on commercial speech is substantial, the restriction directly advances the interest and is not more extensive than necessary to serve the interest, the restriction against commercial speech is valid.[148] Critically, the restriction need not be shown to be the least restrictive means to advance the governmental interest, but rather need only be a reasonable fit between the ends and the means.[149]

Despite plaintiff's claims that the law school was disingenuous about its policy because of a history of selective enforcement, the court concluded that the law school's interest in equal opportunity was a substantial governmental interest appropriately served by a recruitment ban against those employers refusing to comply.[150] Moreover, the court held that the restriction was narrowly tailored in circumscribing only recruiting (commercial speech) and not any other form of protected expression.[151]

The court's decision in *Regents of the University of Minnesota* demonstrates the difficulties facing the military in forwarding arguments based on the First Amendment to gain campus access. Although most courts will likely find some protected interest, a reasonably crafted policy furthering the goal of equal opportunity will almost always survive constitutional muster. This supposition would be true even if military recruitment were viewed as more substantially protected speech than commercial speech because content-neutral time, place, and manner restrictions can legitimately limit other forms of protected expression.[152] Aside from the First Amendment, however, there may be other ways, discussed in the next section, that the law protects military recruiting interests on law school campuses.

B. *Legal Protection of Military Interests in Recruitment*

When compared to the protections against discrimination on the basis of sexual orientation, the protection of the military's interest in recruiting appears more firmly grounded. However, a careful analysis reveals weaknesses in the extent of

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567 (1979)).

148. *Id.* at 418.

149. *Id.* (citing Board of Trustees v. Fox, 109 S. Ct. 3028, 3035 (1989)).

150. *Id.* at 418-19.

151. *Id.* at 418.

152. Indeed, the University of Minnesota did make the argument that its ban on military recruiting was a content-neutral time, place, and manner restriction. *Id.* at 420 n.6. However, the court refused to rule on the issue because it found that military recruiting only constituted commercial speech. *Id.*

protection afforded by law to military recruitment *on campus*. Nevertheless, law schools considering a ban on military recruitment should be aware of the potential sources of protection for the military in this regard.

1. Law and military access to institutions of higher learning. The United States Constitution grants to Congress broad powers concerning the military and the ability to wage war.[153] Despite Congress' power to equip our armed forces, it is not self-evident that military recruitment on college campuses, particularly law schools, is a constitutionally-mandated prerogative of the military. Concededly, however, Congress could enact laws, pursuant to Article I, Section 8 of the Constitution, requiring access to both private and public law school campuses in times of war.[154] Even in peacetime, Congress could act to require campus access by the military if preparedness for war were threatened, or if Congress felt it necessary in order to "raise and support Armies" as it is required to do by Article I, Section 8 of the Constitution.[155]

Nevertheless, Congress has never passed a law exclusively for the purpose of allowing the military unimpeded access to the nation's college or law school campuses. The failure of Congress to mandate access is interesting because access to colleges and graduate schools in particular must be a military concern, especially given the history of military recruitment of officers and professionals.[156] Congress' inaction in this area may mean nothing; however, it is possible that Congress has never been quite convinced that the military's lack of access to college and law school campuses presents a threat to military recruiting.

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153. *See* U.S. CONST. art. I, § 8 (authorizing Congress, *inter alia*, to declare war, raise and support armies through appropriations lasting no longer than two years, provide and maintain a navy, make rules for the government and regulation of the land and naval forces, and provide for organizing, arming, and disciplining the militia).

154. *See* Lichter v. United States, 334 U.S. 742, 754 (1948) (arguing that it is necessary during war for a citizen to make sacrifices of his profits and property just as a soldier sacrifices his comfort and security); *cf.* Korematsu v. United States, 323 U.S. 214, 219, 220 (1944) (noting that citizenship entails responsibilities, including compulsory exclusion of citizens from their homes).

155. Article I of the Constitution provides that Congress shall have the power "To raise and support armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years . . . ." U.S. CONST. art. I, § 8, cl. 12; *see also* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 141, 144 (1948) (stating that the war power does not necessarily end when fighting ceases); Stewart v. Kahn, 78 U.S. (11 Wall.) 493, 507 (1871) (holding that Congress' power is not limited to war itself but may extend to guard against renewal of conflict or problems which result from the conflict).

156. Refer to note 235 *infra* and accompanying text.

The evidence presented in one of the few cases addressing the military interest in *on-campus* recruitment suggests that at least with respect to recruitment of attorneys, any threat is minimal.[157]

Congress did include restrictive provisions in various military-related appropriations measures during and immediately after the Vietnam War.[158] These restrictive provisions would have denied federal, defense-related grants to "non-profit institutions of higher learning" that barred recruiting personnel of any of the Armed Forces of the United States from campus.[159] The purpose of such provisions was to bolster the importance of military ties to colleges and universities during the turbulent atmosphere existing at the time of the Vietnam War.

A Committee Report accompanying the last of those appropriations acts explained that the main reason for the funds restriction language was the "complete disaffection" of students, faculties, and administrations of some institutions of higher learning, and resulting university policies barring military recruiters from campus facilities.[160] The Committee Report emphasized, however, that any decision to withdraw defense appropriations must be made by Congress, and explained that, despite such a possibility, every educational institution had "the absolute right to determine whether it desire[s] to have any association with the military forces of its country, and this includes the right to determine whether it desire[s] to permit military recruiters or have [ROTC] programs on its campus."[161] Significantly, the Committee stated that although it believed the national interest was best served by full opportunities in all career fields as well as opportunities for students to

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157. Refer to notes 237-40 *infra* and accompanying text.

158. *See* Armed Forces Appropriation Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740; Armed Forces Appropriation Authorization Act of 1971, Pub. L. No. 91-441, § 510, 84 Stat. 905, 914; National Aeronautics and Space Administration Authorization Act of 1969, Pub. L. No. 90-373, § 1(h), 82 Stat. 280, 281-82. Each of these laws prohibits funds from being used at institutions of higher learning that bar recruiting personnel from any of the Armed Forces. However, the laws allow an exception for particular research at barring institutions that the Secretary of Defense certifies are likely to make significant contributions to the defense effort. *Id.* In addition, the laws provide for the Secretary of Defense to furnish to the Administrator of the particular funds the names of any barring institutions within 60 days of the Act's passage and every January 30 and June 30 thereafter. *Id.*

159. Refer to note 158 *supra*.

160. H.R. REP. NO. 1149, 92d Cong., 2d Sess. 79 (1972). The original proposal to withdraw funds came from Senator Curtis in the form of an amendment to the 1968 NASA Authorization. 114 CONG. REC. 16,534 (1968). Senator Stennis, who supported the amendment, stated: "[T]his situation of barring those officers was largely created by sentiment in connection with the war." *Id.* at 16,537.

161. H.R. REP. NO. 1149, 92d Cong., 2d Sess. 79 (1972).

talk to all recruiting sources, "*it [did] not believe that Congress in any way should try to impose its will on such colleges and universities.*"[162] However, the Committee emphasized, "[i]f some institutions desire divorcement from the military, the separation should be made total and complete,"[163] thereby raising the possibility that if an institution denied access to the military, the military would withdraw its "business" from the institution.[164]

Since 1973, Congress has not included any such access-related language in its appropriations bills. But the recruiting policy initiated in those early acts was resurrected and has been carried on by Department of Defense regulations since 1984.[165] Under the Defense Regulations, "funds appropriated for the Department of Defense may not be used at any institution of higher learning if the Secretary of Defense . . . determines that recruiting personnel of [the Army, Navy, Air Force, or Marine Corps] are barred by the policy of the institution from the premises of the institution."[166]

Particularly noteworthy, though, is a provision that limits the effect of a funding cut-off at any given institution of higher learning. The regulation states that subordinate elements of an institution of higher learning may be treated independently with respect to withdrawal of research funds and contracts.[167] This part of the regulation, which serves to limit the rule's deterrent effect, has recently been the source of some controversy. The Washington Legal Foundation petitioned the Depart-

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162. *Id.* (emphasis added).

163. *Id.* at 80.

164. *See id.* at 79-80.

165. *See* Identification of Institutions of Higher Learning that Bar Recruiting Personnel From Their Premises, 32 C.F.R. § 216.1-.6 (1991). The regulations establish elaborate procedures to follow prior to any funding cut-off. First, the Department of Defense must confirm that the institution is indeed barring the military by contacting the head of the institution, *id.* § 216.5(c)(1)-(4); second, the institution is reported to the Assistant Secretary of Defense for Manpower (in a semi-annual report), *id.* § 216.5(c)(7); third, the institution is offered a chance to respond (which includes a chance to reconsider its policy) to any funds cut-off, *id.* § 216.5(c)(4); finally, the Assistant Secretary, after notice and an opportunity for response (which can be up to 90 days from the date of the Secretary's letter), must decide whether in fact funds should be cut-off, *id.* § 216.5(e)(1)-(3).

166. *Id.* § 216.3(a).

167. *See id.* The regulation provides that

> [i]f recruiting personnel are barred from the premises of a subordinate element of an institution by the policy of such subordinate element, and the policy does not bar effectively recruiting at other subordinate elements, *the prohibition on use of funds applies only to the elements in which recruiting is barred effectively.*

Id. (emphasis added).

ment of Defense in the summer of 1991 to remove the regulation language limiting the funding cut-off to a university's subordinate element that bars military recruiters.[168] The Washington Legal Foundation argued that nothing in the original appropriations statute might lead one to believe that Congress intended for a university to continue to receive funds while subentities excluded military recruiters.[169] The Department of Defense disagreed with the Washington Legal Foundation's arguments.[170] The Department stated that because the degrees of autonomy that universities give subordinate elements differ widely, an overall ban might wrongly punish some elements sympathetic to and important to military recruitment efforts.[171]

Cited as the source of the Department of Defense's authority for promulgating the regulations is the funding cut-off regulations of the Defense Appropriations Act of 1973.[172] The Defense Department's apparent regulatory stretch of Congress' original intent with respect to the funding cut-off provisions contained in Vietnam-era appropriations laws is remarkable. Although campuses in the Vietnam-era excluded the military because of "disaffection," exclusion since the 1980s has been pursuant to neutrally applied nondiscrimination policies—policies which happen to ensnare the military because of its discriminatory practices against gays and lesbians.[173] The Department has argued that the shift in reasoning for exclusion makes no difference, stating that it interprets the 1973 law "as requiring a funding cut-off when an institution barred military recruiters as a result of military policy even if the institution happened to apply the same recruiting policy to other employers."[174] A number of institutions commenting on the regu-

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168. *See* Petition from Daniel Popeo, General Counsel, Washington Legal Foundation, to Richard Cheney, Secretary of Defense (July 15, 1991) (on file with author).

169. *Id.* at 3.

170. *See* Letter from W.S. Sellman, Defense Department Director of Accession Policy, to Daniel Popeo, General Counsel, Washington Legal Foundation (Aug. 8, 1991) (stating that no legislative history supports the view that the regulation contravenes Congress' original intent) (on file with author).

171. *Id.*

172. Identification of Institutions of Higher Learning That Bar Recruiting Personnel From Their Premises, 32 C.F.R. § 216 (1991). The Department of Defense was concerned that if withdrawal of funds were contingent upon motive, those institutions desiring to bar the military for reasons other than discrimination could claim discrimination as the basis for exclusion and thus avoid any penalty.

173. *See* Letter from Mel Boozer, Director of Civil Rights Advocacy, National Gay Task Force, to the Assistant Secretary of Defense (Dec. 29, 1982) (opposing changes in the interpretation of the 1973 regulation) (on file with author).

174. Identification of Institutions of Higher Learning that Bar Recruiting Person-

lation in 1982, however, noted the different reason for military exclusion and questioned the Department's authority to withdraw funds because of an institution's enforcement of a neutrally applied nondiscrimination policy.[175]

Although no funds to any college or law school have been withdrawn under the funding cut-off provisions,[176] the Judge Advocate General of the Army did threaten the withdrawal of funds in 1982 in reaction to the ban of military recruiters from the campuses of various law schools that occurred due to the military's policy of discrimination against gays and lesbians.[177] Yet, as early as 1984, the Department of Defense had

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nel From Their Premises, 32 C.F.R. § 216.1-.6 (1991).

175. Among those institutions raising the point of regulatory authority were: The National Gay Task Force, *see* Letter from Mel Boozer, *supra* note 173, at 1 (stating that

> [t]he new provisions would also make it possible for the Department of Defense to sanction institutions whose policies were never directed against military recruitment per se . . . . The National Gay Task Force strongly objects to this interpretation of P.L. 92-436 since it has no foundation in the legislative history of this law and grossly interferes with the internal management and autonomy of civilian academic institutions);

The Association of American Law Schools, *see* Letter from John A. Bauman, Executive Director, The Association of American Law Schools, to Caspar Weinberger, Secretary of Defense (Dec. 29, 1982) (stating that

> the Association wishes to express its very serious concern over those portions of the proposed regulations which suggest that it would be appropriate for the Department to take action against schools or units of schools merely because their policies apply to military recruiters. The history of the statute and its predecessor suggests that such a broad reading is inappropriate);

The American Council on Education, *see* Letter from J.W. Peltason, President, American Council on Education, to the Assistant Secretary of Defense (Dec. 28, 1982) (on file with author) (stating that "the most troublesome feature of the Proposed Rules lies in the provisions which would call down the law's sanctions whenever military recruiters are unable to gain access . . . even if that institutional policy was adopted and is applied innocent of any bias against the military"). One statement by the American Council on Education actually analyzes congressional statements in connection with the relevant appropriations laws in the early 1970s to argue that Congress passed the fund cut-off provisions due to concern that institutions were barring the military for anti-military reasons. The American Council on Educ., Comments on Proposed Rule, submitted to Assistant Secretary of Defense (Manpower, Reserve and Logistics) (commentary on 47 Fed. Reg. 42757) (on file with author).

176. Since 1972, only 10 schools have even been included on the official list of institutions barring military recruiters. It is unclear whether those schools had ever received Department of Defense funds even prior to their listing. Moreover, those 10 schools were removed from the list in the mid-1980s, and no schools have been placed on the list since. *See* Letter from W.M. McDonald, Director, Freedom of Information and Security Review, Office of the Assistant Secretary of Defense for Public Affairs, to Roberto L. Corrada (Oct. 16, 1991) (responding to a Freedom of Information Act request) (on file with the *Houston Law Review*).

177. *See* Ruth Marcus, *Army, Law Schools in Showdown on Gay Rights*, WASH. POST, July 24, 1982, at A1 (stating that "[i]n a high stakes showdown over the Army's refusal to recruit homosexuals, the Army's top military lawyer has threatened to recommend withholding millions of dollars in Defense Department con-

substantially softened its position. Major Richard Mirelson, an Army spokesman, reportedly denied that the Judge Advocate General's earlier statements were threats, questioned the General's authority to have funds withdrawn, and stated that the Army so far had not recommended that the Department of Defense "cut-off funding to any school."[178] Mirelson explained that a critical reason the Army was not pressing the Defense Department for a funding cut-off was the Army's success in recruiting despite the ban.[179] However, he suggested that if the Army were only getting a small percentage of the lawyers it needed, the Army's position would perhaps change.[180]

Because Congress has previously enacted laws that could penalize financially those schools that bar military recruiters from their campuses, it is clear that, at least at certain times, the legislature considers military recruitment on campuses an important national interest. The question remains, however, whether the so-called national interest in military recruitment *on campus* is now sufficiently strong to override state and local interests in nondiscrimination. For example, is it possible for a state or local civil rights agency, pursuant to state or local law, to order a law school to bar military recruiters from campus?[181] To address the question in a practical way, it is important to study how the Supreme Court views the collision of military interests with state and local laws.

2. *Federal judicial deference to national security concerns: the military and federal preemption.* Past conflicts between

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tracts from universities whose law schools bar Army recruiters"). The Judge Advocate General's threats were aimed at six universities that had barred military recruitment: Harvard, Yale, Columbia, NYU, UCLA, and Wayne State. *Id.* In addition to the loss of approximately $41 million in defense contracts, the Judge Advocate General threatened the removal of ROTC units at the schools as well as a refusal to recruit any students at the schools who might be interested in the military, regardless of the ban. *Id.* at A9.

178. David A. Kaplan, *Two California Schools Lift Ban on Visits by Anti-Gay Recruiters*, NAT'L L.J., Oct. 29, 1984, at 4.

179. *Id.*

180. *Id.*

181. It should be noted here that a state court judge in Connecticut did bar military recruiters from the campus of the University of Connecticut Law School in 1992. *See* Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992). That decision states, without any analysis, that there is no federal law requiring military access. *Id.* at *2. Although the decision is certainly encouraging to gay and lesbian groups, reliance on the decision may be risky given Congress' treatment of access in the 1970s appropriations laws, refer *supra* Part II.B.1., the Third Circuit's *City of Philadelphia* decision, refer *infra* Part III.A.1., and the Supreme Court's traditional deference to the military, refer *infra* Part II.B.2.

military policies and national security on the one hand, and state and local regulation on the other, have often led the Supreme Court to find that federal policy supersedes state law. One relatively recent Supreme Court case illustrates the lengths to which the Court will go to accommodate military concerns. In *Boyle v. United Technologies*,[182] the Supreme Court extended governmental immunity for design defects in military equipment to private defense contractors, holding that in proper cases the "discretionary function" exception to the Federal Tort Claims Act (FTCA) could be used by those private parties to avoid tort liability.[183]

The *Boyle* case involved a crash of a Sikorsky helicopter off of the coast of Virginia during a training exercise.[184] The marine lieutenant flying the craft survived the impact but eventually drowned in the helicopter because of his inability to escape.[185] Specifically, a defectively designed escape hatch that could only open outward was rendered ineffective when the craft was submerged. The lieutenant's parents sued United Technologies, the manufacturer of the helicopter and escape hatch.[186]

In holding that Virginia tort law was preempted, the Court relied on a theory that requires a "uniquely federal interest" to be implicated in the case.[187] According to the Court, preemption under the "uniquely federal interest" theory requires the identification of a strong, unique federal interest.[188] The Court emphasized that once a strong interest is uncovered, the interest and the state law that are involved must be analyzed to determine whether a "significant conflict" exists between the two.[189] The benefit of identifying a "unique federal interest," according to the Court, is that any "conflict with federal policy

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182. 487 U.S. 500 (1988).
183. *Id.* at 513.
184. *Id.* at 503.
185. *Id.*
186. *Id.*
187. *Id.* at 505-06.
188. *Id.* Sometimes a unique federal interest may be too remote to trigger a specialized preemption analysis. *See, e.g.*, Miree v. DeKalb County, 433 U.S. 25, 30 (1977) (allowing a state law determination of whether third party beneficiaries could sue on an agreement between a local municipality and the Federal Aviation Administration). The *Boyle* Court's discussion of the *Miree* case is somewhat confused, leaving an unclear impression whether the *Miree* interest was too weak or the conflict between the federal interest and state law was too insignificant. *See Boyle*, 487 U.S. at 507.
189. *Boyle*, 487 U.S. at 508. The second requirement for preemption would be met if state law "frustrate[d] the objectives" of federal legislation. *Id.*

need not be as sharp as that which must exist for ordinary preemption."[190]

The Supreme Court found a "unique federal interest" in ensuring the United States government's continuing ability to procure equipment from private sources on its own terms.[191] The Court proceeded to declare that the duty imposed on United Technologies by the Virginia common law of tort (i.e., the duty to equip helicopters with more escape protection than that provided by an outward opening escape hatch) was contrary to the duty imposed on the company by government contract (i.e., the duty to manufacture and deliver helicopters with the type of escape mechanism required by government specifications).[192]

The holding in *Boyle*, however, was not as broad as the preceding passage suggests. The Court clearly would have had problems with immunizing private contractors that sold "off the shelf" items not particularly modified by government specifications.[193] Thus, prior to engaging in any preemption analysis, the Court identified a limiting principle found within the Federal Tort Claims Act (FTCA). The Court explained that preemption would only apply, and, presumably, immunity would only extend, to situations in which the federal contracting agency was exercising a "discretionary function" of government.[194] Applying its newly-announced rule, the Court found that "the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of this [FTCA] provision."[195]

A reading of Justice Brennan's dissent (joined by Marshall and Blackmun) reveals the broad sweep of the *Boyle* majority's decision. The "unique federal interest" theory of preemption has been sparingly used over the years.[196] Moreover, the majority's merging of two separate federal interests—procurement and civil liability of federal officials—to achieve a new, more comprehensive, unique federal interest is extraordinary, if not unprecedented.[197]

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190. *Id.*
191. *Id.* at 508-10.
192. *Id.* at 510.
193. *See id.* (stating that it would be impossible to find a significant government interest in escape hatches incidentally found on helicoptors that are ordered from stock).
194. *Id.* at 512-13.
195. *Id.* at 512.
196. *See id.* at 517-19 (discussing the "few and restricted" instances in which federal common law can displace state law).
197. *See id.* at 519-20 (criticizing the majority for creating a new category of

Professor Barry Kellman has suggested that the result in *Boyle* is not surprising considering the military interests involved in the case.[198] Professor Kellman has introduced a theory of judicial involvement in military matters that identifies a separate category of law, "national security" law, whose precedents call for judicial abdication to the military.[199] In particular, Kellman argues that the judiciary has created a wholesale immunity from law that extends beyond mere deference to the military on matters of national security.[200]

Although the Court may not yet have yielded so wholeheartedly to the military as Professor Kellman suggests, it is probable that the military's involvement in a particular matter results in extraordinary deference, especially among more conservative judges. *Boyle* is a good example of just such a case, as is the earlier but still recent decision of the Court in *McCarty v. McCarty*.[201] In *McCarty*, the Supreme Court ruled that a retired army colonel's military pension was a "personal entitlement" not subject to division upon divorce by California's "community property" laws.[202] To achieve its result, the Court relied heavily on the legislative history of the military pension system, which, the Court explained, characterizes military retired pay as current "compensation for reduced current services."[203] To validate its view that military retirement pay is pay for currently rendered services, the Court distinguished the retired military person from other retirees.[204]

In reviewing state and federal law to determine the extent of any conflict, the *McCarty* Court explained its preemption analysis in the language of deference that has echoed through the Court's decisions involving the military. For example, the Court found that the application of community property laws to military retirement pay "threatens grave harm to 'clear and substantial' federal interests."[205] To the Court's credit, it first identified a congressional objective to create a military pension system different from a separate system created by Congress to

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"uniquely Federal interests").

198. *See* Barry Kellman, *Judicial Abdication of Military Tort Accountability: But Who Is to Guard the Guards Themselves?*, 1989 DUKE L.J. 1597, 1646-49.

199. *Id.* at 1599 n.13.

200. *Id.* at 1649-53.

201. 453 U.S. 210 (1981).

202. *Id.* at 232-33.

203. *Id.* at 222.

204. *Id.* at 222-23 (citing Hooper v. United States, 326 F.2d 982, 986 (Ct. Cl.), *cert. denied*, 377 U.S. 977 (1964) (stating that retired officers are still considered part of the Army)).

205. *Id.* at 233.

care for surviving spouses and families.[206] However, it is unclear how that single objective would have fared as the sole federal interest to be weighed in a conflict analysis for preemption purposes.

In *McCarty*, the great bulk of the Court's rationale for finding a conflict sufficient for preemption consisted of the impact of a community property division upon the enlistment and reenlistment of personnel in the military.[207] The Court stretched itself in finding, without any empirical support, that a division of military retirement pay discourages retirement and serves as a positive incentive for a member of the military to continue working.[208] Such a result, the Court claimed, would be inconsistent with the congressionally-acknowledged essential need for a "youthful military."[209]

The Court recently made an exception to traditional federal and Supreme Court judicial deference to the military, but a close review of its decision reveals the analysis to be inapposite. In *North Dakota v. United States*,[210] the Court reviewed a conflict between a federal law requiring military purchases of liquor to be procured from the most competitive source and North Dakota state labelling laws that have the effect of increasing liquor costs to military bases.[211] The Court refused to find federal preemption for reasons that are inapplicable in most military/state conflicts, particularly those involving military recruitment. For example, the Court emphasized the importance of the provision of the Twenty-first Amendment that grants states "'virtually complete control' over the importation and sale of liquor and the structure of the liquor distribution system."[212] The Court concluded that particular protection of state liquor regulation rights by constitutional amendment gave North Dakota's laws a strong presumption of validity.[213] Proceeding to the question of whether federal interests and North Dakota laws conflicted, the Court found that while the state liquor laws "incidentally raise[d] the costs to the military," the laws did not obstruct the federal government.[214] The Court's

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206. *Id.* at 234. *See generally* The Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431-1446 (1988); Survivor Benefit Plan, 10 U.S.C. §§ 1447-1455 (1988).
207. *McCarty*, 453 U.S. at 235-36.
208. *Id.* at 236.
209. *Id.*
210. 495 U.S. 423 (1990).
211. *Id.* at 423.
212. *Id.* at 431 (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980)).
213. *Id.* at 433.
214. *See id.* at 441 (stating that the state's regulations do not restrict the parties

conclusion was supported by the Constitution's preservation of state power to regulate liquor distribution, a point emphasized throughout the decision.[215]

The Court's particular analysis of the force of the Department of Defense's liquor regulation (the "DoD Regulation") vis-à-vis North Dakota's laws is notable. As the Court is prone to do these days, it searched the DoD Regulation for any specific language regarding preemption.[216] The Court found preemption inappropriate because even the DoD Regulation envisioned some state involvement by requiring that the Department cooperate with state and local officials.[217] Significantly, however, the Court preserved notions of general judicial deference to the military when it stated the following:

> [W]hen the Court is confronted with questions *relating to military discipline and military operations, we properly defer to the judgment of those who must lead our armed forces in battle.* But in questions relating to the allocation of power between the Federal and State Government on civilian commercial issues, we heed the command of Congress without any special deference to the military's interpretation of that command.[218]

Thus, a review of recent preemption decisions involving the military reveals that the Court's traditionally narrow view of federal preemption broadens considerably when the issues involved carry perceived "national security" implications. This broadened view of federal preemption arises regardless of whether attorneys arguing on behalf of the military have attempted to demonstrate the likelihood of any particularized effect on national security. At best, the Court's attitude may be described as "due deference." At worst, the Court has abdicated its proper role as a check upon Congress and the Executive when the military is involved, even indirectly, in a legal dispute involving military discipline or military operations. Even if the Court's reviewing role lies somewhere between deference and abdication, the Court's historical special treatment of the military with respect to operations and discipline should affect

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from whom the Government may purchase liquor or its ability to engage in competitive bidding, but simply raises the price).

215. *See, e.g., id.* at 431 (noting states' power to control liquor shipments throughout their territory and to take steps to prevent unlawful diversion of liquor regulated intrastate markets); *id.* at 432 (discussing North Dakota's liquor distribution and regulation system as "unquestionably legitimate" under the Constitution); *id.* at 439-40 (characterizing the state's labelling regulations as "at the core" of the state's power under the Twenty-first Amendment).

216. *Id.* at 441-42 & n.12.

217. *Id.* at 442.

218. *Id.* at 443 (emphasis added).

how legal counsel view the potential conflict that exists between military interests in campus recruitment and state and local interests in eliminating discrimination.

III. Of Heterosexism, National Security, and Federal Preemption: Issues Confronting Law Schools Debating Whether or not to Bar Military Recruiters from Their Campuses

The legal implications of a law school's decision *to allow* on-campus recruiting by the military are somewhat unclear. While no federal law requires law schools to bar military recruiters from campus because of discriminatory military policies aimed at gays and lesbians, there is a decided trend toward increasing state, local, and private protection for gays and lesbians as well as mounting public pressure concerning the military's exclusionary policy.[219] As a result, many law schools in states and localities that protect gays and lesbians from employment discrimination are legitimately inquiring whether state or local agencies, buoyed now by some amount of public support, may enforce orders barring military recruitment.[220]

The legal implications of a law school's decision *to prohibit* on-campus recruiting by the military are equally unclear. The ill-defined military interest in on-campus recruitment of attorneys, combined with Title VII's embrace of state and local antidiscrimination legislation, suggest that as a purely legal matter the military may find it difficult to argue that military interests should override the other policy interests involved. However, traditional judicial deference to the military and federal court apathy toward gay rights may suggest that as a practical matter, military interests will prevail over state or local actions.

In resolving the legal implications of a law school's decision to allow or to prohibit military recruiting, it is important to keep in mind a third interest—the interest of the law school in institutional freedom. Congress has recognized the "absolute right" of institutions of higher learning to decide for themselves what the nature of any relationship with the military will be.[221] Because of this congressional recognition, a law school's

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219. Refer to notes 15-21, 26-29 *supra* and accompanying text.

220. A law school administration fear of state and local agency or judicial action has likely been heightened by the 1992 Connecticut state court decision preliminarily enjoining the military from recruiting at the University of Connecticut Law School. *See* Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992).

221. *See* H.R. Rep. No. 92-1149, 92d Cong., 2d Sess. 79 (1972) (statement by the

interest in institutional academic freedom may override both antidiscrimination and military concerns in any law school clash.

This section of the article attempts to clarify the legal implications of a law school's decision with regard to military recruiting. Two main scenarios present themselves under which conflicts between sexual orientation and military recruitment concerns will arise. The first involves actions by external agencies or organizations to force a law school which desires military on-campus recruitment to bar the military. The second involves possible action by the military when a law school chooses to bar or partially bar military recruitment on campus. These scenarios and the varying interests under each will be discussed below.

A. Assessing the Risk of an Institutional Decision Fully Supporting Military Recruitment On Campus

A law school that decides to fully support military recruitment on its campus risks attack from two sources. First, if the law school is located in a state or locality with laws that prohibit discrimination on the basis of sexual orientation, it may face enforcement actions by a government agency or even litigation filed by students. Second, regardless of where the law school is located, it may face sanctions by private organizations such as the AALS.

1. Application of state/local sexual orientation laws to military recruitment interests. This subsection seeks to assess the outcome of a clash between a law school that desires to allow on-campus recruiting and a state or local agency attempting to enforce antidiscrimination laws. In the event of such a clash, the most important legal issue will involve preemption. That is, a court will have to decide whether the state or local law that prohibits discrimination on the basis of sexual orientation is overridden by some federal law or policy concerning the military or academic institutions.

a. United States v. City of Philadelphia*: Using the Third Circuit's decision as a factual model for analysis.* The bulk of state and local ordinances that provide protection against sexual orientation discrimination are very recent, thus,

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Committee on Armed Services in a report accompanying the Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972)).

case law on the issue is scarce. Recently, a Connecticut state court judge did preliminarily enjoin the military from recruiting on the University of Connecticut Law School campus.[222] The decision, however, concluded that no federal law requires military access to campus.[223] Thus, its utility in analyzing a preemption clash between military and gay concerns is marginal. However, an ordinance in the city of Philadelphia was the basis for a Philadelphia Human Rights Commission order requiring the Temple Law School to prohibit military recruitment on the Temple campus. The decision of the United States Court of Appeals for the Third Circuit is based on federal preemption[224] and therefore serves as a good starting point for further discussion of the interrelationship between the military, Title VII, and state/local antidiscrimination laws.

As is the case with most law schools, Temple University's law placement office annually arranges interviews between law students and, typically, more than one hundred law employers around the nation, including the Judge Advocate General Corps of the Army, Navy, and Marine Corps (the "JAG Corps").[225] In 1982, two law students who had applied with but were not interviewed by the JAG Corps filed complaints with the Philadelphia Human Rights Commission (the "Commission"). They claimed that the law school had violated the Philadelphia Fair Practices Ordinance, which protects against sexual orientation discrimination in employment, by allowing the JAG Corps, an admitted discriminator, to recruit on campus.[226]

After a hearing, the Commission found that Temple Law School had committed three unlawful employment acts: 1) allowing the JAG Corps to use law school placement facilities; 2) referring persons to the JAG Corps for employment; and 3) aiding and abetting the JAG Corps in executing its policy of

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222. *See* Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992).

223. *Id.* at *2.

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

225. *Id.* at 83.

226. *Id.* at 84. The Philadelphia ordinance provides:

> (A) It shall be an unlawful employment practice:
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> (2) For any . . . employment agency . . . to establish, announce or follow a policy of denying or limiting . . . the employment . . . opportunities, of any individual or group because of . . . sexual orientation . . . .
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> . . . .
>
> (7) For any person to aid, abet, incite, compel or coerce the doing of any unfair employment practice . . . or to attempt directly or indirectly to commit any act declared by this Chapter to be an unfair employment practice.

Id. at 84 n.2.

sexual orientation discrimination.[227] A Commission order requiring the law school to "cease and desist" from cooperating with the JAG Corps prompted the United States to file a complaint in federal district court alleging that the Philadelphia law, as applied, violated the Supremacy Clause of the United States Constitution.[228] After Temple filed a similar complaint, the district court granted summary judgment to the United States and Temple.[229] The district court order was appealed by the Commission.[230]

In *City of Philadelphia*, the Third Circuit held that the Commission's order restraining the Temple Law School was preempted by federal law.[231] As an initial matter, the court acknowledged that Congress had not explicitly overridden the local ordinance.[232] The court indicated that Congress had not "occupied the field" and thus had left room for states and localities to regulate employment discrimination.[233] Accordingly, the court stated that the Philadelphia ordinance could only be preempted if it conflicted with some other federal law.[234] Through an analysis of defense appropriation legislation, the Third Circuit first found that "Congress considers access to college and university employment facilities by military recruiters to be a matter of paramount importance."[235] The court then proceeded to analyze whether Philadelphia's order conflicted with that congressional policy under the preemption standard that the Supreme Court announced in *Penn Dairies v. Milk Control Commission*.[236]

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227. *City of Philadelphia*, 798 F.2d at 84. The law school stipulated that its placement office constitutes an "employment agency" for purposes of the Philadelphia law. *Id.* at 84 n.2.

228. *Id.* at 84-85.

229. *Id.* at 85. The district court entered an order prohibiting the Commission from enforcing the ordinance if the Commission's complaint stemmed from its objection to the United States policy of sexual orientation discrimination in military recruitment. *Id.*

230. *Id.* The Commission was joined on appeal by the Philadelphia Lesbian and Gay Task Force, the American Civil Liberties Union of Greater Philadelphia, and the Lambda Legal Defense and Education Fund, Inc. *Id.*

231. *Id.* at 87-88. The court stated:

> We conclude . . . that the [district court] Order conflicts with a clearly discernible Congressional policy concerning military recruitment on the campuses of this nation's colleges and universities. It follows, then, that the Commission cannot enforce the Ordinance against Temple with respect to the latter's decision to make its placement facilities available to the J.A.G. Corps.

Id. at 88-89.

232. *Id.* at 86 n.5.

233. *Id.*

234. *Id.*

235. *Id.* at 86.

236. *Id.* at 84-85; *see* Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 271

In analyzing the effect of the Commission's order on military recruitment, the court reviewed data concerning military recruitment on all Philadelphia area college and university campuses.[237] The court's review revealed that of the ninety-five officers recruited by the Navy from Philadelphia area colleges in 1984, some forty-seven percent were recruited from contacts made on campus.[238] Although the data revealed no attorneys among the officer recruits, the court found that over the prior three years, ninety-eight percent of Navy nuclear propulsion engineers were recruited from on-campus contacts.[239] Finally, in finding on-campus recruitment important to the military, the court credited the testimony of the Deputy Assistant Secretary of Defense for Military Personnel and Force Management, who stated that, based on statistics, "campus recruiting represents the most effective way to fill the critical shortage of persons possessing these important skills."[240]

Based on this evidence, the Third Circuit concluded that the order restraining Temple Law School conflicted with congressional policy.[241] More specifically, the court found that the Philadelphia agency's order significantly impaired the military's ability to recruit skilled personnel even though the order was aimed only at the Temple Law School.[242] The possible application of this precedent beyond Temple Law School was admittedly important to the Court's conclusion.[243]

(1943) (stating that preemption may be based on an actual conflict with an unexpressed but clear, discernible congressional policy); *see also id.* at 275 (providing that when the legislative command is ambiguous, an unexpressed purpose of Congress to nullify states' internal regulations ought not to be implied). If preemption cannot be found on express statutory terms or on a finding that Congress intended to preempt the entire field, federal law requires that " 'the consequences [of the state regulation] sufficiently injure the objectives of the federal program' " before a court may hold the regulation preempted. *City of Philadelphia*, 798 F.2d at 87 (citing McCarty v. McCarty, 453 U.S. 210, 232 (1981); Hisquierdo v. Hisquierdo, 439 U.S. 572, 581-83 (1979)). Refer to text accompanying notes 153-64 for a review of congressional action and legislative history on the question of whether there is a clear military recruitment policy.

237. *City of Philadelphia*, 798 F.2d at 88.

238. *Id.* at 87.

239. *Id.*

240. *Id.*

241. *Id.* at 88.

242. *Id.* The court considered the order's effect generally, concluding that "other jurisdictions may adopt a similar interpretation of their anti-discrimination ordinances," thus impacting military recruitment throughout the nation. *Id.*

243. *Id.* The court's position on precedent is somewhat conflicting. While the court was very willing to use the threat of precedent to strengthen its position concerning the potentially expansive effect of the local order, it made clear in a footnote that it had not even considered the likelihood of the city applying its ordinance to other entities which might cooperate with the military, or whether the application of

In holding that the Commission's order was preempted, the Third Circuit also considered institutional academic freedom.[244] The court reaffirmed the legislative history of the Department of Defense Authorization Act of 1973,[245] concluding that each college and university retains the "absolute right to determine whether it desires to have any association with the military forces of its country, and this includes the right to determine whether it desires to permit military recruiters . . . on campus."[246] The court's reasoning indicates that a key to the result in *City of Philadelphia* was the imposition of a recruitment bar by an outside agency.[247]

Although the Third Circuit's reasoning appears sound at first glance, it is troubling in certain respects. For example, it is at least questionable whether in cases like *City of Philadelphia*, involving compelled action by state and local authorities a "discernible congressional policy" should be sufficient to allow national interests to supersede state and local laws. The Third Circuit, as shown below, failed to consider other preemption standards and improperly balanced the competing interests.

b. Rethinking preemption standards: the implications of clear and manifest intentions, merely discernible policies, and uniquely federal interests. To examine the legal impact of a state or local agency order requiring a law school to prohibit military recruiters from recruiting on campus, a determination must first be made concerning the appropriate preemption standard. Which standard is chosen is important in determining how the identified federal interest will be balanced against state and local laws. The applicable standard for weighing military recruitment interests against state and local antidiscrimination laws, however, has been the source of some controversy.

Three preemption standards could apply in the context of state and local laws prohibiting sexual orientation discrimination. In *City of Philadelphia*, the Third Circuit applied the "discernible congressional policy" standard for judging preemp-

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the local law in such cases would violate the principle of supremacy. *Id.* at 88 n.8.

244. *Id.* at 88.

245. Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972).

246. *City of Philadelphia*, 798 F.2d at 88 (quoting H.R. REP. NO. 92-1149, 92d Cong., 2d Sess. 79, 79-80 (1972) (statement by the Committee on Armed Services in a report accompanying the Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, 86 Stat. 734 (1972)).

247. *See id.* at 89 (indicating that Temple would be barred under the order from cooperating with the military and would be unable to permit the military to conduct on-campus interviews).

tion.[248] The court inquired whether military recruitment on campus constituted a "discernible congressional policy" sufficient to preempt state or local laws with which the policy might conflict.[249] At least one commentator, who has viewed employment discrimination as an area traditionally regulated by the states, has criticized the Third Circuit as applying the wrong preemption test.[250] Instead of trying to discern an unstated congressional policy, this commentator suggested that courts should determine whether Congress has shown a "clear and manifest" intent to preserve for federal regulation what has traditionally been an area regulated by the states.[251] Another commentator, refusing to take sides in the preemption standards debate, has simply argued under each standard that no military interest rises sufficiently high to preempt state/local employment discrimination laws.[252] While both commentators make strong arguments about preemption and roundly criticize the Third Circuit's decision in *City of Philadelphia*, neither commentator considers judicial deference to the military nor

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248. *Id.* at 85.

249. *Id.* (citing Penn Dairies v. Milk Control Comm'n, 318 U.S. 261 (1943)). The court relied upon the traditional preemption test cited in *Penn Dairies*. The Third Circuit failed to explain why it was imposing the *Penn Dairies* test; however, the test remains good law and, indeed, has been cited by the current Supreme Court. *See, e.g.*, North Dakota v. United States, 495 U.S. 423, 434-35 (1990).

250. *See* Wyllie, *supra* note 1, at 1351.

251. *See id.* at 1351-52. The author emphatically insists that the "clear and manifest" intent standard should apply because employment discrimination is an area "traditionally regulated by the states." *Id.* at 1351. Although the Third Circuit also suggested that states possess "traditional regulatory powers to prohibit employment discrimination," *City of Philadelphia*, 798 F.2d at 86 n.5, it is perhaps a bit extreme—given the Thirteenth Amendment, the Fourteenth Amendment's Equal Protection Clause, Title VII of the Civil Rights Act of 1964, and §§ 1981 and 1985 of the Civil Rights Act of 1866—to presume that the Supreme Court will view the state interests in employment discrimination regulation to be precisely comparable to the interest in state licensing of businesses or even the interest in state regulation of contractual relationships.

Moreover, in invoking the "clear and manifest" standard, the author relies on North Dakota v. United States, 495 U.S. 423 (1990), a recent decision of the Supreme Court involving a potential conflict between federal military purchasing policies and state regulation of liquor distribution. That case, however, is inapposite on two very critical grounds. First, federal regulation of state liquor distribution demands a higher preemption standard because state power in the area is granted by the Twenty-first Amendment to the U.S. Constitution, a fact cited often by the Court when analyzing the potential conflict in the case. Refer to notes 212-14 *supra* and accompanying text. Second, the Court expressly distinguishes the "civilian commercial" issues involved in the case from state laws impacting "military discipline and military operations" which must be reviewed with proper deference to military leaders. Refer to note 218 *supra* and accompanying text. Clearly, state laws affecting military recruitment are more likely to be characterized as "military operations/military discipline" problems than as "civilian commercial" ones.

252. *See* Falik, *supra* note 1.

analyzes generally the area of military preemption in reaching their conclusions. Reliance on such preemption analyses is therefore somewhat risky. Finally, it is possible that the Supreme Court could eschew both the "discernible congressional policy" and the "clear and manifest" standards by finding that military recruitment on campus is a "unique federal interest," as in *Boyle v. United Technologies*.[253] Application of this third standard could easily result in preemption by a judicial finding of an actual conflict between federal policy and state or local law under a more flexible conflict standard.[254]

The "clear and manifest" intent standard and the "discernible congressional policy" standard differ in one significant manner. Preemption based on a "discernible policy" necessarily means that a court will nullify state law based upon an *unexpressed* intention of Congress.[255] The "clear and manifest" standard, on the other hand, requires a *clearly expressed* statement by Congress that federal law is supreme prior to any finding of preemption.[256] Although the Supreme Court favors clear congressional statements of preemption, it has not reversed *Penn Dairies* or the "discernible congressional policy" standard for preemption. However, given the current Court's hesitation to find preemption, the "discernible congressional policy" standard, though still applicable, should only act to preempt state law when the alleged legislative policy is absolutely unambiguous.[257]

Application of the "unique federal interest" standard, however, substantially changes the preemption analysis. A review of *Boyle* reveals the Court's willingness to guard certain federal interests from a state or local law, even when the two interests do not actually conflict but are merely inconsistent.[258] Use of

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253. 487 U.S. 500, 522 (1988). Neither of the commentators mentioned previously considers the "uniquely federal interest" standard as a possible preemption guideline for a conservative court.

254. *See Boyle*, 487 U.S. at 507 (noting that obligations of the United States are uniquely federal interests which displace state law). Refer to notes 182-97 *supra* and accompanying text.

255. *See* Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943) (allowing an unexpressed congressional policy interest to preempt state law).

256. *See* Wyllie, *supra* note 1, at 1351 (stating that a court should not find that a state law is preempted unless the law directly conflicts with a state statute or a clear and manifest congressional purpose).

257. The *Penn Dairies* Court cautioned that a finding of preemption based on "policy" is not "lightly to be inferred and ought not to be implied where the legislative command . . . remains ambiguous." *Penn Dairies*, 318 U.S. at 275.

258. *See Boyle*, 487 U.S. at 504 (noting that in most instances the Court will fail to find preemption of state law in the absence of a direct conflict or clear statutory prescription).

the "uniquely federal interest" standard is unprecedented in the employment discrimination arena. Moreover, this standard would likely be passed over in resolving any conflict involving military recruitment because such an interest cannot arguably fall within any particular body of federal common law. Nevertheless, the Court's surprising use of the doctrine to resolve the dispute in *Boyle* suggests that the standard should not be readily dismissed in a recruitment context, especially if deference to the military becomes doctrinally difficult for the Court under other preemption standards. The Supreme Court's use of the "uniquely federal interest" standard would likely lead to a result favoring the military.

In contrast, application of the "clear and manifest" intent standard to determine whether the military interest in on-campus recruitment overrides state or local sexual orientation laws would likely lead to a result in favor of state and local laws. Preemption under this standard requires nothing less than an express statement of congressional intent. Because no language in the relevant laws or their legislative histories states that military access to campuses overrides state and local antidiscrimination laws, no basis exists to find those laws preempted under a "clear and manifest" intent standard. The Court's application of a "clear and manifest" requirement is improbable in a military recruitment controversy, especially given the current membership of the Court and the Court's history of deference to the military. However, a state court judge in 1992 impliedly followed the "clear and manifest" intent standard in enjoining military recruitment on a law school campus pursuant to state law.[259] The judge in *Gay and Lesbian Law Student Ass'n v. Board of Trustees*[260] stated without any further analysis that "the court finds no federal law which requires state institutions (such as the [University of Connecticut] Law School) to allow the military on campus for recruiting purposes. Thus, the state statutes . . . have not been preempted by federal law."[261] Although the decision should be of some comfort to gay and lesbian interests, the lack of any meaningful preemption analysis hardly serves to dismiss the preemption issue altogether.

The only remaining question, then, involves the outcome of a preemption analysis under the *Penn Dairies* "discernible con-

259. *See* Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926, at *1 (Oct. 14, 1992).
260. No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992).
261. *Id.* at *2.

gressional policy" standard. In *United States v. City of Philadelphia*,[262] the Third Circuit found under the *Penn Dairies* test that local law was preempted by the military interest in on-campus recruitment.[263] Certainly, given the Court's past accommodation of conflicting military and state/local interests, no law school should be entirely uncomfortable relying on the *City of Philadelphia* case to determine the risk of state or local liability following a decision to cooperate completely with military recruiters.

However, a law school should not be entirely comfortable relying on *City of Philadelphia* either, especially after two court decisions in 1992 upholding gay and lesbian interests in the military recruitment controversy.[264] In addition, the Supreme Court's view of preemption has narrowed significantly since the Third Circuit's decision in *City of Philadelphia*.[265] Moreover, the Court has since decided *California Federal Savings and Loan Association v. Guerra*[266] which, if it does not elevate state and local antidiscrimination initiatives, at least indicates more clearly Supreme Court disdain for federal interference in state antidiscrimination efforts.[267] Finally, even if preemption analysis had not changed since 1986, a substantial question remains about the Third Circuit's balancing of the competing interests before it in *City of Philadelphia*. The following section criticizes the *City of Philadelphia* court's view of the conflicting interests under the "discernible policy" preemption standard and provides a reasoned approach which more appropriately balances the legally protected expectations of gays and lesbians and the military.

c. Underestimating Title VII, overlooking academic freedom, and misanalyzing conflict: rebalancing the sexual orientation/military seesaw. Applying the *Penn Dairies* "discernible congressional policy" test for preemption, the Third Circuit in

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262. 798 F.2d 81 (3d Cir. 1986).

263. *See id.* at 85.

264. *See* Nomi v. Regents for the Univ. of Minn., 796 F. Supp. 412 (D. Minn. 1992); Gay & Lesbian Law Students Ass'n v. Board of Trustees, No. CV-92-0512240S, 1992 Conn. Super. LEXIS 2926 (Oct. 14, 1992).

265. *See, e.g.*, English v. General Elec. Co., 496 U.S. 72, 79 (1990) (noting that express or plainly implied congressional intent to preempt state law is necessary to negate state actions); *Boyle*, 487 U.S. at 504-05 (noting that for a federal law to preempt a state regulation the subject must be one of unique federal interest and that a significant conflict must exist between federal and state law).

266. 479 U.S. 272 (1987).

267. *See id.* at 272 (holding that a state pregnancy-disability leave statute was not preempted by federal law because it was not inconsistent with the federal law nor did it require doing an unlawful act under federal law).

City of Philadelphia found a congressional policy in favor of military recruitment on campus.[268] Its finding was premised, first, upon Congress' statement in the Armed Forces Act[269] that the branches of the military "shall conduct intensive recruiting campaigns to obtain enlistments."[270] The court also found an interest in on-campus recruitment based on Vietnam-era statutory provisions which revealed a congressional policy of encouraging colleges and universities to cooperate with, and open their campuses to, military recruiters.[271]

The Third Circuit's finding of a discernible congressional policy rests on questionable grounds. Although Congress has expressly stated that military recruitment is important enough that the branches should pursue it intensively, such a declaration does not necessarily suggest that *on-campus* recruitment is absolutely critical to the military recruitment effort. Thus, the Vietnam-era appropriations laws, with provisions threatening withdrawal of defense funds from institutions that bar the military from campus, provide the sole source of guidance with respect to congressional feelings about the significance of on-campus military recruitment.

i. Institutional academic freedom. Contrary to the Third Circuit's conclusion in *City of Philadelphia*, the Vietnam-era appropriations provisions on military recruitment do not unambiguously point to a congressional policy in favor of *on-campus* military recruitment. The specific language of the appropriations laws simply falls short of establishing on-campus recruitment as a matter of "paramount importance," although the laws may suggest that such recruitment is at least a matter of some congressional concern.[272] Rather, the language of the appropriations laws, and their legislative histories serve instead to narrow the significance of the interest. First, the laws do not mandate access. The laws provide an entirely self-contained monetary penalty for barring military recruitment: the withdrawal—or at the least the threat of withdrawal—of Defense Department research funds and contracts.[273] The message of the laws is clear; if an institution prohibits on-cam-

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268. *City of Philadelphia*, 798 F.2d at 87.
269. 10 U.S.C. § 503(a) (1992).
270. *City of Philadelphia*, 798 F.2d at 86 (quoting 10 U.S.C. § 503(a) (1992)).
271. *Id.* (listing the statutory provisions on which the court relied).
272. *See generally* Armed Forces Appropriation Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972) (containing monetary restrictions on institutions of higher learning that bar military on-campus recruitment).
273. Refer to note 158 *supra* and accompanying text.

pus recruiting by the military, it risks losing or failing to receive any Defense Department funding to which the institution would ordinarily be entitled. The laws and their legislative histories nowhere suggest that a recruitment bar will have any other impact on an institution of higher education.

The second limitation on any federal interest in on-campus recruitment is found in the legislative history of the 1973 appropriations authorization law. A House Committee Report released with the measure implies that the federal interest in on-campus military recruitment is subordinate to a college or university's right to decide the nature of its relationship with the military. According to the Committee Report, Congress should not "in any way . . . try to impose its will on such colleges and universities."[274] Moreover, the Committee expressly recognized "that each educational institution has the *absolute* right to determine whether it desires to have any association with the military forces of its country, and this includes the right to determine whether it desires to permit military recruiters or have Reserve Officers Training Corps programs on its campus."[275]

A reading of the legislative history of the 1973 appropriations law allowing cut-off of funds to institutions barring military recruiters is quite revealing. While a reader's initial reaction is to view the legislation and its history as a declaration of the importance of military recruitment, the truth is strikingly to the contrary. A more critical review shows that the paramount interest embodied in the legislation is college and university institutional autonomy rights, characterized as *absolute*, to decide free of any interference what the institutional relationship with the military will be. Thus, while there is indeed a federal interest in military recruitment *on campus*, Congress has expressly tempered the interest by providing a monetary penalty to schools receiving defense monies that bar the military and by declaring the interest to be superseded by college and university rights to determine voluntarily whether to accommodate military recruiters. Although no answer has been given to the question of whether institutional autonomy rights can be characterized as absolute when their exercise can result in a cut-off of government funding, the strong inference is that Congress intended that colleges and universities have the right to choose. If the institution's choice is to bar the military, the

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274. H.R. REP. NO. 92-1149, 92d Cong., 2d Sess. 79 (1972). Refer to notes 160-64 *supra* and accompanying text.

275. *Id.* at 79 (emphasis added).

appropriate federal response is a cut-off of defense funds and nothing more.

Even though the Third Circuit erroneously assessed the strength of the college and university interest in institutional autonomy, it may have achieved the correct result. Recall that in *City of Philadelphia*, the local civil rights order prohibiting military recruitment was in direct conflict with the wishes of the law school subject to the order.[276] The clearly expressed congressional interest in allowing colleges to decide voluntarily their relationship with the military is sufficiently strong, couched in absolute terms by Congress, to override state and local compulsion of university or law school action. Accordingly, the Third Circuit properly refused enforcement of the Philadelphia Human Rights Commission order. The proper rationale for preemption should have been that the order conflicted with the discernible congressional policy favoring college and university autonomy.

ii. Title VII. The clarity of congressional expression about institutional free choice does not leave state and local authorities attempting to enforce state/local antidiscrimination laws without arguments. At the very least, it is not at all clear that Congress intended military campus access to preempt neutrally applied state and local antidiscrimination laws—a factor not even considered by the *City of Philadelphia* court. Remember, the 1973 law and its legislative history preserved institutional free choice at a time of general disenchantment with the military—at a time when military recruiters were barred because of the military's role in an unpopular war. The reason for exclusion has shifted (the military is now barred pursuant to neutrally applied sexual orientation antidiscrimination policies), and Congress has not expressed itself regarding the accommodation it might make given the shifting reason for prohibiting military access.

Moreover, it is possible, maybe even probable, that strong congressional statements in favor of institutional free choice would be more tempered when that free choice is known by Congress to foreclose the effective enforcement of local or state antidiscrimination laws. After all, Congress and the Supreme Court have both stated that local antidiscrimination efforts are an important part of the federal antidiscrimination scheme set

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276. *See City of Philadelphia*, 798 F.2d at 87 (stating that Temple Law School opposed a local civil rights order which would have restricted the school from allowing the use of its placement facilities by the JAG Corps).

out in Title VII.[277] Because the *Penn Dairies* standard requires an unambiguous, even if unexpressed, statement of congressional policy in order to find preemption,[278] the lack of any congressional discussion whatsoever about neutrally applied nondiscrimination laws as a basis for military exclusion is an argument against preemption. Moreover, because Congress refused to mandate military campus access in response to wide-ranging campus hostility toward the military in the early 1970s, the notion that access should suddenly be required in response to the neutral application of nondiscrimination laws makes little sense.

Despite the strength of Title VII's preservation of state and local antidiscrimination laws in any preemption determination, the interest in state and local antidiscrimination enforcement under Title VII may not outweigh military concerns. Indeed, it is hard to distinguish the case of sexual orientation laws conflicting with military campus access from the facts before the Court in *McCarty v. McCarty*.[279] In *McCarty*, the Court was called upon to resolve a conflict between the military pension system and California community property laws.[280] In finding preemption, the Court discerned a congressional objective to create a separate and distinct pension system for military retirees.[281] However, the overriding basis for preemption was the Court's view that community property laws requiring pension payment distributions to former wives could serve to disrupt the essential need for a youthful military.[282]

McCarty and *City of Philadelphia* are similar in that both cases, applying the same preemption standard, involved forceful state interests—community property and employment discrimination laws—pitted against the military interest in recruitment. However, the cases are distinguishable. For example, the state interest in enforcing employment antidiscrimination laws has arguably been elevated to the level of a quasi-federal concern through the unique operation of Title VII.[283] State community property laws enjoy no such position in any equivalent federal scheme. Thus, the state interests in *City of Philadelphia* argu-

277. Refer to note 45 *supra* and accompanying text.
278. Penn Dairies, Inc. v. Milk Control Comm'n, 318 U.S. 261, 275 (1943) (requiring evidence of congressional policy).
279. 453 U.S. 210 (1981). Refer to text accompanying notes 201-04 *supra*.
280. *Id.* at 224.
281. *Id.* at 225.
282. *Id.* at 234.
283. Refer to note 45 *supra* and accompanying text.

ably enjoy a stronger presumption of validity than the state laws in *McCarty*.

Such a distinction between the state concerns involved in both cases would also be consistent with the Court's approach in *United States v. North Dakota*.[284] In *North Dakota* the Court refused to find federal preemption of a state interest preserved by the Constitution's Twenty-First Amendment.[285] Although the military interest in *North Dakota* was certainly not as compelling as its recruitment concerns in *McCarty* and *City of Philadelphia*, state and local employment antidiscrimination initiatives, and their importance to Title VII, should present a more forceful interest than community property laws to weigh against any impact on military recruitment.

Aside from the differing state interests in *McCarty* and *City of Philadelphia*, the cases weigh different federal interests, even though the underlying federal concern in both cases is military recruitment. The *McCarty* decision weighed the federal military pension system against state and local concerns.[286] The *City of Philadelphia*'s preemptive federal interest, on the other hand, was derived from sections of armed forces appropriations laws that the legislature passed in the early 1970s.[287] In the *McCarty* case, the requirements of the military pension system (no division of pension benefits) conflicted directly with community property laws (pension benefits must be divided).[288] The *McCarty* Court ruled in favor of the military based on clear expressions of congressional policy which left absolutely no room for federal/state accommodation.[289]

By contrast, the federal interest in *City of Philadelphia* (an intent to encourage military access to campus by threatening funds withdrawal) does not seem to conflict with the state interest in question (military recruiters may not use campus placement facilities because of military policies of discrimination). Withdrawal of funds certainly falls short of *requiring*

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284. 495 U.S. 423 (1990).
285. *Id.* at 440.
286. *McCarty*, 453 U.S. at 232.
287. *City of Philadelphia*, 798 F.2d at 86 (noting that the Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, § 606(a), 86 Stat. 734, 740 (1972), recognized the well established congressional policy of encouraging military recruitment on university campuses).
288. *See McCarty*, 453 U.S. at 234 (explaining that allowing states to require a division of military retirement pay upon divorce would obviously diminish Congress' policy of providing that pay as an inducement).
289. *See id.* at 236 (noting the clear congressional policy and stating that "it is not the province of the state courts to strike a balance different from the one Congress has struck").

military access to campus facilities. The fact that withdrawal of funds was the penalty chosen by Congress to address its concerns about military recruitment on campus will always raise doubts about the strength of the military's legitimate interest in such recruitment. Even if a convincing case could be made that such a penalty establishes a congressional policy in favor of campus access, the statement of congressional policy is not as clear as the expression of policy regarding the military pension system which was determinative in *McCarty*. Nevertheless, the military's arguments have traditionally been accorded great deference by federal circuit courts struggling to determine which interests should prevail in a preemption clash. The Third Circuit's reliance on a readily distinguishable decision in *McCarty* to decide *City of Philadelphia* supports the notion that federal courts may remain myopic on the issue of actual conflict, even in an antidiscrimination law context.

iii. Actual conflict. Despite the fact that institutional free choice as stated in absolute terms by Congress presents an extremely strong federal interest for preemption purposes, courts reviewing any conflict regarding military recruitment on campus may choose to rely instead on the military recruitment interest, as did the Third Circuit, in order to find preemption. Courts that rely on the military recruitment interest, rather than on institutional free choice, face an additional hurdle. Preemption under an "actual conflict" analysis requires a finding that federal and state interests indeed conflict.[290] When "institutional free choice" becomes the federal preemptive interest, any attempt to force an institution to do what it does not wish to do will trigger an "actual conflict." However, when, as in *City of Philadelphia*, the preemptive interest is military recruitment, a showing of "actual conflict" will require some proof that forbidding access to campus interferes with recruitment—a tougher evidentiary proposition.[291]

The Third Circuit's analysis of the conflict between military recruitment on campus and state/local antidiscrimination laws is tortured at best. To determine the extent of the conflict, the Third Circuit analyzed recruitment statistics that the military provided for the Philadelphia area.[292] Although the military presented statistics concerning the importance of on-campus

290. *City of Philadelphia*, 798 F.2d at 86 n.5.

291. *See id.* at 87 (stating that the state's order must significantly impair the military's ability to recruit personnel).

292. Refer to text accompanying notes 237-39 *supra*.

contacts in hiring for other critical military needs, it presented no evidence at trial regarding the importance of recruiting attorneys on campus.[293] The Third Circuit nevertheless concluded that the Philadelphia Human Rights Agency order barring military recruiters had "'the potential to frustrate' effective recruiting of skilled personnel in the Philadelphia area."[294] Despite the lack of particular evidence showing any impact on actual military recruitment of attorneys, the court found the agency's order preempted because of the court's belief that the Philadelphia Human Rights Commission order would ultimately impair military attempts to recruit engineers and doctors at Philadelphia area colleges and universities.[295]

The Third Circuit's finding of a conflict based on a presumed precedential license to the Philadelphia Human Rights Commission cannot possibly be squared with the "actual conflict" standard for preemption. The "actual conflict" standard is a narrow one that requires an actualized, rather than merely potential, conflict. Moreover, the Third Circuit's analysis of conflict is inconsistent with the Supreme Court's approach in *California Federal Savings & Loan Ass'n v. Guerra*.[296] When there has been no finding that Congress has occupied the field of employment discrimination and where no "unique federal interest" in military recruitment has been identified, *Guerra* requires that there be absolutely no room for any federal or state accommodation prior to a finding of preemption.

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293. *City of Philadelphia*, 798 F.2d at 87; *see also id.* at 87 n.7 (concluding that at least a minority of enlistments were recruited from Philadelphia area colleges based on on-campus contacts, but noting the lack of precise evidence).

294. *Id.* at 87.

295. Refer to note 241-42 *supra* and accompanying text. The court relied on City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), to justify its view of the impact of precedence in the frustration of federal objectives. *Id.* at 638-40. However, the analysis in *Burbank* is quite different. The Burbank municipal noise ordinance was indistinguishable from noise ordinances in other municipalities; thus, upholding the Burbank ordinance, despite its relatively minor effect, would make it impossible for the court to rule differently with regard to other ordinances. In *City of Philadelphia*, however, the same problem is simply not presented. The Philadelphia order was applicable to a law school. It would be easy for a court to distinguish recruitment of attorneys from recruitment of doctors or engineers. Moreover, an express judicial statement that conflict analysis will turn on regional recruitment statistics in each case would allow other courts to find differently even with respect to orders against law schools.

296. 479 U.S. 272 (1987). *Guerra* held that an actual conflict between federal and state law is necessary to preempt a state regulation unless Congress has expressly or impliedly occupied the field. Such an actual conflict is only established when compliance with both federal and state laws is a physical impossibility, or when the state law is an obstacle to the fulfillment of congressional objectives. *Id.* at 280.

Without speculating about what the Philadelphia Human Rights Agency might have done after a favorable Third Circuit decision involving the Temple Law School, there was no conflict in the *City of Philadelphia* case. Indeed, nationwide statistics have shown that the Judge Advocate General's Office has not been frustrated in its attempts to recruit attorneys, even in the face of law school exclusion from on-campus recruitment.[297] Finally, a genuine Third Circuit concern for military recruitment of doctors and engineers at college campuses could have been addressed by the court. The court could have clearly indicated that its decision only applied to orders directed at law schools and not to similar orders prohibiting military recruitment on campus for positions like doctor and engineer—positions that are important to the military and for which off-campus contacts are clearly not sufficient.

In conclusion, the congressionally recognized interest in institutional freedom should serve to override state, local and military compulsion of any particular law school response, despite the strength of state/local antidiscrimination initiatives. And, although state and local authorities attempting to enforce antidiscrimination policies have made some very good arguments against preemption by military interests, law school faculties and administrators should feel comfortable making independent decisions with respect to enforcement of nondiscrimination policies. Possible freedom from state and local action, however, does not mean that schools will be shielded from purely private initiatives.

2. *Application of ABA and AALS policies on sexual orientation to military interests.* A law school deciding to fully support military recruitment on its campus must also confront the antidiscrimination policies of private organizations like the ABA and the AALS. After all, such a decision could have implications for law school accreditation. The decision may also invite AALS sanctions.

a. Implications for accreditation. As an initial matter, it is important for law schools to realize that the ABA, which has publicly declared its opposition to discrimination on the basis of sexual orientation, has simply not taken an active stance on the issue of military recruitment and accreditation. Indeed, accreditation questionnaires and site evaluation materials seem to ignore the issue altogether. Thus, at least for now,

297. Refer to text accompanying note 179 *supra*.

institutional policies concerning military recruitment remain a matter between those institutions and the military itself or the AALS.

With regard to accreditation, a law school fending off state and local civil rights enforcement agencies on the basis of academic freedom may nonetheless face pressure from the AALS if the school chooses to allow military recruiters complete access to their law placement facilities. Prediction of an AALS response to an institutional decision to fully support military recruitment on campus is somewhat risky because the organization has taken such an absolute position with respect to law school assistance of military recruitment.[298] ABA site evaluation teams, each of which includes one member appointed by AALS, can certainly report that any given issue is a concern.[299] In the case of the military's policy of discrimination on the basis of sexual orientation, it is conceivable that ABA or AALS instructions to the site evaluation team could result in a more intensive than usual evaluation of the examined law school's placement office. However, nothing currently in ABA site evaluation materials and questionnaires suggests such a particularized emphasis.[300]

Nevertheless, an AALS-imbued sensitivity to the military recruitment issue may affect the nature of a site evaluation. Such sensitivity may lead to on-site questions to individual faculty members about their feelings on the issue. It may also invoke discrimination-oriented comments by the site evaluation team to the dean of the law school or to the president of the institution of which the law school is a part.

Despite questioning about military recruitment policies, it is doubtful that any law school's failure to abide strictly by AALS policy will affect the nature of the team's personal interview with the law school dean and president. The issue of military on-campus recruiting has simply not risen to the level of a serious ABA concern, and, even if it did, the issue would merely be one of many factors in the final report. The AALS member's emphasis on the matter during the accreditation pro-

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298. Refer to notes 6-13 *supra* and accompanying text.

299. *See generally* Levin, *supra* note 69. ABA approved schools and AALS member schools are reinspected every seven years by a four to six person team that represents both associations. The ABA Accreditation Committee, which is charged with reviewing site evaluation team reports, is appointed by the Chair of the ABA Section of Legal Education and Admissions to the Bar. The Committee consists of legal educators, practitioners, judges, and two public members who are nonlawyers. The sole AALS appointee has special responsibility for any particular concerns of the AALS.

300. *See* LAW SCHOOL SITE EVALUATION QUESTIONNAIRE, *supra* note 80.

cess may, at worst, affect somewhat the kind of overall scrutiny engaged in by a particular site evaluation team, or possibly the overall tone of any investigation. It is more likely that the law school's accommodation of the military will have little impact of any kind, because the ABA, and even the AALS, have not yet appeared to emphasize the sexual orientation provisions of their nondiscrimination policies in the evaluation materials distributed to site evaluation team members.[301]

b. The possibility of AALS sanctions. Aside from some possible attempt to enforce its policy against sexual orientation discrimination through its involvement in the accreditation process, imposition of AALS sanctions is possible. However, the willingness of the AALS to sanction and the method by which it might sanction any given law school are not yet known. Regardless of which institution the AALS chooses to scrutinize for its failure to bar military recruitment, the AALS's approach is likely to be incremental, as suggested by the way in which its "Sanctions" provisions are framed.[302] Since 1977, when the AALS Sanctions provisions were amended,[303] the AALS has prided itself on achieving appropriate institutional changes through conciliatory means. A review of AALS annual proceedings reports on individual law schools since 1977 reveals substantial use of law school improvement reports to achieve change without sanction.[304] Accordingly, an institution is likely to receive full notice prior to a severe sanction such as probation. In addition, it is doubtful that a law school's refusal to bar military recruitment on campus will ever, by itself, result in expulsion from AALS membership, especially given the significance of such a penalty.

B. Assessing the Risk of an Institutional Decision to Protect Sexual Orientation Interests By Barring the Military from Campus

Of the law schools that have already acted voluntarily to restrict military recruiting on campus, it is unclear how many

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301. Refer to notes 80-81 *supra* and accompanying text.

302. *See* AALS HANDBOOK, *supra* note 6, bylaw, art. 7, § 7-1 (noting varying degrees of sanctions for material failure to meet AALS requirements).

303. *See* AALS Proceedings 67 (1977); AALS Memorandum 77-26 (Oct. 26, 1977) (on file with author); AALS Memorandum 77-30 (Nov. 17, 1977) (on file with author).

304. *See generally* AALS Proceedings 197 (1983) (noting the role of inspection and periodic inspection reports in determining recommendations for continued membership).

have been motivated to do so by the AALS's interpretation of its by-laws to require just such a response. A review of newspaper reports over the last ten years reveals that a fair number of institutions had already decided to bar the military even before the AALS expanded its nondiscrimination policy in 1990.[305] Regardless of this fact, it is probably safe to assume that some law schools had acted voluntarily to bar military recruiters prior to AALS pressure, and that some law schools since the change in AALS policy have viewed themselves as having acted voluntarily—simply having been convinced, possibly by the AALS, that a bar of recruitment is an appropriate response to military policy.

Those law schools acting voluntarily to prohibit military recruitment can be divided into two groups for analytical purposes: those that have absolutely barred military access by refusing to schedule interviews, allowing use of placement facilities, or posting notices, and those that have restricted military access in a more limited fashion—refusing to schedule interviews or allowing the use of facilities but willing to post military employment notices possibly with a disclaimer.

1. Absolute bar on military recruitment. The law school that absolutely bars military recruiters from any access to law students on campus will immediately have two concerns—the military, of course, and popular and political sentiment. Although the effect of popular sentiment and politicians' letters to deans and presidents is certainly not to be underestimated,[306] the social impacts are beyond the scope of this article.

It would be a gross understatement to suggest that it is difficult to determine how military recruiters, and the Judge Advocate General in particular, will react to an absolute bar by any given institution. In the past, military reaction has ranged from the mild to the belligerent.[307] The question that this sec-

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305. Refer to note 177 *supra* and accompanying text. A question exists of whether law schools that choose to limit rather than bar military recruitment have indeed acted truly voluntarily because such a choice smacks of compromise forced by an unwillingness to summon the full wrath of the military on the one hand and possibly another institutional reaction, like the AALS's, on the other. In any case, because limitation rather than prohibition has actually been chosen by some law schools, it would be a difficult scenario to overlook in any meaningful review of the problem.

306. Refer to notes 3, 12, 13 *supra* and accompanying text. Virginia and UCLA seem to be extreme examples of the political reaction to law school policy, a result possibly of bad timing and the Gulf War more than anything else. As a general matter, law schools in localities and states that have outlawed sexual orientation discrimination are likely to receive a more tempered political response, if any at all.

307. Refer to notes 176-80 *supra* and accompanying text.

tion of the article attempts to answer is what exactly an irate military can do to an institution that has adopted a restrictive policy. What the military may do can be predicted fairly well by analyzing what it has done in the past. A review below of the Department of Defense's (DoD) past willingness to cut off funds suggests that this threat is minimal. Even if the DoD cuts off funds, institutions may be able to thwart a cut-off by making various administrative and constitutional arguments. Those arguments will be analyzed below.

a. The Department of Defense's historical unwillingness to cut off funds. Certainly the military can attempt to act administratively through the DoD to block funds and contracts that may be flowing to the institution through the Department. Such administrative action appears unlikely, however. First, although the regulatory procedure for cutting off funds has been in effect since 1984,[308] the Defense Department has not yet attempted to cut off institutional funds, nor has it even kept a list of barring institutions. Second, the regulation itself specifies that no particular branch of the military acting alone can cut off funds to any institution; rather, funding can be cut off only if the Secretary of Defense or his designee determines that such a course of action is desirable.[309] Further, the Secretary can make this determination only after the institution's policy of military exclusion is scrutinized through a fairly lengthy evaluation process, during which the head of the institution is ultimately given an opportunity to explain the policy, and even to change it, prior to any action involving cancellation or denial of research funds and defense contracts.[310]

Even if the DoD recommended cancelling research funds and defense contracts, the regulation itself provides that any cut-off will affect only that unit of an institution that has acted to bar military recruitment.[311] Therefore, defense funds earmarked for a particular university's graduate program in computer science would not be jeopardized by an independent law school administration or faculty decision to bar military recruitment.

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308. *See* Identification of Institutions of Higher Learning That Bar Recruiting Personnel From Their Premises, 32 C.F.R. § 216 (1991).

309. *See id.* § 216.5(f) (requiring a determination by the Assistant Secretary of Defense (Manpower, Installations, and Logistics) before funds can be cut-off).

310. *See id.* § 216.3-.6 (listing the procedures that must be followed to cut off funds).

311. *Id.* § 216.3(a).

Finally, some question remains concerning the validity of the regulation, given the regulation's source of authority. As a result, it is possible to challenge the DoD's authority in promulgating the rule allowing funding cut-off. The shifting reasons for military exclusion since the early 1970s certainly make such an argument feasible, even despite strong Supreme Court deference to agency rulemaking.

b. Challenging the Department of Defense's administrative authority to regulate funding due to an institutional ban on military recruitment. While it has been well established that Congress may delegate its legislative powers to administrative agencies of the government,[312] agencies may exercise power only within the scope of the delegation.[313] In *Chevron U.S.A., Inc. v. National Resources Defense Council Inc.*,[314] the Supreme Court established that federal courts must defer to administrative agency interpretations based on a permissible construction of a statute if the statute is silent or ambiguous with respect to congressional intent.[315] According to Justice Scalia, under the *Chevron* doctrine, the courts should determine whether an agency's interpretation of a statute is *permissible*, not *correct*.[316]

Several arguments support the proposition that, in the case of on-campus military recruitment, Congress did not intend to empower the Defense Department to do by regulation in 1984 what Congress had failed to do since 1972. First, during the Vietnam-era Congress had chosen to act on its own through direct regulation when it felt that institutional prohibition of the military had reached proportions requiring a legislative response. Indeed, the Committee Report accompanying the 1973 appropriations act emphatically stated, "*Congress* has the right and duty to determine how the appropriations made for the Department of Defense or the Armed Forces should be spent."[317]

While the 1973 provision regarding funding cut-offs arguably indicates some congressional interest in military access to college and graduate school students, that interest only became

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312. Wayman v. Southard, 23 U.S. (10 Wheat) 1, 43 (1825).
313. *See* Board of Governors v. Dimension Fin. Corp., 474 U.S. 361, 375 (1986) (stating that agencies may only exercise powers granted to them by Congress).
314. 467 U.S. 837 (1984).
315. *Id.* at 843.
316. Antonin Scalia, *Judicial Deference to Administrative Interpretations of the Law*, 1989 DUKE L.J. 511, 512 (1989).
317. H.R. REP. NO. 92-1149, 92d Cong., 2d Sess. 79 (1972) (emphasis added).

substantial enough to support congressional action when campuses excluded the military in times of unpopular aggression by the United States government. In particular, the interest has received federal protection when campuses have barred the military *qua* military. Significantly, congressional interest in military access has not received independent federal protection when access has been barred on the basis of some neutral lawful policy, which a college or law school enforces evenly against all recruiters who come calling at the institution's door. Regardless of Congress' feelings in 1968 through 1973, Congress has obviously not taken the opportunity to analyze the shifting reasons for law school exclusion of the military since the early 1970s and to decide upon an appropriate legislative response.

The arguments demonstrating that the DoD possibly lacks proper authority in promulgating the funding cut-off rules are weakened, however, by Congress' express statement in the 1973 appropriations law that the funding cut-off provision applies to funds "appropriated pursuant to this *or any other Act* for the Department of Defense or any of the Armed Forces . . . ."[318] Moreover, prevailing on the theory that an administrative agency is acting beyond its authority in making rules has been more difficult in recent years, primarily because of the Supreme Court's strict development of the *Chevron* doctrine.

Recently, for example, in *Rust v. Sullivan*,[319] the Supreme Court found that Health and Human Services (HHS) regulations that prohibit abortion counseling in conjunction with the expenditure of government funds were legitimate administrative interpretations of the legislative language in Title X of the Public Health Service Act.[320] Title X expressly provides that "[n]one of the funds appropriated under this sub-chapter shall be used in programs where abortion is a method of family planning."[321] One of the issues before the Court was whether the regulations went beyond the scope of congressionally delegated authority in regulating speech that the First Amendment might protect.[322] With respect to the issue of proper authority, the Court upheld the lower court's application of *Chevron* in finding that HHS's regulatory interpretation of Title X was consistent with the Act's legislative history.[323]

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318. Armed Forces Appropriations Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972) (emphasis added).
319. 111 S. Ct. 1759 (1991).
320. *Id.* at 1778; *see* 42 U.S.C. § 300a-6 (1988).
321. 42 U.S.C. § 300a-6.
322. *Rust*, 111 S. Ct. at 1766-67.
323. *Id.* at 1768-69.

However, only last year, the United States District Court for the District of Columbia struck down an agency regulation that conditioned government funding to a University on an unconstitutional prior restraint. In *Board of Trustees v. Sullivan*,[324] the court reviewed the validity of a National Institute of Health requirement that medical research contracts include a "confidentiality of information" clause, which would require government approval prior to publishing preliminary research reports.[325] The district court found that the requirement constituted an unconstitutional prior restraint, even though the decision reflected in part the court's concern that the government regulatory standards at issue were overly broad, because they applied generally to *any* research project, and vague, because they were imposed in cases of "adverse effect on the Federal agency."[326] Nevertheless, the decision suggests that federal courts may be willing to scrutinize closely the withdrawal of funds by government agencies, like the DoD, from institutions of higher learning.[327]

Based on *Chevron*, and its subsequent application, the DoD will stand a good chance of prevailing against a law school's challenge of its authority to issue the 1984 regulations. A law school's only chance of prevailing lies in convincing a reviewing court that congressional intent is clearly at odds with DoD initiatives to cut off funding from institutions of higher learning on the basis of neutral application of nondiscrimination policies.

The DoD can certainly emphasize that Congress has in the past enacted legislation contemplating funding cut-offs from institutions barring military recruiters. And, in so legislating, Congress established a role for the DoD which allowed the Secretary of Defense to determine which schools should be subject to funding cut-offs. In defending the regulations, the DoD might also emphasize that its penalty for barring military recruiters, a funding cut-off, is expressly the same penalty adopted by Congress in the early 1970s. However, the critical argument for the department is that Congress' 1973 authorizations law suggests an unlimited impact to funding cut-offs. Congress expressly provided that the funding cut-off applies with respect to funds under the 1973 Act "or any other Act" for the DoD.[328]

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324. 773 F. Supp. 472 (D.D.C. 1991).
325. *Id.* at 473-74.
326. *Id.* at 477.
327. *See id.* at 479 (reasoning that, notwithstanding the federal funding of research, an institution should be able to use its own judgment regarding when and what to publish). For an interesting recent treatment of the funding issue in the context of military recruitment at public institutions, see Kalil, *supra* note 1.
328. Armed Forces Appropriation Authorization Act of 1973, Pub. L. No. 92-436, §

Nonetheless, in distinguishing cases like *Rust* and *Chevron*, a law school challenging the DoD's authority might emphasize that the legislation at issue in those cases actually authorized the involved administrative agency to act "in accordance with such regulations as the Secretary may promulgate."[329] The Vietnam-era appropriations laws, and particularly the 1973 law which the DoD claims as authority for the 1984 regulations, envision a more circumspect and limited role for the DoD. Moreover, unlike in most cases involving congressional delegations, the DoD would have to argue that Congress intended a permanent delegation by its statements in an appropriations law, a statute of only temporary duration. In fact, there is little language suggesting that Congress intended to delegate its powers in this very sensitive area. In proposing the 1984 regulation, even the DoD commented on the lack of information regarding the congressional intent of the 1973 law.[330]

However, any institution seeking to challenge the DoD's authority to promulgate the 1984 rules should be cautious. Even if the institution succeeds in overturning the regulations, the 1973 law's provision allowing funds withdrawal upon a finding that the military has been barred by a particular institution may survive because its unlimited effect is suggested by express statutory language.[331] While the threat of funds cut-off will remain, the elaborate process by which those funds are cut-off will be eliminated, as will the Department's self-imposed restriction cutting off funds only to subordinate elements of those institutions that actually bar military recruitment.

c. Challenging the Department of Defense's regulation on First Amendment grounds. Another plausible ground for challenging the Defense Department regulation may be the First Amendment to the United States Constitution. Such an argument was made in 1982 by the American Council on Education, commenting on the proposed regulation. The argument generally challenges the Department of Defense's ability to condition research funds on a university decision to limit the

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606, 86 Stat. 734, 740 (1972).

329. *Rust*, 111 S. Ct. at 1764.

330. *See* Identification of Institutions of Higher Learning That Bar Recruiting Personnel From Their Premises, 32 C.F.R. § 216 (1991).

331. *See* Armed Forces Appropriations Authorization Act of 1973, Pub. L. No. 92-436, § 606, 86 Stat. 734, 740 (1972) (stating that "[n]o part of the funds appropriated . . . may be used at any institution if the Secretary of Defense . . . determines that . . . the Armed Forces of the United States are being barred by the policy of such institution . . . .").

use of its placement facility. A university's decision with regard to use of its placement facilities, so the argument goes, implicates the institution's academic freedom which is protected by the First Amendment. The recent federal district court decision in *Board of Trustees of Stanford University v. Sullivan*,[332] which invalidated an agency regulation conditioning funds on an institution's prior agreement to allow the government to make all decisions about public dissemination of research findings, may serve to aid entities like the American Council on Education in the context of military funding cut-offs.

The success of a First Amendment challenge to the DoD's regulation cutting off research funds to institutions that bar the military will depend on the challenger's ability to convince a court of two propositions. First, the challenger must argue convincingly that nondiscrimination policies enforced by placement offices reflect more than merely administrative convenience or attempts to conform to the law. The challenger must be able to show that the policies reflect responsible institutional judgments, which are at the very heart of notions of institutional autonomy and academic freedom. In its comments to the DoD in 1982, the American Council on Education suggested that such arguments can be maintained by analyzing institutional decisionmaking and by reviewing the role of the placement office in the accreditation process.[333]

Second, the challenger must establish through case law that institutional academic freedom, as embodied by recruitment office policies, is protected by the First Amendment. In 1982 the American Council on Education charted the development of constitutional protection for academic freedom.[334] From early decisions commenting on the importance of a college's educational mission,[335] to later decisions identifying academic freedom as a liberty interest protected by constitutional due process,[336] to more recent decisions finding that academic freedom is protected by the First Amendment,[337] the

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332. 772 F. Supp. 472 (D.D.C. 1991).

333. *See* Letter from J.W. Peltoson, President, American Council on Education, to the Assistant Secretary of Defense 23-26 (Dec. 28, 1982) (on file with the *Houston Law Review*) (discussing the role of the placement office).

334. *Id.* at 27-29.

335. *See, e.g.*, Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (discussing the importance of education while declaring a state law unconstitutional for impairing the obligation of contracts).

336. *See, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399-400 (1923) (stating that the Fourteenth Amendment protects the rights of teachers and parents regarding a child's education).

337. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 268-69 (1981) (stating that the

fact that academic freedom is constitutionally protected cannot be questioned.

The precise definition of "academic freedom" is not as clear. For example, although past courts and commentators tended to view "institutional" and "individual" academic freedom as similar ideals, there has been substantial writing suggesting that the concepts, and the way they are protected and analyzed, are distinct.[338] Moreover, in this same vein and contrary to the arguments of the American Council on Education, Justice Frankfurter's narrow interpretation of academic freedom in *Sweezy v. New Hampshire*[339] may make it difficult to argue that placement office policies are a component of institutional academic freedom. Frankfurter stated, "[i]t is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[340] The recent federal district court decision in *Sullivan* provides no help regarding institutional academic freedom because dissemination of research findings, while not directly delineated by Frankfurter in *Sweezy*, more closely aligns with First Amendment ideals of protected speech than does the functioning of a law school placement office.[341] Nevertheless, an argument can be made that the functioning of a law placement office, and any debate over its policies, must certainly be part of the experimental university atmosphere about which Frankfurter felt strongly. Such an argument becomes even stronger in the context of military recruitment because decisions concerning military use of placement facilities have become so politicized.

In sum, an absolute bar on military recruitment could threaten research funds and defense contracts that a university

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"First Amendment rights of speech and association extend to the campuses of state universities").

338. *See, e.g.*, Matthew W. Finkin, *On 'Institutional' Academic Freedom*, 61 TEX. L. REV. 817 (1983); David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom Under the First Amendment*, 53 LAW & CONTEMP. PROBS. 227 (1990). *See generally* WILLIAM A. KAPLIN, THE LAW OF HIGHER EDUCATION 187-190 (1985); MICHAEL A. OLIVAS, THE LAW AND HIGHER EDUCATION 133-144 (1989).

339. 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

340. *Id.* (quoting a statement from a conference of senior scholars from the University of Capetown and the University of the Witwatersrand).

341. *But cf.* OLIVAS, *supra* note 338, at 222 (citing to Delgado and Millen for the proposition that the right to undertake research is fundamental but must bow to state restrictions that are narrowly tailored).

receives through Congress and the DoD. However, an actual cut-off of such funds is unprecedented and most likely would be limited by the wording of defense regulations to those subordinate elements of a university that actually bar the military. Finally, in the extremely rare case in which the DoD chooses to cut off funds, an institution may be able to thwart a funds cut-off through litigation challenging the Department's authority to promulgate the regulation.

2. *Partial bar on military recruitment.* A law school can restrict military recruitment in many ways without imposing an absolute bar. For purposes of this article, however, the discussion will focus on one particular scenario that has commanded the attention of some law schools: prohibiting military interviews on the law school campus and banning military use of placement facilities, but permitting the posting of employment notices for military jobs.[342]

The partial bar option is probably the best strategic choice for those law schools not as concerned with the moral and ethical debate about the military's policy, but that desire to continue in the good graces of both the military and the AALS. To illustrate how the partial bar may impact the external agents involved, assume that some, maybe most, law schools will either absolutely bar the military or will allow the military complete access to campus and facilities. If indeed that is the case, it is unlikely that either the AALS or the military will be as concerned about yet a third group of law schools, such as the University of Iowa, that in some way manifests an intention to accommodate both AALS and military concerns through a compromise policy. One can easily imagine that if the DoD has shown extreme hesitation in cutting off funds to institutions that have a record of hostility toward the military, law schools that at least post military job notices are much less likely to attract the attention of any particular military branch or the Secretary of Defense.

While the political advantages of some hybrid approach to the military recruitment problem, such as a partial bar, are

342. A law school that permits the posting of a military job announcement may choose to attach its own notice to the announcement to inform students that the military openly discriminates on the basis of sexual orientation and possibly to explain the law school's policy that such discrimination has resulted in a military bar from on-campus recruiting. It is probably fair to say that the military would be less receptive to such a notice as compared to a posting without such an explanation of law school policy; however, the addition of an "attached notice" to the posting should not act to change the way a partial bar will be viewed legally.

really almost self-evident, the disadvantages are important for law school consideration. Chief among the disadvantages is a diluted, and possibly entirely ineffective, message to the military. In an attempt to reach a politically "acceptable" position, an institution should not lose sight of the ultimate issue: the military's policy of discrimination. Assuming that a law school is acting voluntarily, the choice of a partial bar reflects at least some concern about the military's exclusion of gays and lesbians. Given that the institution is reacting, at least in part, to what it may consider an offensive policy, what ultimately will be the effect of a partial bar on the military? If the impact on recruitment is minimal, what has the law school truly gained?

It is at least arguable that the effect of a partial bar may be to minimize, and possibly even to trivialize, any message of disapproval intended for the military. Therefore, it is incumbent on any law school faculty and administration contemplating a partial bar in order to reach some politically neutral ground between the military and the AALS to consider the question of moral boldness. The challenge to any law school, in the context of the broader moral and ethical debate, is to ensure that its response reflects the views of the faculty or the law school community, rather than to approve a response in hopes of attracting the least attention in the midst of controversy.

One other important, and certainly more legally sensitive, disadvantage to a partial bar involves the potential negative effect of such a bar on state and local civil rights agencies. Depending on the amount of assistance a particular law school lends to the military, proactive state attorneys general or local civil rights enforcers in states and localities that protect against sexual orientation discrimination may still feel that it is too much access to ignore under applicable nondiscrimination statutes or ordinances. Moreover, the publicity invariably attendant to the institutional announcement of a partial bar may, ironically, serve to draw enforcement attention that otherwise may have been focused elsewhere.

The decision of the Third Circuit in *United States v. City of Philadelphia*[343] may provide a modicum of comfort to institutions worried about state or local reaction to a partial bar. Remember, the Third Circuit in that case found that an identified national interest in military campus recruitment served to preempt the actions of local civil rights authorities in Philadelphia. Moreover, in *City of Philadelphia*, the local civil rights agency was compelling the Temple Law School to bar the military. A

343. 798 F.2d 81 (3d Cir. 1986).

law school's voluntary choice to partially bar the military, given the legislative history of the 1973 appropriations law, may be even more likely to preempt state or local action. It is possible, maybe even likely, that in other circuits judges will view any additional state requirements as conflicting with the military's mission unless the settlement sought by state officials somehow allows the military sufficient access to accomplish its recruiting goals. However, if the military is able to meet its hiring goals under a partial bar, there will be no "actual" conflict between state law and national policy. Without an actual conflict, state or local regulators may be free to demand that law school officials impose more restrictive access requirements than were originally contemplated by the law school.

While it is possible that lawyers familiar with civil rights enforcement activity in particular areas may be able to predict the response of state and local agencies to a partial, as opposed to an absolute, bar, such a prediction is certainly beyond the ambit of this article. In cases in which the sexual orientation law is too recent or the minds of local enforcement officials too closed to predict a response with any accuracy, a law school considering a partial bar may decide that its best interests lie in consulting civil rights enforcement agencies in an effort to learn what might be tolerated in advance of any final institutional decision. One strong advantage to such an action is the accompanying assurance that any final institutional decision will have been informed by the best available evidence of resulting enforcement activity.

IV. CONCLUSION

It is possible that within the next few years at least one federal circuit court will find constitutional protection for sexual orientation under the equal protection clause of the Fourteenth Amendment. It is also now assured, due to the election of Bill Clinton to the position of U.S. President, that there will be a substantial governmental review of military policies concerning gays and lesbians, possibly resulting in a decision to modify or even rescind them. Until some definitive action is taken at the federal level, however, gays and lesbians will have to rely increasingly on sympathetic state and local policymakers to enact substantive protection for sexual orientation. Despite the best of state and local efforts, protection at that level will always result in inconsistent enforcement at best and, at worst, will be superseded by conflicting federal interests. One such federal interest, a strong military, has been used to justify discrimination

on the basis of sexual orientation. That justification, framed by military leaders, has been consistently upheld by federal circuit courts that are unwilling to question military policy. As a result, other equal rights achievements by gays and lesbians have been dealt a blow.

The fallen military banner of gay and lesbian rights, however, has recently been taken up by the Association of American Law Schools. The AALS has added sexual orientation to its nondiscrimination policy and has interpreted that policy to require law school exclusion of military recruiters. The strength of AALS conviction with respect to its policy is yet to be tested. And AALS use of conciliatory means to achieve change may ultimately prove useless against institutions with strong military ties. If gays and lesbians are to achieve their goals of governmental recognition, or at least grudging protection, it is important that law schools voluntarily choosing to bring pressure on the military are not thwarted by military judicial challenges of law school exclusion.

In the early 1970s, Congress enacted legislation penalizing colleges and universities that excluded military recruiters, by providing for cut-off of defense research monies to such institutions. However, in enacting the penalty provision, Congress expressly recognized the absolute right of institutions of higher learning to choose voluntarily exactly how they will relate to the military. Above all, institutional freedom of choice is preserved in congressional documents discussing the problem of military exclusion. Indeed, under any preemption standard, even perhaps that which requires for preemption a "clear and manifest" expression of congressional intent, the identified federal interest in academic free choice can serve to override conflicting state or local laws.

To gay and lesbian activists, the preservation of academic free choice can only be viewed as a mixed blessing. While the federal interest in free choice can be used to immunize from the military those law schools that voluntarily choose to exclude military recruiters, precisely the same notion can likewise immunize law schools that choose to open their campuses entirely to the military from enforcement actions by state and local civil rights agencies.

Rightly or wrongly, Congress believes that the actions of independent colleges, universities, or law school faculties and administrators are worth protecting against the myriad of other concerned interests. This belief is really nothing short of a special academic trust of responsible decisionmaking. The challenge for law schools, pursuant to the congressional trust granted

almost twenty years ago, then, is to ensure that the controversial question is faced, not ignored, and that any institutional decision about military on-campus recruitment reflects a weighing of values identified in consultation with the relevant law school communities and interests.