Buffalo Law Review

Volume 39 | Number 3 Article 6

10-1-1991

SUNY Buffalo & Military Recruiters: Funding Unconstitutional Conditions?

Christopher J. Kalil

SUNY Buffalo & Military Recruiters: Funding Unconstitutional Conditions?

INTRODUCTION

Since Reconstruction, we have perceived the federal government to be the creator and enforcer of civil rights.[1] Today, however, our perceptions have changed.[2] Particularly in the context of homosexual rights,[3] the federal government offers little solace for gay men and lesbians.[4] In

1. *See, e.g.*, U.S. CONST. amend. XIV, § 1: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws"; Civil Rights Act of 1964, 42 U.S.C. § 2000a-1 (1988): "All persons are to be free, at any establishment or place . . ." from State-required discrimination; Cannon v. University of Chicago, 441 U.S. 677, 704 (1979) (primary purpose of Title IX of the Education Amendments of 1972 was "to avoid the use of federal resources to support discriminatory practices"; and this purpose "is generally served by the statutory procedure for the termination of federal financial support for institutions engaged in discriminatory practices"). *But see* Korematsu v. United States, 323 U.S. 214 (1944) (forced relocation and internment of Japanese-Americans during World War II).

2. *Compare, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976) (Section 1981 of Civil Rights Act of 1866 applicable to private contract) *with* Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (racial harassment following formation of a contract not actionable under Section 1981); *compare also, e.g.*, these criminal law cases: United States v. Wade, 388 U.S. 218 (1967) (constitutional right to counsel at a pretrial lineup) *with* Kirby v. Illinois, 406 U.S. 682 (1972) (no constitutional right to counsel at a pre-indictment lineup); Miranda v. Illinois, 384 U.S. 436 (1966) (affording broad protections in the area of custodial interrogation) *with* Harris v. New York, 401 U.S. 222 (1971) (otherwise trustworthy statements obtained in violation of *Miranda* admissible for impeachment purposes).

3. This Comment refers to "homosexuals" and "lesbians and gay men" to describe women and men whose sexual orientation is toward persons of the same sex. Some commentators suggest that because of its pejorative cast, its common identification with only gay men and not lesbians, and its focus on sex and not personal identity, the term "homosexual" skews discussion of issues confronting lesbians and gay men. *See, e.g.*, Note, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men from the Military*, 17 N.Y.U. REV. L. & SOC. CHANGE 171 (1990) [hereinafter *Military Deference*]. For further elaboration see Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I*, 10 U. DAYTON L. REV. 459, 463-64 (1985) [hereinafter *Queer Law, Part I*].

4. *See, e.g.*, *Queer Law, Part I*, *supra* note 3, at 465. For example, despite the expansive language of the 1964 Civil Rights Act, homosexuals have been generally unsuccessful in bringing "sexual orientation" under the scope of the Act. Rivera offers two reasons which are often cited by courts as justifying their exclusion of "sexual orientation" from the group of protected classes: "(1) that only the enumerated classes were legislatively intended to be protected, and hence, any broader protection must be added by legislative action . . . (2) that the term 'sex' does not encompass sexual orientation. . . ." *See, e.g.*, DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 329 (9th Cir. 1979); Smith v. Liberty Mutual Ins. Co., 569 F.2d 325, 326-27 (5th Cir. 1978). *See also* Bowers v. Hardwick, 478 U.S. 186 (1986) (no fundamental right to engage in homosexual sodomy); Webster v. Doe,

light of the absence of national development, some states, including New York, are establishing their own anti-discrimination policies with respect to homosexuals.[5] A current controversy between the State University of New York at Buffalo School of Law and the Judge Advocate General (JAG) Corps[6] externalizes some issues which may arise when states take such initiatives. Ultimately, the debate embodies the nature of state sovereignty and individual rights in the federal system.

Using the JAG controversy as a backdrop, this Comment explores the constitutional implications of New York State setting forth its own civil rights agenda, at a state university, in light of countervailing federal interests. Part I of this Comment briefly considers state executive orders and their effectiveness in this area. Part II focuses on preemption questions raised when state and federal entities collide. Parts III and IV examine the congressional spending power and its relationship to state and individual rights. Part V then considers the applicability of judicial doctrine to the JAG dispute.

BACKGROUND

The State University of New York at Buffalo (SUNY Buffalo) serves many masters.[7] As a state instrumentality, the University is accountable

---

486 U.S. 592 (1988) (refusing to consider whether the Constitution precludes a federal agency from discharging an employee based solely on the employee's sexual orientation); Woodward v. United States, 871 F.2d 1068 (D.C. Cir. 1989) (upholding military regulations barring homosexuals from service), *cert. denied*, 110 S. Ct. 1295 (1990); *accord* Ben-Shalom v. Stone, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990).

Queer Law, Part I, supra note 3, at 473 n.84, offers the following cases to typify the Supreme Court's avoidance of gay issues: *In re* Longstaff, 716 F.2d 1439 (5th Cir. 1983), *cert. denied*, 467 U.S. 1219 (1984); Van Ooteghem v. Gray, 628 F.2d 488 (5th Cir. 1980), *aff'd en banc*, 654 F.2d 304 (5th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); Burton v. Cascade School Dist., 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975); Acanfora v. Board of Educ., 491 F.2d 498 (4th Cir. 1973), *cert. denied*, 419 U.S. 836 (1974).

5. *See infra* note 12 and accompanying text. *See, e.g.*, Kentucky v. Wasson, No. 86M859, slip op. (Fayette Dist. Ct. Oct. 31, 1986) (holding state sodomy statute violates right to privacy in Kentucky constitution); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (equal protection clause of California constitution bars a state-protected public utility from arbitrarily excluding homosexuals from employment). *See also* Note, *The Use of the State Constitutional Right to Privacy to Defeat State Sodomy Laws*, 14 N.Y.U. REV. L. & SOC. CHANGE 973, 980 (1986). *See generally* Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977) ("[M]ore and more state courts are construing state constitutional counterparts of provisions of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.").

6. The JAG Corps is the legal branch of the armed services. The Army, Navy, Marines, Air Force and Coast Guard each has its own recruiting program.

7. N.Y. EDUC. LAW § 201 (McKinney 1979). The State University of New York is a corpora-

to New York.[8] At the same time, SUNY Buffalo must comply with federal constitutional mandates.[9] Finally, as a recipient of federal aid and grants, the University is expected to honor any conditions attached to these monies.[10]

In October 1983, the SUNY Board of Trustees passed a resolution forbidding any University program or activity from discriminating on the grounds of, among others, sexual orientation.[11] In November of the same year, New York State Governor Mario Cuomo signed Executive Order No. 28, which bars any state agency or department providing services, benefits or employment from discriminating on the basis of sexual orientation.[12]

---

tion whose purpose "shall be to encourage and promote education, to visit and inspect its several institutions and departments, [and] to distribute or to expend or administer for them such funds as the state may appropriate."

8. Education is a state function. *See, e.g.*, San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1972) ("Education . . . is not among the rights afforded explicit protection under our Federal Constitution."). For a discussion of the extensive regulatory powers of the New York Board of Regents, see O'Neil, *Private Universities and Public Law*, 19 BUFFALO L. REV. 155, 180-81 (1970).

9. Tinker v. Des Moines Indep. School Dist., 393 U.S. 503, 506, 511 (1969) ("It can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate. . . . [Both] are possessed of fundamental rights which the State must respect . . . .").

10. Department of Defense grants and/or contracts to SUNY Buffalo comprise approximately 8% of grants and/or contracts awarded to the school annually. Telephone interview with SUNY Buffalo Sponsored Programs Administration (June 5, 1991). This percentage equals $3.8 million annually. *Military's Gay Recruitment Ban Ignites Potential Battle in Albany*, N.Y. Times, Sept. 21, 1991 at 26, col. 3. *See also, e.g.*, Lau v. Nichols, 414 U.S. 563, 568-69 (1974) ("Respondent school district contractually agreed to 'comply with Title VI of the Civil Rights Act of 1964 . . . and all requirements imposed by or pursuant to the Regulation' of [the Department of Health, Education, and Welfare, and to] . . . take any measures necessary to effectuate this agreement.' ").

11. S. Res. No. 83-216 (Oct. 26, 1983) provides:

> It is the policy of the State University of New York and the expectation of the Board of Trustees that no discrimination against or harassment of individuals will occur on any of the campuses or in the programs or activities of the University. Consistent with this policy, the Board of Trustees expects that all judgments about and actions toward students and employees be based on their qualifications, abilities and performance. Attitudes, practices, and preferences of individuals that are essentially personal in nature, such as private expression or sexual orientation, are unrelated to performance and provide no basis for judgment. The Board of Trustees expects all State University campuses to take appropriate action to implement this policy of fair treatment.

See also DeVito v. McMurray, 64 Misc. 2d 23, 26, 311 N.Y.S.2d 617, 620 (Sup. Ct. 1970) (it is the function of the president of any branch of the university to carry out its by-laws and resolutions).

12. Exec. Order No. 28, N.Y. COMP. CODES R. & REGS. tit. 4, § 28 (1983) provides in part:

> 1) No State agency or department shall discriminate on the basis of sexual orientation against any individual in the provision of any services or benefits by such State agency or department.
>
> 2) All State agencies and departments shall prohibit discrimination based on sexual orientation in any matter pertaining to employment by the State including, but not limited to, hiring, job appointment, promotion, tenure, recruitment and compensation.

Pursuant to the Board's resolution and Executive Order No. 28, the SUNY Buffalo Law Faculty, in September 1988, voted to amend all relevant statements regarding law school policies in order to prohibit sexual orientation as an acceptable basis for discrimination.[13] Under these new regulations, the JAG Corps, which, in accordance with military regulations, discriminates against homosexuals,[14] was barred from recruiting

---

Ten other states have executive orders that bar discrimination against homosexuals in public employment. N.Y. Times, Nov. 1, 1989, at A27, col. 2. Two states have comprehensive statutes barring sexual orientation discrimination. *See* WIS. STAT. ANN. §§ 111.31-.395 (West 1988); MASS. GEN. LAWS ANN. ch.151B, § 4 (West 1982). Some states regulate certain forms of anti-gay discrimination. *See, e.g.*, MICH. COMP. LAWS ANN. § 333.20201(2)(a) (West 1984) (prohibiting the denial of care in health facilities on the basis of sexual preference); CAL. CIVIL CODE § 51.7 (West 1984) (prohibiting violence based on sexual orientation against property or persons). *See also* People v. Onofre, 51 N.Y.2d 476 (1980), *cert. denied*, 451 U.S. 987 (1981) (holding unconstitutional a state law that criminalized consensual sodomy). Currently, twenty-four states and the District of Columbia prohibit consensual sodomy. *See* ALA. CODE § 13A-6-65(a)(3) (1975); ARIZ. REV. STAT. ANN. §§ 13-1411, 13-1412 (1988); D.C. CODE ANN. § 22-3502 (1981); FLA. STAT. § 800.02 (1987); GA. CODE ANN. § 16-6-2 (1988); IDAHO CODE § 18-6605 (1987); KAN. STAT. ANN. § 21-3505 (1988); KY. REV. STAT. ANN. § 510.100 (Michie/Bobbs-Merrill 1990); LA. REV. STAT. ANN. § 14:89 (West 1986); MD. CODE ANN. art. 27, §§ 553-54 (1987); MICH. COMP. LAWS ANN. §§ 750.158, 750.338 (West 1991); MINN. STAT. § 609.293 (1987); MISS. CODE ANN. § 97-29-59 (1972); MO. REV. STAT. § 566.090 (1986); MONT. CODE ANN. §§ 45-2-101(20), 45-5-505 (1990); NEV. REV. STAT. § 201.190 (1987); N.C. GEN. STAT. § 14-177 (1986); OKLA. STAT. tit. 21, sec. 886 (1983); R.I. GEN. LAWS § 11-10-1 (1986); S.C. CODE ANN. § 16-15-120 (Law. Co-op. 1985); TENN. CODE ANN. § 39-2-612 (1982); TEX. PENAL CODE ANN. §§ 21.01, 21.06 (Vernon 1989); UTAH CODE ANN. § 76-5-403 (1990); VA. CODE ANN. § 18.2-361 (1988). Article 125 of the Uniform Code of Military Justice provides a similar provision. *See* 10 U.S.C. § 925 (1988).

13. The Law Faculty's Resolution, September 16, 1988, reads in part:

> [T]he State University of New York Faculty of Law and Jurisprudence hereby adopts a comprehensive policy of non-discrimination in all activities. This policy includes . . . employer recruitment practices in any way connected to this institution: the Law School expressly prohibits discrimination on the basis of . . . sexual orientation . . . [T]hat all employers seeking to recruit at the Law School, or in any way utilize Law School facilities or resources to effect such recruitment, be required first to sign a statement pledging compliance with the above policy . . . .

14. Dept. Def. Directive 1332.14 (1982) provides in part that:

> Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Service to maintain discipline, good order, and morale; to foster mutual trust and confidence among servicemembers; to ensure the integrity of the system of rank and command; to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy; to recruit and retain members of the Military Services; to maintain the public acceptability of military service; and to prevent breaches of security.

32 C.F.R. Part 41, App. A, Part 1(H)(1)(a) (1990). For a critique of this and related regulations, see Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties, Part II*, 11 U. DAYTON L. REV.

employees at the law school.[15]

275, 293-301 (1986). *See also* Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987) (holding that regulation does not violate the first amendment by punishing status rather than conduct).

15. Many law schools have policies regarding the JAG Corps' recruitment on their campuses. An Air Force JAG Corps notice of August 8, 1991 lists the following law schools in terms of their campus recruiting policies:

Assistance Code Legend

0 - Unknown level of asistance or policy not yet firm.
1 - Total ban, i.e. no assistance of any sort to recruiter.
2 - Placement office will give information to student about JAG upon request only.
3 - Placement office will post [JAG Corps] information, literature, recruiting dates, and other relevant information.
4 - Placement office will help recruiter with information, scheduling interviews, and all other assistance short of allowing recruiter in law school.
5 - Have policy, but don't enforce against JAG.

Law School	[Year Policy was Adopted]	Assistance Code
U of Alabama	1991	1
U of Albany	1991	1
American U	1984	1
U of Arizona	1990	0
Boston College	Unknown	3
U of California-Davis	1991	1
California Western	1990	2
Benjamin Cardozo	Unknown	0
Catholic U	1991	1
U of Chicago	1990	0
U of Cincinnati	1990	0
Cleveland Marshall	1990	2
U of Colorado	1991	1
Columbia	1984	1
U of Dayton	1990	0
U of Denver	1991	1
Dickinson	1991	1
Duke U	1991	1
Emory U	1990	3
Franklin Pierce	1984	4
Georgia State U	1990	2
U of Georgia	1990	3
Golden Gate U	1984	0
Hamline U	1990	2
Harvard U	1984	1
U of Hawaii	1990	1
Hofstra U	1990	3
IIT Chicago-Kent	1990	1
U of Iowa	1989	4
Lewis and Clark	1991	1
U of Miami	1990	4
U of Minnesota	1984	2
U of Missouri-Columbia	1990	2
New York	Unknown	1

But the faculty's policy was short-lived. In the Spring of 1989, then SUNY Buffalo President Steven Sample placed the resolution in abeyance and later announced that the law faculty had exceeded its authority by enacting the policy.[16] The discrimination ban was thus lifted, and the

New York U	1984	0
U of North Dakota	1991	1
Northeastern U	1984	1
Northern Illinois U	1991	1
Northwestern U	1988	0
Nova U	1990	2
Ohio State U	1984	1
U of Oregon	1984	0
Pace U	1991	2
U of Pennsylvania	Unknown	1
Rutgers U	1991	4
Santa Clara	1991	1
St. Louis U	1990	2
St. Mary's U	1990	5
U of San Francisco	1991	1
U of Southern California	1990	1
Southern Illinois U	1991	1
Southwestern U	1991	1
Stanford U	Unknown	0
Stetson	1991	3
Syracuse U	1984	1
U of Tennessee	1991	1
Touro College	1985	0
Tulane	1990	3
U of Utah	1990	0
Vermont	1986	2
Washburn U	1990	1
Washington U	1990	3
Wayne State U	1984	2
Western New England	1990	2
U of West Virginia	1991	1
Whittier College	1990	3
Willamette U	1991	1
William Mitchell	1990	2
Yale	1984	1

The other branches of the JAG Corps claim not to have a list of law schools which bar military recruiting on their campuses. However, as all brances of the JAG Corps are bound by the same Department of Defense regulations, all JAG Corps branches would be barred from recruiting by the same schools. Telephone interview with Navy JAG Corps recruiter (Sept. 19, 1991).

It should be noted that university policies barring the JAG Corps from campus recruiting change on a regular basis.

16. *See* SUNY Buffalo Reporter, May 11, 1989, Vol 20, No. 29, p. 1. *But cf.* Beta Sigma Rho, Inc. v. Moore, 46 Misc. 2d 1030, 261 N.Y.S.2d 658 (Sup. Ct. 1965), *aff'd*, 25 A.D.2d 719, 269 N.Y.S.2d 1012 (1966) (holding that the SUNY Board of Trustees did not act arbitrarily in requiring Buffalo chapters to comply with existing state university-wide ban on national fraternities). The court quoted a Trustee's report which stated that "[i]t would be sophistry for the State University to

JAG Corps was, once again, free to recruit at the school.

I. EXECUTIVE ORDERS & RED HERRINGS

The executive power of the State of New York vests the Governor with broad authority.[17] The Governor is responsible for managing the operation of the divisions of the executive branch,[18] fixing the moral tone of the state government, and ensuring that public servants conform their official conduct to those standards.[19] Moreover, when an "[e]xecutive [o]rder directs rather than requests State agencies or employees to conduct a designated program, the order has the full force and effect of law."[20]

Nevertheless, the meaning and scope of Executive Order No. 28 has engendered debate. On one hand, SUNY Buffalo officials argue that the executive order and SUNY Resolution 83-216,[21] though binding on administrators of the State University, may not be "applied to the activities of third persons, or be used to deny third persons access to state facilities, services, or benefits."[22]

Informing the administration's position is the New York Court of Appeals decision in *Under 21 v. City of New York*.[23] That case involved an executive order, issued by former New York City Mayor Ed Koch, forbidding those who secure contracts with the city from refusing to hire people solely on the basis of sexual preference.[24] The primary issue addressed by *Under 21* was whether the Mayor may forbid city contractors from discriminating against homosexuals, a classification not protected by any city legislative enactment.[25] The Court of Appeals held that the

---

vigorously combat discrimination in its admissions and academic policies and, at the same time, condone those practices among extracurricular organizations recognized by it." *Id.* at 661.

17. *See* N.Y. CONST. art. IV, §§ 1 & 3. *See also* Rapp v. Carey, 44 N.Y.2d 157, 375 N.E.2d 745, 404 N.Y.S.2d 565 (1978).

18. New York State Inspection, Sec. and Law Enforcement Employees, District Council 82 v. Cuomo, 64 N.Y.2d 233, 239, 475 N.E.2d 90, 93, 485 N.Y.S.2d 719, 722 (1984).

19. *Rapp*, 44 N.Y.2d at 174, 375 N.E.2d at 755, 404 N.Y.S.2d at 575 (Cooke, J., dissenting).

20. Clark v. Cuomo, 66 N.Y.2d 185, 193 n.1, 486 N.E.2d 794, 800 n.1, 495 N.Y.S.2d 936, 942 n.1 (1985) (Jasen, J., dissenting in part) (quoting Matter of DiBrizzi, 303 N.Y. 206, 213 (1933)).

21. *See supra* notes 11-12.

22. SUNY Buffalo Reporter, *supra* note 16, at 4.

23. 65 N.Y.2d 344, 482 N.E.2d 1, 492 N.Y.S.2d 522 (1985).

24. *Id.*

25. *Id.* at 357, 482 N.E.2d at 5, 492 N.Y.S.2d at 526. Similarly, New York State has not included "sexual orientation" in any legislative enactments. *See generally* N.Y. CIV. RIGHTS LAW § 40-c (McKinney 1976 & Supp. 1990); N.Y. EXEC. LAW § 296 (McKinney 1982); N.Y. LAB. LAW § 220-e (McKinney 1986).

Mayor had exceeded his authority in initiating the policy.[26] Other courts similarly held that executive orders which mandate specific actions for private parties are void as encroachments on legislative prerogatives.[27]

Proponents of the JAG ban suggest, however, that Executive Order No. 28 does not place an affirmative obligation on third parties. Rather, supporters contend, the order directs state actors to refrain from discrimination based on sexual orientation. Thus, since SUNY Buffalo is a state actor,[28] and because the law school's Career Development Office arguably constitutes an agency or department as envisioned by Executive Order No. 28,[29] the Order ostensibly obligates the school to refrain from catering to employers like JAG who discriminate on the basis of sexual preference.

Although they offer the "greatest potential source of legal protection

---

26. 65 N.Y.2d at 364, 482 N.E.2d at 10, 492 N.Y.S.2d at 531.

27. *See, e.g.*, Fullilove v. Carey, 62 A.D.2d 798, 406 N.Y.S.2d 888 (1978), *aff'd*, 48 N.Y.2d 826, 399 N.E.2d 1203, 424 N.Y.S.2d 183 (1979) (executive order requiring building contractors to undertake programs of affirmative action to insure equal employment opportunities exceeded authority of Governor as it impinged on legislative branch); Matter of Broidrick v. Lindsay, 39 N.Y.2d 641, 350 N.E.2d 545, 385 N.Y.S.2d 265 (1976) (regulations requiring affirmative action in form of minority employment percentages are in excess of executive authority).

28. *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950); Sweatt v. Painter, 339 U.S. 629 (1950); Sipuel v. Board of Regents, 332 U.S. 631 (1948); Missouri ex. rel. Gains v. Canada, 305 U.S. 337 (1938). In each of these cases, action by a state university was held subject to the fourteenth amendment. *See also* Weise v. Syracuse University, 522 F.2d 397 (2d Cir. 1975) (employment discrimination by private university found to constitute state action under federal constitution). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 1688 (2d ed. 1988).

Supreme Court cases set forth the following factors as determinative of state action: extensive regulation; receipt of public funds; type of function involved; and presence of a symbiotic relationship. *See, e.g.*, Rendell-Baker v. Kohn, 457 U.S. 830 (1982) (personnel decisions of private school that received state aid found not to constitute state action); Norwood v. Harrison, 413 U.S. 455, 466 (1973) (state lending textbooks to private schools with racially discriminatory policies was granting "tangible financial aid [which had] a significant tendency to facilitate, reinforce, and support private discrimination"). *See also* Sinn v. Daily Nebrasken, 829 F.2d 662 (8th Cir. 1987) (state college newspaper's refusal to print advertisements stating homosexual orientation held not to be state action); *accord* Mazart v. State, 109 Misc. 2d 1092, 441 N.Y.S.2d 600 (Ct. Cl. 1981) (involving SUNY Binghamton); Gay and Lesbians Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) (state action was present in denial of funding to gay and lesbian student association by student senate at public university where university administrator had final say as to funding decisions through his power to hear appeals).

29. *See* Kaplowitz v. University of Chicago, 387 F. Supp. 42 (N.D. Ill. 1972) (placement office of university which was the primary source through which employers hired law students was an "employment agency" within statute prohibiting employment agencies from refusing to refer persons for employment on the basis of, *inter alia*, sex; but law school was not required to make a determination as to whether particular firms engaged in discrimination or to prohibit those law firms from interviewing at the law school); United States v. City of Philadelphia, 798 F.2d 81 (3d Cir. 1986) (stipulation that law school placement office constituted "employment agency" for purposes of anti-discrimination ordinance).

for gay men and lesbians,"[30] state and local executive orders nevertheless remain limited in several respects. First, such orders may be rescinded through judicial invalidation or referendum.[31] Second, "in contrast to a uniform federal ban on employment discrimination based on sexual orientation, local regulations can cover only a limited number of employees and reach only selected regions of the country."[32] Finally, local anti-discrimination ordinances may be preempted, hence unenforceable, because they conflict with federal interests.[33]

To be sure, the confusion over the scope and meaning of Executive Order No. 28 suggests "the need for a rational, structured, legislative solution to the problem" of regulating gay discrimination in public places.[34] Perhaps Executive Order No. 28 may help to "produce a more favorable climate for [such] legislation."[35] But assuming the existence of a clear executive command and/or a state legislative act prohibiting SUNY officials from catering to employers who discriminate on the basis of sexual orientation raises the question: is a state civil rights law enforceable against a federal entity, particularly the military?

II. THE GUISE OF PREEMPTION

The supremacy clause[36] invalidates all state laws that conflict with

30. Note, *Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1509, 1583 (1989) [hereinafter *Sexual Orientation and the Law*] (footnotes omitted).

31. *Id. See also* Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1297 (1985) [hereinafter Note, *Status*] ("Judicial designation of homosexuality as a suspect classification [for the purpose of equal protection analysis], even though it could not automatically eradicate all forms of discrimination against gays could provide a comprehensive doctrinal framework for addressing the problem of gay inequality."); L. TRIBE, *supra* note 28, at 1616 (arguing that homosexuals "seem to satisfy all of the Court's implicit criteria for suspectness"); J. ELY, DEMOCRACY AND DISTRUST 148-53 (1980) (arguing that suspect classification is warranted for politically powerless). *But see The Future of Gay America*, NEWSWEEK, Mar. 12, 1990, at 22 (the Human Rights Campaign Fund, a gay lobbying group, was the ninth largest PAC during the 1988 presidential election).

In the following cases, homosexuality was accorded neither suspect nor quasi-suspect status: Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987), *cert. denied*, 111 S. Ct. 384 (1990); Doe v. Casey, 796 F.2d 1508 (D.C. Cir. 1986), *aff'd in part, rev'd in part on other grounds*, 486 U.S. 592 (1988). *But see* Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1988), *cert. denied*, 111 S. Ct. 384 (1990) (homosexuality deemed a suspect class for purposes of equal protection analysis). Courts have been even less willing to support a due process analysis of homosexual rights; *see, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (no fundamental right to engage in homosexual sodomy).

32. *Sexual Orientation and the Law*, *supra* note 30, at 1583.

33. *Id.*

34. Lewis, *The Role of Law in Regulating Discrimination in Places of Public Accommodation*, 13 BUFFALO L. REV. 402, 436 (1964).

35. *Id.*

36. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which

an act of Congress or an administrative regulation promulgated pursuant to congressional authority.[37] Federal law may preempt state law in three ways: 1) Congress may explicitly define the extent to which it plans to preempt state law when it enacts the federal law; 2) in the absence of a clear congressional boundary, congressional intent may be considered; 3) if compliance with both federal and state law is impossible, or if compliance with the state law would hinder the accomplishment of the full purposes and objectives of Congress, the state law is preempted.[38]

In *In re Greater Buffalo Chapter, American Red Cross v. State Division of Human Rights*,[39] the Red Cross, claiming exemption as a federal instrumentality,[40] refused to be bound by race, age and sex discrimination provisions of the New York State Human Rights Law regarding employment.[41] The Human Rights Division contended that the Red Cross was subject to the local law under the state police powers.[42] The court held that because compliance with the state law would not impermissibly interfere with the Red Cross' operations,[43] the Red Cross would be bound by the relatively stringent state regulations.[44] Implicit in the court's decision was the contemplation by Title VII of the Civil Rights Act of 1964 of the "enforcement of state fair employment laws as an essential component of the Federal statutory framework."[45]

---

shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or the Laws of any State to the Contrary notwithstanding.").

37. *See* L. TRIBE, *supra* note 28, at 479-501.

38. Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n, 837 F.2d 600, 605-06 (3d Cir. 1988).

39. 118 A.D.2d 288, 504 N.Y.S.2d 882 (1986).

40. *Id.* at 289, 504 N.Y.S.2d at 883. The Red Cross was incorporated by an act of Congress. It is a federal instrumentality. *See* Act, ch. 784, 31 Stat. 277 (1900).

41. 118 A.D.2d at 289, 504 N.Y.S.2d at 883.

42. *Id.*

43. *Id.*

44. *Id.* at 292, 504 N.Y.S.2d at 885.

45. *Id.* at 291, 504 N.Y.S.2d at 885. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-7 (1988) provides:

> Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State . . . other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.
>
> Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000h-4 (1988) provides: Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

Yet several factors militate against the notion of forcing any federal entity, particularly the military, to respect a state anti-gay discrimination law at a public university. For example, despite the expansive language of the 1964 Civil Rights Act,[46] homosexuals have been generally unsuccessful bringing "sexual orientation" under Title VII's ambit.[47] Moreover, a court could simply hold that binding the military to local civil rights regulations substantially interferes with military operations.[48] Finally, pursuant to the constitutional command that Congress shall raise and support an army,[49] there are several congressional directives that provide financial incentives for colleges and universities to cooperate with military recruiters.[50]

In *United States v. City of Philadelphia*,[51] the Court of Appeals for the Third Circuit invalidated a City Commission's order that prohibited

46. *See id. See also* Roper v. Department of Army, 832 F.2d 247 (2d Cir. 1987) (Title VII of Civil Rights Act of 1964 does not apply to uniformed members of the armed services); *accord* Johnson v. Alexander, 572 F.2d 1219 (8th Cir.), *cert. denied*, 439 U.S. 986 (1978). *But see* Hill v. Berkman, 635 F. Supp. 1228 (E.D.N.Y. 1986) (applying Title VII to uniformed military personnel).

47. *See supra* note 4.

48. For reviews of the historic deference accorded by courts to military operations, *see generally* Note, *Military Deference*, *supra* note 3; Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855 (1987) [hereinafter *First Amendment Rights of Military*].

49. U.S. CONST. art. I, § 8, cls. 12-14 provide that "Congress shall have the Power . . . To raise and support Armies . . . To provide and maintain a Navy . . . [and] To make Rules for the Government and Regulation of the land and naval Forces."

50. *See* Department of Defense Authorization Act of 1973, Pub. L. No. 92-436, Title VI, § 606(a), 86 Stat. 734, 740 (1972) providing, in part:

> No part of the funds appropriated pursuant to this or any other Act for the Department of Defense or any of the Armed Forces may be used at any institution of higher learning if the Secretary of Defense or his designee determines that recruiting personnel of any of the Armed Forces of the United States are being barred by the policy of such from the premises of the institution . . . .

See 118 CONG. REC. 22,436-67 (1972) (statement by Rep. Herbert) ("If institutions of higher learning want to sever their relationship with the Armed Forces, that is their prerogative. But we think the separation should be complete. We don't want to tempt their morality with government dollars."). *See also* Department of Defense Authorization Act of 1971, Pub. L. No. 91-44I, § 510, 84 Stat. 905 (1970) (similar provision).

Congress has passed other laws which condition federal funding to academic institutions. *See, e.g.*, Public Health Service Act § 771(b), *amended by* Health Professions Educational Assistance Act of 1976, Pub. L. No. 94-484, § 501, 90 Stat. 2290 (current version at 42 U.S.C. §§ 293-95 (1988)) (denying federal grants to medical schools and their students, if school fails to transfer qualified American students who spent their first two years of medical training abroad); National Science Foundation Authorization Act of 1974, Pub. L. No. 93-96, § 7, 87 Stat. 315 (1973) (codified as amended at 42 U.S.C. § 1862 (1988)) (denying federal financial aid to campus troublemakers). *See generally* Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103, 1149-50 (1987).

51. 798 F.2d 81 (3d Cir. 1986).

Temple University Law School, a state-affiliated school, from allowing the JAG Corps use of the school's facilities.[52] The City had acted pursuant to a municipal ordinance which declared it an unlawful employment practice for any employment agency to discriminate on the basis of, *inter alia*, sexual orientation.[53] First, the court framed the issue: "whether the Ordinance, as applied to the Law School . . . 'conflicts with Congressional legislation or with any discernible Congressional policy.' "[54] The court then considered federal legislation prohibiting expenditure of defense funds to universities which bar military recruiters.[55] Though the Third Circuit realized that compliance with these laws is voluntary,[56] the court viewed these acts as expressing congressional intent that military recruiters have access to university employment facilities.[57] In light of these federal objectives, the Third Circuit held that the City's order had " 'the potential to frustrate' effective military recruiting" of skilled personnel in the Philadelphia area.[58]

Despite the Third Circuit's assurance that *City of Philadelphia* was decided solely on the basis of congressional intent,[59] the ruling's undermining effect on the city's efforts at local regulation nevertheless "impli-

---

52. *Id.* at 82.

53. Two Temple University Law School students filed the original complaint with the Philadelphia Commission on Human Relations. The students claimed that the Law School Placement Office, by referring students to employment interviews conducted by JAG Corps, was in violation of the Philadelphia Fair Practices Ordinance, Philadelphia Code §§ 9-1101 to 9-1110. *Id.* at 84. The Ordinance provides, in part:

> (A) It shall be an unlawful employment practice:
>
> (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. . . .
>
> . . .
>
> (4) For any employment agency because of a person's race, color, sex, religion, national origin, ancestry, age or handicap to:
>
> (a) fail or refuse to classify properly or refer for employment;
>
> (b) otherwise discriminate against any person.
>
> . . .
>
> (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 (quoting Philadelphia Code § 9-1103(A)(2), (4), (7)).

54. *City of Philadelphia*, 798 F.2d 81, 85 (3d Cir. 1986) (quoting Penn Dairies v. Milk Control Comm'n, 318 U.S. 261, 271 (1943)).

55. 798 F.2d at 86. For relevant parts of the legislation, see *supra* note 50.

56. *Id.* at 88.

57. *Id.* at 86.

58. *Id.* at 88 (quoting McCarty v. McCarty, 453 U.S. 210 (1981)).

59. *Id.* at 86-88.

cates the very structure of federalism established by the Constitution."[60] To be sure, the Court of Appeals agreed with the District Court's conclusion that "the Commission's order constituted an attempt to . . . 'regulate . . . indirectly through Temple University the conduct of the United States, insofar as it adheres to its policy of discrimination against homosexuals.' "[61] But the Third Circuit failed to note that the same charge can be leveled against the United States. After all, in *City of Philadelphia*, the federal government, with the support of congressional legislation which threatens to terminate campus funding,[62] indirectly regulated the school's behavior and the municipality's conduct as the city tried to implement its own anti-discrimination policy.

III. CONDITIONAL SPENDING

Congress' ability to enact conditional legislation is derived from the Constitution. The spending power provides that "Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defense and general Welfare . . ."[63] Pursuant to this authority, Congress conditions grants and thus compels recipients to accept a myriad of federal objectives.[64] The Office of Management and Budget has compiled a list of fifty-nine mandates that attach to every grant.[65] These stipulations include, for example,

60. Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 88 (1988) ("[P]reemption . . . implicate[s] controversial issues of power because of its similarity to a power that the Framers denied Congress: the power to veto state laws."). *But see* L. TRIBE, *supra* note 28, at 479 (Preemption decisions "may pose complex questions of statutory construction but raise no controversial issues of power.").

61. *City of Philadelphia*, 798 F.2d at 85.

62. *See supra* note 50. The Department of Defense may only withdraw funds from the specific department of a university which bars the military. 32 C.F.R. § 216.3 (1990) ("[T]he prohibition on use of funds applies only to the elements in which recruiting is barred effectively."). Other federal prohibitions may apply differently. *See, e.g.*, Grove City College v. Bell, 465 U.S. 555 (1984) (Title IX prohibition against sex discrimination applies only to program deemed to have received federal assistance), *superseded by statute*, Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a (1988).

In a state university system, the pertinent question is whether the Department of Defense can withdraw funds from other state schools. In Board of Governors v. United States Dep't of Labor, 917 F.2d 812, 816 (4th Cir. 1990), *cert denied*, 111 S. Ct. 2013 (1991), the court held that, under North Carolina law, the various campuses of the University of North Carolina system were merely sub-agencies of a single state agency. Thus, the court held that even campuses which had not contracted with the federal government were subject to federal contract provisions. 917 F.2d at 818.

63. U.S. CONST. art. I, § 8, cl. 1.

64. *See* Pennhurst School v. Halderman, 451 U.S. 1, 17 (1981) ("[O]ur cases have long recognized that Congress may fix the terms on which it shall disburse federal money to the states.").

65. Cappalli, *Mandates Attached to Federal Grants: Sweet and Sour Federalism*, 13 URB. LAW. 143, 143-44 (1981).

nondiscrimination rules concerning race, gender, age and handicaps; policies aimed at environmental preservation and employment; and principles regarding "freedom of information" and "right of privacy."[66]

Controversy arises because these conditions often intrude into areas which may be reserved for local regulation.[67] Most problematic are authorizations made pursuant to the rather ambiguous "general welfare." Spending for the "common defense," on the other hand, is less tenuous because, with the Necessary and Proper Clause,[68] Congress can more easily enact laws in its exercise of the enumerated powers dealing with defense.[69] But, as the JAG dispute and the *City of Philadelphia*[70] decision suggest, congressional grants of this nature are suspect because such funding is ultimately conditioned on the acceptance of discriminatory military practices.[71]

Supreme Court decisions, though usually focusing on "general welfare" appropriations, are helpful in analyzing the issues surrounding the JAG controversy. The opinions suggest that the judiciary would not invalidate, on state autonomy grounds, conditional appropriations made pursuant to the common defense.

In *United States v. Butler*,[72] the Court struck down provisions of the Agricultural Adjustment Act of 1933 which subsidized farmers who reduced their crop production.[73] The Court found that, while the farmer

66. *Id.* at 145. *See, e.g.*, Fullilove v. Klutznick, 448 U.S. 448 (1980) (Congress may employ racial or ethnic classifications in exercising its spending powers, if those classifications do not violate equal protection).

67. *See* Note, *Constitutional Limitations on Congressional Use of Conditional Funding Grants in Light of South Dakota v. Dole*, 4 WAYNE L. REV. 1643 (1988) [hereinafter Note, *Limitations*]. *See also* Lau v. Nichols, 414 U.S. 563 (1974) (applying nondiscrimination provisions to federally funded school).

68. U.S. CONST. art. I, § 8, cl. 16. Congress shall have power "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution."

69. *See supra* note 48. *See also* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 426 (1819); Buckley v. Valeo, 424 U.S. 1, 90 (1976) (The General Welfare clause is "a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause."); Nevada v. Skinner, 884 F.2d 445, 449 (9th Cir. 1989) ("[I]f Congress has the authority under an enumerated power (other than the Spending Power) to compel the States through direct regulation to change its practices, then it may also achieve that result through the more gentle commands of the Spending Power . . . ."), *cert. denied*, 110 S. Ct. 1112 (1990).

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

71. *See supra* note 14. Congress did not specifically legislate the military's anti-gay regulations; rather, the regulations were imposed by the Department of Defense, pursuant to the Department's inherent authority. But the analysis herein applies equally whether the condition is imposed by Congress or by the Department. *See* Rosenthal, *supra* note 50, at 1104 n.3.

72. 297 U.S. 1 (1936).

73. The Agricultural Adjustment Act of 1933, ch. 25, 48 Stat. 31 (1933).

may refuse to comply with the Act, such refusal meant the loss of benefits.[74] This, the Court determined, "is coercion by economic pressure. [And t]he asserted power of choice is illusory."[75] Although *Butler* declared that the congressional spending power is not limited to direct grants found in the Constitution,[76] the Court held that since the authority to regulate agricultural production was not reasonably conferred by an enumerated power, the Act was forbidden.[77]

Since *Butler*, however, the Supreme Court has not invalidated any conditional appropriation on the basis of spending power analysis. In *Steward Machine Co. v. Davis*,[78] the Court examined a provision of the Social Security Act that allowed tax credits for contributions made to the state unemployment fund, provided the state scheme was approved by the Social Security Board.[79] Petitioner, an Alabama corporation, contended, *inter alia*, that the regulation unlawfully intruded upon the reserved powers of the state.[80] To strike down the tax credit plan, the Court required petitioner to meet a two part test: first, it must be shown that the provision of the Act was incapable of standing alone; and second, that the regulation was a "weapon . . . of coercion, destroying or impairing the autonomy of states."[81] Although the Court acknowledged the economic incentive for the state to comply with the federal regulation and realized that, at some point, such "pressure turns into compulsion,"[82] the Court emphasized the voluntary nature of the federal plan and held that whatever the point of coercion may be, it was not met in *Steward*.[83]

---

74. 297 U.S. at 70.
75. *Id.* at 71.
76. *Id.* at 66.
77. *Id.* at 68.
78. 301 U.S. 548 (1937).
79. *Id.*
80. *Id.* at 578.
81. *Id.* at 586.
82. *Id.* at 590.
83. *Id.* The Court continues to stress the voluntary nature of conditional grants. In South Dakota v. Dole, 483 U.S. 203, 211 (1987), despite an apparent collision between a federal highway conditional funding law and the state's broad powers to regulate alcohol under the twenty-first amendment, the Court emphasized the voluntary nature of the federal program and upheld the federal law; once again, the Court declined to discuss at which point " 'pressure turns into compulsion.' " (quoting Steward Machine Co. v. Davis, 301 U.S. 548, 590 (1937)). *See also* Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1112 (1990), in which the Court of Appeals for the Ninth Circuit struggled to define "coercion":

> Does the relevant inquiry turn on how high a percentage of the total programmatic funds is lost when federal aid is cut-off? . . . Or on the extent to which alternate private, state, or federal sources . . . are available? . . . [C]an a sovereign state which is always free

Yet, the Supreme Court has noted, since 1960 federal grants to state and local governments have grown from seven billion to about ninety-six hundred billion dollars, or "about one-fifth of state and local government expenditures."[84] In light of the threatened loss of such federal funding, the "choice" to which the Court often refers appears to be merely a theoretical option for a grant-dependent recipient.[85] Moreover, "[t]he perception that the . . . [local] residents have a proprietary interest in the funds makes rejection of the federal benefit . . . [even more] difficult."[86]

In addition to *Steward's* coercion test, the Supreme Court has articulated other limits on the spending power,[87] most notably, by requiring that the grant may not offend a constitutional provision.[88] Nonetheless, the Court has been unwilling to invalidate any conditional appropriation on this basis as well.

In *Oklahoma v. United States Civil Service Commission*,[89] for example, the state argued that federal highway funds could not be conditioned on Oklahoma's compliance with a provision of the Hatch Act, which

---

to increase its tax revenues ever be coerced by the withholding of federal funds—or is the state merely presented with hard political choices?

For a thorough examination of the coercion debate, see Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1428-56 (1989).

84. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 552-53 (1985).

85. *See* Note, *Limitations*, *supra* note 67, at 1649.

86. Note, *The Coercion Test and Conditional Federal Grants to the States*, 40 VAND. L. REV. 1159, 1178 (1987) [hereinafter Note, *Coercion*].

87. In addition to the excessive coercion test, the Court has announced that the Congressional appropriation must be for the "general welfare." Helvering v. Davis, 301 U.S. 619, 640 (1937):

> The line must be drawn between one welfare and another . . . . Where this shall be placed cannot be known . . . in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. This discretion, however, is not confided to the courts. This discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment.

The Court also requires that Congress unambiguously state the funding condition. Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) ("[I]f Congress intends to impose a condition on the grant of federal money, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.").

The Court has also declared that any condition on a grant must be "reasonably related" to the federal interest. Massachusetts v. United States, 465 U.S. 444, 461 (1978). Dissenting in South Dakota v. Dole, 483 U.S. 203, 218 (1986), Justice O'Connor argued the "reasonably related" standard (*see infra* notes 98-99 and accompanying text). But, as the Court noted in *Dole*, "[o]ur cases have not required that we define the outer bounds of the 'germaneness' or 'relatedness' limitation on the imposition of conditions under the spending power." 483 U.S. 203, 208 n.3 (1986).

88. *See, e.g.*, Lawrence County v. Lead-Deadwood School Dist., 469 U.S. 256, 269-70 (1985); Buckley v. Valeo, 424 U.S. 1, 91 (1976).

89. 330 U.S. 127 (1947).

restricted the state's political activities.[90] The Court, stressing the voluntary nature of the conditional grant, rejected Oklahoma's tenth amendment argument[91] and held that state sovereignty was not offended by the Act.[92]

More recently, in *South Dakota v. Dole*,[93] the state challenged the Federal Drinking Age Amendment which allowed the Secretary of Transportation to withhold a percentage of highway funds to states refusing to raise their drinking ages to twenty-one.[94] South Dakota argued that " 'Congress may not use the spending power to regulate that which it is prohibited from regulating directly under the Twenty-first Amendment.' "[95] But the Court rejected the state's independent constitutional bar theory and instead found "that the language in . . . earlier opinions stands for the . . . proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional."[96] Upholding the appropriation, the Court suggested that "a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of . . . Congress' broad spending power."[97]

In dissent, Justice O'Connor argued that the condition imposed by Congress was too attenuated from highway funds to pass constitutional muster.[98] Drawing on *Butler*, O'Connor emphasized the practical effect that such conditions have on state sovereignty: "the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives 'power to the Congress to tear down the barriers, to invade the states jurisdiction, and to become a parliament of the whole people.'. . ."[99]

---

90. *Id.* at 129. The applicable section of the Hatch Act provided that:

> [N]o officer or employee of any State or local agency whose principle employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency shall . . . take any active part in political management or in political campaigns.

91. U.S. CONST. amend. X: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

92. 330 U.S. at 143-44.

93. 483 U.S. 203 (1987).

94. *Id.* at 205. The state stood to lose 5% of its federal highway funding. *Id.* at 211.

95. *Id.* at 205 (quoting Brief for Petitioner at 52-53). U.S. CONST. amend. XXI, § 2 provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

96. 483 U.S. at 210.

97. *Id.* at 210-11.

98. *Id.* at 218 (O'Connor, J., dissenting).

99. *Id.* (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)). *See also* Nevada v. Skinner, 884

The *Oklahoma* and *Dole* decisions, together with *Garcia v. San Antonio Metropolitan Transit Authority*,[100] suggest that a constitutional bar to congressional spending, particularly via the tenth amendment, is unlikely to be judicially approved.[101] In *Garcia*, the Supreme Court extolled state sovereignty as being more properly preserved "by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."[102] These protections, *Garcia* argued, ensure that states are free to pursue "any activity that their citizens choose for the common weal, no matter how unorthodox or unnecessary anyone else . . . deems state involvement to be."[103] But, as the JAG controversy demonstrates, these procedural safeguards are thwarted by Congressional spending schemes.

F.2d 445 (9th Cir. 1989) (upholding Congress' ability to cut off 95% of Nevada's highway funds if state failed to adopt national speed limit), *cert. denied.*, 110 S. Ct. 1112 (1990).

100. 469 U.S. 528 (1985).

101. *See generally* Note, *Limitations*, *supra* note 67, at 1654-57.

102. 469 U.S. at 552. Though the commerce clause, and not the spending power, was at issue in *Garcia*, the Court's sentiments are also applicable in this context. *See also* Sullivan, *supra* note 83, at 1432 n.67 ("Even during the reign of *National League of Cities* . . . when federalism-based limits on Congress' regulatory power over state functions reached their modern zenith, federal courts routinely upheld conditions on federal aid to the states that would likely have been struck down if posed as direct commands."). In National League of Cities v. Usery, 426 U.S. 833 (1976) (*overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985)), the Court held that Congressional extension of the Fair Labor Standards Act to all employees of state and their subdivisions exceeded the scope of the commerce power. The Court made clear, however, to "express no view as to whether different results might obtain if Congress seeks to affect integral operations of state governments by exercising authority granted it under other sections of the Constitution such as the Spending Power." *Id.* at 852 n.17. Moreover, during the *National League* era, the Supreme Court summarily affirmed North Carolina ex rel. Morrow v. Califano, 435 U.S. 962 (1979) (district court finding that tenth amendment did not prohibit federal health which was conditioned on the requirement that local health facilities meet federal standards). *See* TRIBE, *supra* note 28, at 322.

In a footnote, *National League* explicitly left unresolved the scope of Congress' authority under its war power. 426 U.S. 854 n.18. Nevertheless, during *National League's* reign, the Fifth Circuit held that the tenth amendment did not limit federal authority under the war power. Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1083 (1979) ("Where the legitimate exercise of a power delegated to Congress outweighs the interference with the state's self-determination in providing its essential public services, the tenth amendment is no bar to congressional action."). *See also* Dukakis v. United States Dep't of Defense, 686 F. Supp. 30 (D.Mass.) (reservation of power to state authority, expressed in the militia clause of the Constitution, does not override the legitimately exercised power of Congress to raise and support armies), *aff'd*, 859 F.2d 1066 (1st Cir. 1988); *accord* Perpich v. United States Dep't of Defense, 880 F.2d 11 (8th Cir. 1989), *cert. granted*, 110 S. Ct. 715 (1990).

103. 469 U.S. at 546. *See also* Nevada v. Skinner, 884 F.2d 445, 448 (9th Cir. 1989) ("The purpose of the coercion test is to protect state sovereignty from federal incursions. If this sovereignty is adequately protected by the national political process, we do not see any reason for asking the judiciary to settle questions of policy and politics that range beyond its normal expertise."), *cert. denied*, 110 S. Ct. 1112 (1990).

IV. INDIVIDUAL RIGHTS

The Supreme Court abandons spending power analysis when "more appears to be at stake than a federal benefit,"[104] particularly when the stipulation induces an individual into an unconstitutional condition.[105] As Rosenthal remarks, "[i]t is striking that in recent years the majority of the Court has almost never expressed in the civil liberties area what it has said with respect to state autonomy: If you object to the condition, you have the simple alternative of not taking the money."[106]

In a series of cases, the Court has examined restrictions attached to state welfare laws and invalidated the local rules as contravening individual rights provisions of the Constitution.[107] In *Thomas v. Review Board*,[108] for example, the Court struck down a state requirement that a person be disqualified from receiving unemployment benefits if he or she failed to accept work without good cause.[109] Petitioner was denied benefits after he refused to work in a munitions factory because of religious objections to war.[110] The Court relied upon the first amendment[111] to

104. Note, *Coercion*, *supra* note 86, at 1185.

105. Sullivan, *supra* note 83, at 1415, defines "[t]he doctrine of unconstitutional conditions [as] hold[ing] that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold the benefit altogether." The JAG controversy presents the situation where "one party's consent may threaten the rights of another." Rosenthal, *supra* note 50, at 1154. *See also* Perry v. Sindermann, 408 U.S. 593, 597 (1972):

> For at least a quarter-century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . .

See generally the following sources for discussions of unconstitutional conditions: Epstein, *Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4 (1988); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968); Sullivan, *supra* note 83; Rosenthal, *supra* note 50.

106. Rosenthal, *supra* note 50, at 1163.

107. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (free exercise clause bars conditioning of unemployment benefits on agreement to work on Sabbath). The Court held that "not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable." *Id.* at 404. *See also* Hobie v. Unemployment Appeals Comm'n, 480 U.S. 136 (1987); *accord* Frazee v. Illinois Dep't of Employment, 109 S. Ct. 1514 (1989); Goldberg v. Kelly, 397 U.S. 254 (1970) (welfare benefits cannot be conditioned on waiver of procedural due process rights); Speiser v. Randall, 357 U.S. 513 (1958) (first amendment bars conditioning of tax exemption on showing that taxpayer had not engaged in subversive advocacy).

108. 450 U.S. 707 (1981).

109. *Id.*

110. *Id.* at 710-11.

111. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ."

emphasize the requirement's coercive nature:

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.[112]

The Court has applied similar reasoning in other contexts as well. In *Keyishian v. Board of Regents*,[113] a case involving SUNY Buffalo, the Court invalidated New York statutes[114] and administrative regulations[115] that barred State University employment solely on the basis of membership in subversive organizations.[116] The Court held that this condition to work seeks "to bar employment [for both] association which legitimately may be proscribed and . . . association which may not be proscribed consistently with first amendment rights."[117]

Petitioners in *FCC v. League of Women Voters*[118] challenged a section of the Public Broadcasting Act of 1967[119] which prohibited any noncommercial educational broadcasting station receiving federal grants from "engag[ing] in editorializing."[120] Though the Court struck down the provision, it did not evaluate the restriction as a condition on a federal expenditure.[121] Rather, the Court used the same strict scrutiny analysis which it would apply to a direct regulation that abridged speech.[122]

---

112. 450 U.S. at 717-18.

113. 385 U.S. 589 (1967).

114. N.Y. CIV. SERV. L. § 105 (McKinney 1963) (statute provided for the termination of any teacher in a state supported educational institution who advocated subversive activities); *accord* N.Y. EDUC. L. §§ 3021-22 (McKinney 1963) (*reprinted in* 385 U.S. at 610).

115. Rules of the Board of Regents, art. XVIII (1949) (*reprinted in* 385 U.S. at 614-17) provided for, *inter alia*, mandatory faculty "loyalty oaths."

116. 385 U.S. at 609.

117. *Id.* at 589. *See also* United States v. Robel, 389 U.S. 258 (1967) (mere membership in the Communist Party could not bar a person from employment in private defense establishments important to national security). *But see* Law Students Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971) (bar examiners may ask about Communist affiliations as a preliminary to further inquiry and may exclude an applicant for refusal to answer); *accord* Konigsberg v. State Bar of California, 366 U.S. 36 (1961).

118. 468 U.S. 364 (1984).

119. Public Broadcasting Act of 1967, Pub. L. No. 90-129, 81 Stat. 365, 47 U.S.C § 399 (1967) (forbidding any "noncommercial educational broadcasting station which receives a grant from the Corporation" to "engage in editorializing"). *See* 468 U.S. at 366.

120. 468 U.S. at 366. The federal funds at stake amounted to about 25% of public broadcasting's budget. *Id.*

121. *Id.* at 399-401.

122. *Id.* at 384, 396-99.

In *Clarke v. United States*,[123] District of Columbia Council members brought suit challenging a congressional act that conditioned the District's federal appropriations on the Council's passage of certain federal legislation. The Act specified that any District of Columbia school affiliated with a religious organization need not provide equal access to homosexuals.[124] While *Clarke* invited examination of the effect of conditional spending on District autonomy,[125] the Circuit Court of Appeals instead focused on the condition as a regulation of council members' speech.[126] And under the auspices of the first amendment, the court found that the federal act "coerces . . . Council members' votes on a particular piece of legislation, and, because none of the interests asserted . . . justify the abridgement of . . . members' free speech rights," the court held the federal act unconstitutional.[127]

Although *Clarke* and its relatives carry the colors of first amendment rights, the judiciary will, of course, not strike down regulations whenever individual rights are conditionally threatened.[128] The most

123. 886 F.2d 404 (D.C. Cir. 1989), *vacated as moot*, 915 F.2d 699 (D.C. Cir. 1990). The case remains noteworthy for its evaluation of a conditional spending requirement as implicating plaintiffs' first amendment rights.

124. *Id.* The 1989 District of Columbia Appropriations Act, Pub. L. No. 100-462, 102 Stat. 2269 § 1-2520 (1988) provides, in part:

> Notwithstanding any other provision of the laws of the District of Columbia, it shall not be an unlawful discriminatory practice in the District of Columbia for any educational institution that is affiliated with a religious organization or closely associated with the tenants of a religious organization to deny, restrict, abridge, or condition (A) the use of any fund, service, facility, or benefit; or (B) the granting of any endorsement, approval, or recognition, to any person or persons that are engaged in, promoting, encouraging, or condoning any homosexual act, lifestyle, orientation, or belief.

This piece of legislation was enacted in response to the D.C. Circuit's decision in Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1 (D.C. 1987) (en banc) (Georgetown required to provide homosexuals with equal access to University facilities and services).

125. *See, e.g*, District of Columbia Self-Government and Governmental Reorganization Act ("Home Rule Act"), Pub. L. No. 93-198, 87 Stat. 774 (1973) (intended to "grant the inhabitants of the District of Columbia powers of local self-government").

126. 886 F.2d at 411.

127. *Id.* at 406. *See id.* at 418 (Buckley, J., concurring) ("At what point . . . does a federal grant-in-aid program cross the line that separates the encouragement of state municipal action from coercion? Are the constitutional rights of corporate directors and university trustees comparable to those of state and municipal legislators?").

128. *See* Lyng v. International Union, UAW, 485 U.S. 360 (1988) (rejecting an unconstitutional conditions challenge to amendment barring federal food stamps from otherwise eligible households that had become needy because a household member was on strike); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam) (Congress did not violate first amendment when it conditioned acceptance of public campaign funds on an agreement by the candidate to abide by specified expenditure limitations).

striking example here is the Supreme Court's recent *Rust v. Sullivan*[129] decision. There, per Chief Justice Rehnquist, the Court upheld government regulations that barred doctors at family planning clinics which are funded by Title X funds from discussing abortion with patients.[130] Petitioners argued that the regulations violated the first amendment rights of health providers by, *inter alia*, "condition[ing] the receipt of a benefit, . . . Title X funding, on the relinquishment of a constitutional right, the right to engage in abortion advocacy and counseling."[131] Dismissing the challenge, the Court distinguished *Rust* from unconstitutional conditions cases like *FCC v. League of Women Voters*:[132]

> [H]ere the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for the purposes for which they were authorized. The . . . regulations do not force the Title X grantee to give up abortion-related speech; they merely require that the grantee keep such activities separate and distinct from Title X activities.[133]

Petitioners also contended that since Title X requires grant recipients to contribute matching funds, the "regulations . . . penaliz[ed] speech funded with non-Title X monies."[134] Rejecting this argument, the Court found that "[b]y accepting Title X funds, a recipient voluntarily consents to any restrictions placed on any matching funds . . ."[135] The Court then declared: "Potential grant recipients can choose between accepting Title X funds—subject to the Government's conditions that they provide matching funds and forego abortion counseling and referral in the Title X project—or declining the subsidy and financing their own unsubsidized program."[136]

---

129. 111 S. Ct. 1759 (1991).

130. "Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion as a method of family planning." 42 CFR § 59.8(a)(1) (1990). These regulations were promulgated pursuant to Title X of the Public Health Service Act, Pub. L. No. 91-572, 84 Stat. 1506, (codified as amended at 42 U.S.C. §§ 300 to 300a-41 (1988)), which provides federal funding for family planning clinics. Section 1008 of the Act, 42 U.S.C. § 300a-6 (1988), states that: "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning."

131. 111 S. Ct at 1774.

132. *Id.*, distinguishing 468 U.S. 364.

133. *Id.*

134. *Id.* at 1775 n.5.

135. *Id.*

136. *Id.* This is language reminiscent of that used by the Court when deciding conflicts between state autonomy and conditional federal spending. See *supra*, notes 78-92 and accompanying text.

V. SPENDING POWER AND INDIVIDUAL RIGHTS IN THE JAG CONTROVERSY

This Comment does not dispute the objective of federal laws that entice universities to cooperate with the military.[137] Rather, this Comment focuses on conditions which are collateral to the purpose of raising an army.[138] The stipulations attached to campus recruitment laws are suspect because they threaten the constitutional rights of some students.[139] In particular, obtaining a job with the JAG Corps may "exact a specified silence"[140] and, ultimately, "entail the wholesale surrender of speech rights"[141] from gay men and lesbians who seek the government benefit of a job.[142] SUNY Buffalo's consent to these laws ostensibly yields the rights of some of its students.[143]

As the *Philadelphia*[144] decision demonstrates, however, the issues raised by courts, particularly in the military context, are not necessarily "in the form of [the] alleged unconstitutionality of the condition, but in the guise of statutory interpretation."[145]

Nevertheless, in a series of cases involving gay student groups, courts have approved first amendment arguments[146] to support rights to

---

137. *See supra* note 50.

138. *See supra* note 14.

139. *Cf.* United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 882 (5th Cir. 1966) (" 'The legality [of desegregation guidelines] is based on the general power of Congress to apply reasonable conditions. . . . In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color or national origin by granting money and other kinds of financial aid.' ") (quoting Rep. Celler), *aff'd per curiam*, 380 F.2d 385 (5th Cir. 1967). *See generally*, O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 524, 538-43 (1975).

140. Sullivan, *supra* note 83, at 1485.

141. *Id.*

142. *See*, Note, *First Amendment Rights of Military*, *supra* note 48, at 882-89 (discussing application of first amendment protection to government employees as a model for the military); Epstein, *supra* note 105, at 67-73 (discussing unconstitutional conditions analysis in employment cases between government and private individuals).

143. *See* Rosenthal, *supra* note 50, at 1154.

144. See *supra* text accompanying notes 51-61.

145. Brewster, *Does the Constitution Care About Coercive Federal Funding?*, 34 CASE W. RES., 1, 14 (1983). Constitutional limitations apply to the military context. *Compare* United States v. O'Brien, 391 U.S. 367, 377 (1968) (the power to raise an maintain an army and navy is "broad and sweeping") *with* United States v. Macintosh, 283 U.S. 605, 622 (1931) (it is a power which "tolerates no qualifications or limitations, unless found in the constitution"). *But see supra* note 102 (discussing unlikelihood of a tenth amendment restraint to congressional power to raise an army). *See also supra* note 46 (discussing applicability of civil rights legislation to military).

146. Freedom of association arguments have been particularly successful. However, equal protection arguments, especially in the military context, have generally been unsuccessful. *See supra* note 31.

organize, to have school recognition, to secure access to campus facilities and to have school funding.[147] The judiciary has also ruled that statements regarding sexual orientation may constitute protected political speech under the first amendment.[148] But these conceptions of protected speech require gay men and lesbians to adopt either an educational goal or take a public political stance.[149] In other words, "the expression is protected, the lifestyle is not."[150] Moreover, the peculiar judicial deference afforded to the military was not at issue in the cases discussed above. And, in any case, while some lower courts have held that Defense Regulations which bar homosexuals violate the first amendment because they unreasonably chill speech,[151] these decisions have been reversed on appeal.[152]

147. Note, *Sexual Orientation and the Law*, *supra* note 30, at 1587. *See, e.g.*, Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988); Gay Student Serv. v. Texas A & M Univ., 737 F.2d 1317 (5th Cir. 1984) *cert. denied*, 471 U.S. 1001 (1985); Student Coalition for Gay Rights v. Austin Peay State Univ., 477 F. Supp. 1267 (M.D. Tenn. 1979); Gay Lib v. University of Mo., 558 F.2d 848 (8th Cir. 1977).

148. *See, e.g.*, Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980) (male student bringing male date to prom constitutes a political statement); Gay Students Org. v. Bonner, 509 F.2d 652 (1st Cir. 1974) (gay students social activities constitute a political statement); Gay Law Students Ass'n v. Pacific Tel. & Tel. Co., 24 Cal. 3d 458, 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32 (1979) ("[T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity.").

149. Note, *Sexual Orientation and the Law*, *supra* note 30, at 1589.

150. Note, *Status*, *supra* note 31, at 1294. Presumably, a homosexual wanting to work for the JAG Corps would be forced to conceal his or her "personhood." *See* Gomez, *The Public Expression of Lesbian/Gay Personhood as Protected Speech*, 1 L. & INEQUALITY 121, (1983) (arguing that the expression of lesbian/gay 'personhood,' whether public or private, is entitled to constitutional protection and that societal pressure on gay people to deny or hide their sexual orientation is tantamount to impermissible forced expression under the first amendment). Though she eventually discounts it, Professor Sullivan elaborates on the "personhood" argument as "the view that some attributes are so closely connected to the person that their alienation would injure personal identity." Sullivan, *supra* note 83, at 1485. Sullivan states that "[s]uch a 'personhood' approach would hold that the opportunity to exchange rights for benefits wrongly commodifies rights. Especially when the government benefit comes in the form of money . . . the condition attaches a price to the right surrendered -- a value in exchange." *Id. See also* Note, *Equal Protection*, 36 UCLA L. REV. 915, 966 (1989) ("[T]his view is extremely vulnerable after *Hardwick* if a majority [of the Supreme Court] can criminalize what this essentializing viewpoint describes as 'intimacies inherent in a homosexual orientation' and 'the behavior that forms part of the very definition of homosexuality,' what constitutional duty can that majority owe to restrain its moral indignation when confronted not with the act but with the personhood that produces it?") (footnotes omitted).

151. *See, e.g.*, *supra* note 14.

152. *See* Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1377 (E.D. Wis. 1989) (holding military regulation "facially violative of the First Amendment because it unreasonably chills the right to freedom of speech of individuals"), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1296 (1990); Matthews v. Marsh, No. 82-0216P, slip op. at 18, 21 (D.Me. 1984) (holding petitioners' statements about her sexual orientation and her status as a homosexual both fall under the ambit of first amendment protections, and that the Army's regulations were an unconstitutional infringement

A first amendment assault on campus recruitment schemes is further curtailed by the Supreme Court's decision in *Grove City College v. Bell.*[153] Although the college received no federal aid, many of its students did.[154] The Department of Education thus concluded that Grove City was a recipient of federal money for purposes of attaching sex-discrimination provisions of Title IX of the Education Amendments of 1972.[155] Though *Grove City* has been nullified by congressional act, the manner in which the Court dismissed the challenge that "conditioning federal assistance on compliance with Title IX infringes first amendment rights of the College and its students"[156] remains relevant. The Court began its brief individual rights analysis by declaring that "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance . . . ."[157] Then, in language reminiscent of state autonomy opinions like *Steward Machine Co. v. Davis*[158] and *Oklahoma v. United States Civil Service Commission,*[159] the Court stressed the voluntary nature of the congressional provisions: "Grove City may terminate its participation in the BEOG [(Basic Educational Opportunity Grants)] program and thus avoid . . . [its] requirements . . . ."[160] The Court applied the same take-it-or-leave-it sentiment to students as well: "Students affected by the Department's action may either take their BEOG's elsewhere or attend Grove City without federal financial assistance."[161]

In contrast to *Grove City*, the JAG dispute presents a situation

---

on those rights), *rev'd*, 755 F.2d 182 (1st Cir. 1985). *See also* Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987) (holding Army regulations did not violate first amendment by punishing status rather than conduct). *Cf.* Goldman v. Weinberger, 475 U.S. 501 (1986) (first amendment did not prohibit application of Air Force regulation to prevent wearing of yarmulke by an Orthodox Jew while on duty and in uniform).

153. 465 U.S. 555 (1984).

154. *Id.* at 559. The students received Basic Educational Opportunity Grants, 20 U.S.C. § 1070(a) (1982).

155. 465 U.S. at 560. Education Amendments of 1972, § 901(a), 20 U.S.C. § 1681(a) (1988) provides in part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."

156. 465 U.S. at 575. *Grove City* was superseded by the Civil Rights Restoration Act of 1987, 42 U.S.C. § 2000d-4a (1988). *See supra* note 62.

157. *Id.*

158. 301 U.S. 548, 590 (1937) ("[T]he law has been guided by a robust common sense which assumes the freedom of the will . . . .").

159. 330 U.S. 127, 143-44 (1947) ("Oklahoma adopted the 'simple expedient' of not yielding to what she urges is federal coercion.").

160. 465 U.S. at 575.

161. *Id.* Yearly tuition for fees, room and board at Grove City College in 1983 was $4,270. *Id.* at 576 n.1.

where federal funding is conditioned, not on the rejection of discriminatory practices, but on the acceptance of anti-gay regulations. Nevertheless, in light of *Grove City*'s first amendment approach, a federal court may likely dismiss a first amendment attack on Department of Defense policies by simply stressing the voluntary nature of military funding to universities and jobs to students.

CONCLUSION

Constitutional rhetoric of "states serving as laboratories" aside, the JAG dispute demonstrates how the strings of federal spending lasso progressive state developments at the most public of all institutions, a state university. While the controversy offers federal courts an opportunity to issue more definitive opinions with respect to local autonomy and individual rights,[162] given the judiciary's historic posture on state sovereignty, particularly in spending power cases and in the military context, it is doubtful that a court would strike down Department of Defense appropriations as violating New York state autonomy. On the other hand, with respect to homosexuals, some lower courts are, albeit unsuccessfully, upholding first amendment challenges to military regulations that exclude gay men and lesbians.[163]

The constitutionality of federal laws which condition Department of Defense funding to universities[164] may ultimately hinge upon a court's willingness to first recognize that the relevant military regulations infringe upon free speech and to then find that the condition imposed by Congress and consented to by SUNY Buffalo does not survive strict judicial scrutiny.[165]

CHRISTOPHER J. KALIL

---

162. *Contra* L. TRIBE, *supra* note 28, at 366 ("Typically, the [Supreme] Court 'narrowly construes' federal statutes to avoid broad delegations, thus finding administrative action unauthorized as a statutory matter instead of holding congressional action constitutionally unjustified."). *But see* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 843-44 (1978) (At the same time, "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. . . . Were it otherwise, the scope of freedom of speech . . . would be subject to legislative definition and the function of the First Amendment as a check on legislative power would be nullified.")

163. *See supra* note 152.

164. *See supra* note 50.

165. *See* Sullivan, *supra* note 83, at 1419 ("[A]ssuming that some set of constitutionally preferred liberties has been agreed upon, and that burdens on those liberties require especially strong justification, unconstitutional conditions doctrine performs an important function. It identifies a characteristic technique by which government appears not to, but in fact does burden those liberties,

EDITOR'S NOTE: Developments regarding the JAG Corps' ability to recruit on the Buffalo Law School campus were transpiring as this issue went to press. On September 20, 1991, the New York State Division of Human Rights, Office of Gay and Lesbian Concerns ordered SUNY Buffalo to bar all military recruiters from campus because of the armed forces' refusal to accept homosexuals into military service. The Agency's order arose from a complaint filed eleven months earlier by a lesbian law student at the Buffalo campus. The student maintained that the JAG Corps' recruitment on campus violated the 1983 executive order barring discrimination against homosexuals in state hiring or in the use of state resources. Later that week, the Governor's office declared the Agency's order to be legally unenforceable, stating that the order conflicted with a state education law that allows the military to recruit anywhere that private employers are allowed to do so. SUNY Buffalo is appealing the Agency's order.

---

triggering a demand for especially strong justification by the state."); *see also* Note, *First Amendment Rights of the Military*, *supra* note 48, at 886 (arguing that "[C]onventional first amendment law, as applied to government employees should guide the federal courts in judging the first amendment rights of military personnel in peacetime.").