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DON'T ASK, DON'T TELL, DON'T WORK: THE DISCRIMINATORY EFFECT OF VETERANS' PREFERENCES ON HOMOSEXUALS

LOUIS J. VIRELLI III*

I.

The constitutional rights of homosexuals have become an increasingly prevalent issue in America over the last two decades. Supreme Court cases such as *Bowers v. Hardwick*¹ and *Romer v. Evans*² marked the beginning of serious judicial consideration of whether homosexuals as a class are constitutionally protected. Recently, however, the debate over homosexual rights has received unprecedented attention. In 2003, the Supreme Court, in *Lawrence v. Texas*,³ overturned *Bowers* and invalidated a state statute criminalizing homosexual sodomy. In Massachusetts, the Supreme Judicial Court ruled that denying homosexuals the right to marry violated the State Constitution,⁴ a conclusion that was recently echoed by a state trial court in New York.⁵ During the 2004 presidential election, eleven states voted in favor of constitutional amendments banning gay marriage. Post-election polls indicated that as many as twenty percent of voters in that election cited "moral issues," including gay marriage, as the most important factor in choosing a president.⁶ Gay marriage has also become a federal constitutional

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1. 478 U.S. 186 (1986).

2. 517 U.S. 620 (1996).

3. 539 U.S. 558 (2003).

4. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 968 (Mass. 2003). A group of Massachusetts citizens' attempt to enjoin *Goodridge's* implementation failed. *See Largess v. Supreme Judicial Court*, 373 F.3d 219, 229 (1st Cir. 2004), *cert. denied*, 125 S. Ct. 618 (2004) (denying plaintiffs' request for declaratory and injunctive relief).

5. *Hernandez v. Robles*, 794 N.Y.S.2d 579, 609 (N.Y. Sup. Ct. 2005), *direct appeal denied*, 829 N.E.2d 670 (N.Y. 2005).

6. Todd S. Purdum, *All About the President*, N.Y. TIMES, Nov. 3, 2004, at A5 (referring to the "2 in 10 voters who yesterday told pollsters that 'moral issues' mattered to them more than any other"). Since the election, the precise role of "moral issues" in affecting the outcome has become the source of some debate. While some commentators contend that gay marriage was a driving force in the result, others maintain that the result was a broader political victory, with moral issues such as gay marriage playing only a part. Joel Achenbach, *A Victory for "Values," but Whose?*, WASH. POST., Nov. 4, 2004, at C1. "[G]ay marriage now seems essential to any conversation about the 2004 election. The exit polls pointed to a huge boost for Republicans from voters who said their biggest concern was 'moral values' . . . [t]he term is basically a code phrase for abortion and

issue. In 2004, Congress considered a constitutional amendment defining marriage as a heterosexual institution.⁷

Amid these highly charged and controversial issues, another issue persists — the right of homosexuals to serve in the armed forces. This issue received close national attention beginning in 1992 when President-elect Bill Clinton oversaw the adoption of the “Don’t Ask, Don’t Tell” policy (DADT).⁸ Although DADT initially appeared to offer relief from the prior ban on homosexual military service, the policy falls far short of ensuring equal opportunity for homosexuals wishing to serve. As a result, thirteen years later, particularly in the face of growing demands on the military due to wars in Afghanistan and Iraq, the issue of homosexuals’ right to serve in the Armed Forces remains a source of active debate.⁹

Largely omitted from that debate, however, is DADT’s effect on homosexuals’ civilian life. Veterans are offered a wide variety of benefits

gays.” *Id.* See Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2004, at P9 (identifying eleven States that passed constitutional amendments banning gay marriage). *But see* David Brooks, *The Values-Vote Myth*, N.Y. TIMES, Nov. 6, 2004, at A19 (noting that there was no “disproportionate surge” in evangelical voter turnout in 2004, and arguing that “there is no one explanation” for the outcome). In any event, regardless of the exact impact of moral issues, including gay marriage, on the 2004 election, it is clear that gay marriage obtained national significance on the 2004 campaign trail, and remains an important political and social issue.

7. See, e.g., Fred Barbash, *Bush Urges Congress to Pass Gay Marriage Amendment*, WASH. POST, Feb. 24, 2004, <http://www.washingtonpost.com/ac2/wp-dyn/A1883-2004Feb24?language=printer> (reporting that President Bush urged Congress to send a proposed constitutional amendment banning gay marriages to the states); Elizabeth Mehren, *11 States Back Bans on Gay Unions; Georgia, Ohio Bar Partner Benefits*, L.A. TIMES, Nov. 3, 2004, at A21 (“Some advocates of the same-sex marriage bans hailed Tuesday’s votes as evidence of support for an amendment to the U.S. Constitution that would prevent gays and lesbians from marrying.”); Adam Nagourney, *Decision on Gay Marriage Creates a Thorny Issue for 2004 Race*, N.Y. TIMES, Nov. 19, 2003, at A1 (explaining that Massachusetts’s Supreme Court decision defending gay marriage caused “conservatives . . . [l]ed by Representative Tom DeLay . . . to seek a constitutional amendment prohibiting marriage between gays”).

8. 10 U.S.C. § 654 (2000).

9. A lawsuit challenging DADT’s constitutionality is currently pending in federal district court. *Cook v. Rumsfeld*, No. 04-12546 (D. Mass. filed Dec. 6, 2004). A recent study indicates that approximately fifty percent of junior enlisted service members oppose DADT, up from sixteen percent in 1992. Press Release, Service Members’ Legal Defense Network, *New Poll Shows Shift in Military Attitudes Toward Gays*, (October 26, 2004) available at <http://www.sldn.org/templates/press/record.html?record=1674> [hereinafter *New Poll Shows Shift*]. See also David S. Broder and John F. Harris, *Dean Tackles Kerry’s Record*, WASH. POST, Jan. 30, 2004, at A1 (reporting democratic presidential nominee candidate John Edwards’ position that “the military’s ‘don’t ask, don’t tell’ policy should be revised”); Service Members’ Legal Defense Network, *Featured Stories*, at <http://www.sldn.org> (last visited January 6, 2005) (listing articles about DADT); Robert Crown Law Library at Stanford Law School, *Don’t Ask Don’t Tell Don’t Pursue*, <http://dont.stanford.edu> (last visited January 6, 2005) (discussing the policy of the U.S. military regarding sexual orientation); University of California – Santa Barbara, Center for the Study of Sexual Minorities in the Military, <http://www.gaymilitary.ucsb.edu> (last visited May 31, 2005) (listing several articles regarding DADT).

including health care, education, tax, and other financial benefits that are unavailable to civilians.¹⁰ Because these benefits are restricted to veterans, eligibility is initially determined by the military's admission and discharge standards, including DADT.¹¹

The purpose of this Article is to focus on one of those benefits — veterans' preferences in public hiring — and to consider whether veterans' preferences' treatment of homosexuals is constitutional in light of their reliance on DADT to establish eligibility. Section II examines veterans' preference statutes, in particular, the various state and federal incarnations and their effect on public employment. Section III addresses the development, operation, and implications of DADT. Finally, Sections IV and V consider DADT's role within veterans' preference statutes in order to analyze the statutes' constitutionality under the Equal Protection Clause.¹²

II.

Federal veterans' benefits in the form of pensions, service bonuses, disability allowances, and hospitalization for combat injuries began as early as the Revolutionary War.¹³ Appointments to federal positions, however, were less common and were usually reserved for former officers, rather than rank and file soldiers.¹⁴

The first significant federal hiring preference for veterans was passed at the end of the Civil War, and applied only to disabled veterans.¹⁵ After World War I, this preference was expanded to include all honorably discharged veterans, their widows, and the wives of injured veterans.¹⁶ In 1944, Congress enacted the Federal Veterans' Preference Act.¹⁷ It was

10. See, e.g., U.S. DEP'T VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS AND DEPENDENTS (2004), available at http://www.pueblo.gsa.gov/cic_text/fed_prog/va_benefits/vetbenefits.pdf (last visited Sept. 5, 2005) (outlining and describing the civilian benefits afforded to veterans and their families, including health care programs, the G.I. Bill, tax credits and opportunities in federal lending).

11. *Id.* at 1.

12. In the interest of simplicity, the Equal Protection Clause will be used to refer to both the Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment, which incorporates the equal protection doctrine against the federal government. See *Cruz v. Hauck*, 404 U.S. 59, 63 n.10 (1971) (stating that "[a]lthough no explicit equal protection clause is directed by the Constitution against the Federal Government the concept of equal protection of the laws is incorporated into the Due Process Clause of the Fifth Amendment") (citing *Bolling v. Sharpe*, 347 U.S. 497, 497-99 (1954)).

13. U.S. OFFICE OF PERS. MGMT., VETGUIDE 58 (2003), available at <http://www.feddesk.com/freehandbooks/1114-4.pdf> (last visited June 5, 2005) [hereinafter VETGUIDE].

14. *Id.*

15. *Id.*

16. *Id.* at 59.

17. *Id.* at 60.

designed to acknowledge the economic loss suffered by service members and to facilitate their return to civilian life by making government employment preferentially available to them upon completion of their military service.¹⁸

In general, federal government jobs are divided into two categories: competitive and excepted service.¹⁹ Competitive service jobs are under the jurisdiction of the Office of Personnel Management and are subject to the Veterans' Preference Act.²⁰ Most of the hiring for competitive service positions is through competitive appointments, in which veterans compete with other candidates on a "list of eligibles."²¹ Candidates are placed on a "list of eligibles" by earning a score of at least seventy out of one hundred on a civil service examination.²² Once on the list, veterans who were discharged from the Armed Forces "under honorable conditions" — with either an honorable or general discharge — receive an additional five points on their exam score.²³ Disabled veterans and certain members of disabled or deceased veterans' families receive a ten point increase.²⁴ When hiring from a list of eligibles, an agency must select from the top three candidates, but may not pass over a preferred veteran in favor of a lower-ranking non-veteran without proper justification.²⁵ An agency may, however, bypass a non-veteran to hire a lower-scoring veteran without explanation.²⁶

State governments also have a long history of providing veterans with hiring preferences in public employment, in some cases dating back as far as the late nineteenth century.²⁷ Currently, all fifty states and the District of Columbia have veterans' preference statutes.²⁸

Despite the uniform commitment to veterans' preferences, the form of preference varies widely. For example, some states offer "absolute" hiring preferences to qualified veterans.²⁹ These absolute preferences mandate that a veteran meeting the minimum requirements for a particular position be

18. *Id.* at 3.

19. U.S. OFFICE OF PERS. MGMT., VETSINFO GUIDE 3 (2003), available at <http://www.opm.gov/veterans/html/vetsinfo.pdf> (last visited June 5, 2005) [hereinafter VETSINFO GUIDE].

20. 5 U.S.C. §§ 2108, 3309 (2000).

21. VETSINFO GUIDE, *supra* note 19, at 3.

22. USAJOBS, Federal Employment Information Factsheet: Veterans' Preference 2 (2003) [hereinafter Factsheet].

23. See 5 U.S.C. § 2108(1) (defining "veterans" for purposes of the Act as those who served in the military during certain time periods and were discharged "under honorable conditions"); 5 U.S.C. § 2102(2) (2004) (defining "armed forces"); Factsheet, *supra* note 22, at 1 (explaining that veterans' preference statutes' reference to removal "under honorable conditions" includes either an honorable or general discharge).

24. See 5 U.S.C. § 2108(2) (defining "disabled veteran"); 5 U.S.C. § 2108(3)(C)-(G) (listing the members of a disabled veteran's family that are eligible for the 10-point preference).

25. VETSINFO GUIDE, *supra* note 19, at 7.

26. *Id.*

27. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 261 n.6 (1979).

28. See *infra* notes 30-35 and accompanying text.

29. MASS. GEN. LAWS ANN. ch. 31, § 26 (West 2004); N.J. STAT. ANN. § 11A:5-5 (West 2004); 51 PA. CONS. STAT. ANN. § 7104 (West 2004); S.D. CODIFIED LAWS § 3-3-1 (Michie 2004).

hired regardless of whether more qualified non-veterans are seeking the same position.³⁰ Other state statutes mirror the federal statute, increasing a veteran's score on a civil service examination by a predetermined number of points.³¹ Still other states offer more general preferences, simply stating that qualified veterans should be preferred in public hiring.³²

The definition of a qualified veteran also varies widely by state. Although all of the state veterans' preference statutes require some minimum term of service, they differ in the type of discharge required.³³ The majority of states require that a former service member receive an honorable discharge in order to be considered for a veterans' preference.³⁴ Others follow the federal model by requiring only that a veteran be discharged "under honorable conditions."³⁵ Finally, four states require only that a

30. See sources cited *supra* note 29.

31. COLO. CONST. art. XII § 15; GA. CONST. art. IV, § 3; LA. CONST. art. X, § 10; N.Y. CONST. art. V, § 6; ALA. CODE § 36-26-15 (2004); ALASKA STAT. § 39-25-159 (2004); ARIZ. REV. STAT. § 38-492 (2004); ARK. CODE ANN. § 21-3-302 (2004); CAL. GOV'T CODE § 18978 (West 2004); CONN. GEN. STAT. § 5-224 (2004); DEL. CODE ANN. tit. 29, § 5935 (2004); D.C. CODE ANN. § 1-607.03 (2004); FLA. STAT. ANN. § 295.08 (West 2004); GA. CODE ANN. § 45-2-21 (2004); IDAHO CODE § 65-506 (Michie 2004); 65 ILL. COMP. STAT. 5/10-1-16 (2004); IND. CODE § 4-15-2-18 (2004); IOWA CODE § 400.10 (2004); KY. REV. STAT. ANN. § 18A.150 (2004); ME. REV. STAT. ANN. tit. 5, § 7054 (West 2004); MICH. COMP. LAWS §§ 35.401, 38.413 (2004); MINN. STAT. § 43A.11 (2004); MO. REV. STAT. § 36.220 (2004); MONT. CODE ANN. § 39-29-102 (2004); NEB. REV. STAT. § 48-227 (2004); NEV. REV. STAT. 284.260 (2004); N.M. STAT. ANN. § 10-9-13.2 (Michie 2004); N.D. CENT. CODE § 37-19.1-02 (2004); OHIO REV. CODE ANN. § 124.26 (West 2004); OKLA. STAT. tit. 74, § 840-4.14 (2004); OR. REV. STAT. § 408.230 (2004); R.I. GEN. LAWS § 36-4-19 (2004); TENN. CODE ANN. § 8-30-306 (2004); TEX. GOV'T CODE ANN. § 657.003 (Vernon 2004); UTAH CODE ANN. § 71-10-2 (2004); VT. STAT. ANN. tit. 3, § 310 (2004); VA. CODE ANN. § 2.2-2903 (Michie 2004); WASH. REV. CODE § 41.04.010 (2004); W. VA. CODE § 6-13-1 (2004); WIS. STAT. § 230.16 (2004); WYO. STAT. ANN. § 19-14-102 (Michie 2004).

32. HAW. REV. STAT. § 76-103 (2004); KAN. STAT. ANN. § 75-2955 (2004); MD. ANN. CODE art. 96 1/2, § 48 (2004); MISS. CODE ANN. § 25-9-303 (2004); N.H. REV. STAT. ANN. § 283:4 (2004); N.C. GEN. STAT. § 128-15 (2004). See S.C. CODE ANN. § 1-1-550 (2004) (requiring preference "insofar as such preference may be practicable").

33. See, e.g., COLO. CONST. art. XII, § 15 (requiring discharge under "honorable conditions"); GA. CONST. art. IV, § 3 ¶ II (requiring honorable discharge); N.C. GEN. STAT. § 128-15 (2004) (requiring discharge under other than dishonorable conditions).

34. GA. CONST. art. IV, § 3; LA. CONST. art. X, § 10; ALA. CODE § 36-26-15; ALASKA STAT. § 39-25-159; ARIZ. REV. STAT. § 38-492; ARK. CODE ANN. § 21-3-302; CAL. GOV'T CODE § 18978; CONN. GEN. STAT. § 5-224; GA. CODE ANN. § 45-2-21; 65 ILL. COMP. STAT. 5/10-1-16; KY. REV. STAT. ANN. § 18A.150; ME. REV. STAT. ANN. tit. 5, § 7054; MD. ANN. CODE art. 96 1/2, § 48; MICH. COMP. LAWS §§ 35.401, 38.413; MISS. CODE ANN. § 25-9-303; MO. REV. STAT. § 36.220; N.H. REV. STAT. ANN. § 283:4; N.J. STAT. ANN. § 11A:5-5; N.M. STAT. ANN. § 10-9-13.2; OHIO REV. CODE ANN. § 124.26; OKLA. STAT. tit. 74, § 840-4.14; 51 PA. CONS. STAT. ANN. § 7104; S.C. CODE ANN. § 1-1-550; S.D. CODIFIED LAWS § 3-3-1; TENN. CODE ANN. § 8-30-306; TEX. GOV'T CODE ANN. § 657.003; VA. CODE ANN. § 2.2-2903; WASH. REV. CODE § 41.04.010; W. VA. CODE § 6-13-1; WIS. STAT. § 230.16; WYO. STAT. ANN. § 19-14-102.

35. COLO. CONST. art. XII, § 15; N.Y. CONST. art. V, § 6; ARIZ. REV. STAT. § 38-492; D.C. CODE ANN. § 1-607.03; FLA. STAT. ANN. § 295.08; IDAHO CODE § 65-506; IND. CODE § 4-15-2-18; IOWA CODE § 400.10; KAN. STAT. ANN. § 75-2955; MASS. GEN. LAWS ANN. ch. 31, § 26; MINN. STAT. § 43A.11; MONT. CODE ANN. § 39-29-102; NEB.

former service member not be dishonorably discharged in order to qualify for a veterans' preference.³⁶

The effect of veterans' preference statutes on public hiring is significant. For example, in 1986, 35.1% of all non-postal federal employees were preference-eligible veterans.³⁷ In 1990, veterans made up 29.8% of the non-postal federal workforce.³⁸ Although that number declined somewhat during the financial boom and military reorganization of the 1990s, by 2000, veterans still made up more than 26% of the federal, non-postal work force.³⁹ With ongoing military actions in Afghanistan and Iraq, the number of preference-eligible veterans will likely increase.⁴⁰ This will result in a higher percentage of public jobs going to preferred veterans, and in turn, a greater barrier to public employment for non-veterans and former service members who do not qualify for a veterans' preference.⁴¹ For this reason in particular, it is important to evaluate the criteria used for granting veterans' preferences.⁴²

REV. STAT. § 48-227; UTAH CODE ANN. § 71-10-2; VT. STAT. ANN. tit. 3, § 310; W. VA. CODE § 6-13-1.

36. N.C. GEN. STAT. § 128-15; NEV. REV. STAT. 284.260; N.D. CENT. CODE § 37-19.1-02; OR. REV. STAT. § 408.230.

37. U.S. OFFICE OF PERS. MGMT., BIENNIAL REP. 5, at 7 (2000).

38. *Id.*

39. *Id.*

40. See, e.g., Ron Hutcheson, *Bush Dismisses Talk of Reducing U.S. Forces in Iraq*, ST. PAUL PIONEER PRESS, Aug. 12, 2005, at 1A (reporting that President Bush said "Defense Secretary Donald Rumsfeld is considering ways to increase troop strength [in Iraq] . . . in the run-up to Iraqi elections scheduled for December"); Ellen Knickmeyer, *U.S. Scales Back Plan to Increase Iraq Forces*, WASH. POST, Sept. 2, 2005 (explaining that the United States "plans to deploy 2,000 more troops for the October 15 referendum on Iraq's constitution"); Bradley Graham, *Reservists May Face Longer Tours of Duty*, WASH. POST, Jan. 7, 2005, at A1 ("Army leaders are considering seeking a change in Pentagon policy that would allow for longer and more frequent call-ups of some reservists to meet the demands of conflicts in Iraq and Afghanistan . . ."); Robin Wright and Fred Barbash, *Administration Pressed to Increase Troop Strength in Iraq: Pressure Coming From Republican and Democratic Congressional Leaders*, WASH. POST, Apr. 6, 2004, <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A55098-2004Apr6¬Found=true> ("The Bush administration is coming under intensified pressure from both Republican and Democratic congressional leaders to boost U.S. troop strength in Iraq . . ."); David Stout, *Rumsfeld Leaves Door Open for More U.S. Troops in Iraq*, N.Y. TIMES, Apr. 6, 2004, <http://www.nytimes.com/2004/04/06/international/06CND-PENT.html?ex=1127188800&en=9396474359a28816&ei=5070&hp> ("[Defense Secretary Donald Rumsfeld] said that the American commanders [in Iraq] would get more soldiers if they asked for them.").

41. Graham, *supra* note 40, at A1.

42. Unlike traditional benefits, veterans' preferences are somewhat different in that they not only offer an advantage to those who are eligible, but inflict a burden on those that are not. Grace Blumberg, *De Facto and De Jure Sex Discrimination Under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment*, 26 BUFF. L. REV. 1, 9 (1976-77). For this reason, it is even more crucial to ensure that the statutes do not unconstitutionally discriminate.

To date, the vast majority of equal protection challenges brought against veterans' preferences have been unsuccessful.⁴³ There is at least one challenge, however, that the courts have yet to address — whether veterans' preferences unconstitutionally discriminate against homosexuals. In light of the military's unique policy regarding homosexual service, this question raises distinct issues of fairness and equality.

III.

A. *The Military's Historical Treatment of Homosexuals*

For at least the last century, the United States Armed Forces have adopted various policies regarding the admission and treatment of homosexual service members.⁴⁴ At the outset of World War II, the military adopted a formal policy to exclude homosexuals from service.⁴⁵ As a result, between four and five thousand men were denied membership during the war and another ten thousand were discharged due to their homosexuality.⁴⁶ In 1944, the War Department issued Circular No. 3, which provided for the administrative discharge of homosexuals.⁴⁷ Under Circular No. 3, homosexuals were categorized as either "confirmed" or "first offenders."⁴⁸ If classified as "confirmed," they were administratively discharged or, in cases involving aggravating circumstances, court-martialed.⁴⁹ For those deemed "first offenders," medical treatment was provided and, depending on the "success" of the regimen, the serviceman was either retained on active duty, administratively discharged, or court-martialed.⁵⁰

43. See, e.g., *Feeney*, 442 U.S. at 256; *Koch v. Yunich*, 533 F.2d 80 (2d Cir. 1976); *Rios v. Dillman*, 499 F.2d 329 (5th Cir. 1974); *Russell v. Hodges*, 470 F.2d 212 (2d Cir. 1972); *August v. Bronstein*, 369 F. Supp. 190 (S.D.N.Y. 1974), *aff'd*, 417 U.S. 901 (1974); *Koelfgen v. Jackson*, 355 F. Supp. 243 (D. Minn. 1972), *aff'd*, 410 U.S. 976 (1973). See J.B. Glen, Annotation, *Constitutionality of State Veterans' Public Employment Preference Laws*, 161 A.L.R. 494 (1946) (listing earlier cases). *But see* *Markel v. McIndoe*, 59 F.3d 463, 474 (3d Cir. 1995) (holding that promotional requirement of Pennsylvania absolute veterans' preference violated clause of Pennsylvania Constitution in context of promotions). See also *Soto-Lopez v. New York City Civil Serv. Comm'n*, 755 F.2d 266, 268 (2d Cir. 1985) (ruling that residency requirement for veterans' preference failed equal protection scrutiny).

44. For a discussion of the military's policies toward homosexual servicemen and women prior to World War II, see Jeffrey S. Davis, *Military Policy Toward Homosexuals: Scientific, Historical, and Legal Perspectives*, 131 MIL. L. REV. 55, 72-75 (1991). See also Walter John Krygowski, Comment, *Homosexuality and the Military Mission: The Failure of the "Don't Ask, Don't Tell" Policy*, 20 U. DAYTON L. REV. 875, 879 & n.37 (1995) (citing WILLIAM B. AYCOCK & SEYMORE W. WURFUL, *MILITARY LAW UNDER THE UNIFORM CODE OF MILITARY JUSTICE* 14 (1955)).

45. *Id.* at 879 & n.39.

46. *Id.* at 880 & n.40.

47. William A. Woodruff, *Homosexuality and Military Service: Legislation, Implementation, and Litigation*, 64 UMKC L. REV. 121, 129 (1995).

48. *Id.*

49. *Id.*

50. *Id.*

After the war, in 1946, the War Department issued Circular No. 85, which ordered that enlisted personnel who abstained from homosexual activity but who nevertheless demonstrated homosexual tendencies were to be discharged honorably.⁵¹ Two years later, however, in 1948, this more tolerant approach was amended to require a court-martial or an undesirable or general discharge, rather than an honorable one, for homosexuals.⁵² In 1950, the Department of Defense (DoD) issued a directive outlining a stricter attitude toward homosexuality for all branches of the service.⁵³ Each branch relied on this directive to formulate its own policy.⁵⁴ All of the policies generally prohibited homosexuals from service, except in the instance when a service member was considered "reclaimable."⁵⁵ In 1975, the DoD reaffirmed its position by describing homosexuals as "unsuitable for military service."⁵⁶ In 1978, however, the District of Columbia Circuit overturned discharges from both the Navy and Air Force on the grounds that both policies' standards for retention of homosexuals required clarification.⁵⁷ In 1980, a Wisconsin District Court struck down the Army's policy on homosexuals as unconstitutional because its definition of homosexual tendencies was deemed overbroad.⁵⁸

As a result of these successful legal challenges, the DoD issued Department of Defense Directives 1332.14 (separation of enlisted members) and 1332.30 (separation of officers) in 1981.⁵⁹ These directives represented the DoD's official policy with regard to homosexuals in the military.⁶⁰ The new policy reiterated that "homosexuality is incompatible with military service," relying on the premise that homosexuals, as a class, either engaged in or were likely to engage in homosexual activity, and that such activity was a threat to military cohesion, efficiency, and discipline.⁶¹ In response to the recent legal opinions criticizing the individual branches' previous positions on homosexuality, the new policy eliminated the retention standards found objectionable by the courts in *Matlovich v. Secretary of the Air Force* and

51. Krygowski, *supra* note 44, at 880.

52. Davis, *supra* note 44, at 75.

53. *Id.*

54. Krygowski, *supra* note 44, at 880.

55. Woodruff, *supra* note 47, at 130. In 1970, army regulations also distinguished between those with homosexual "tendencies" and practicing homosexuals. *Id.* While the former were discharged for unsuitability, the latter were discharged as unfit for service. *Id.*

56. C. Dixon Osburn, *A Policy in Desperate Search of a Rationale: The Military's Policy on Lesbians, Gays and Bisexuals*, 64 UMKC L. REV. 199, 206 (1995).

57. *Matlovich v. Sec'y of the Air Force*, 591 F.2d 852, 861 (D.C. Cir. 1978); Berg v. Claytor, 591 F.2d 849, 851 (D.C. Cir. 1978).

58. *BenShalom v. Sec'y of the Army*, 489 F. Supp. 964, 975-77 (E.D. Wis. 1980).

59. Department of Defense Directive 1332.14, (Jan. 28, 1982), reprinted in 32 C.F.R. pt. 41, app. A(H) (1994) [hereinafter 1982 DoD Directive 1332.14]; Department of Defense Directive 1332.30, (Jan. 15, 1982) [hereinafter 1982 DoD Directive 1332.30].

60. Woodruff, *supra* note 47, at 132 (citing 1982 DoD Directive 1332.14 and 1332.30).

61. *Id.*

Berg v. Claytor, as well as the definition of "homosexual tendencies" found problematic in *Ben-Shalom v. Secretary of the Army*.⁶²

Instead, Directives 1332.14 and 1332.30 mandated separation of homosexuals from the armed services when: (1) an individual engaged in, attempted to engage in, or solicited another to engage in homosexual acts; (2) an individual admitted to being homosexual; or (3) an individual married or attempted to marry a person known to be of the same sex.⁶³ A homosexual was defined as a person, "regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."⁶⁴ Homosexual activity was defined as "[a]ny bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and . . . that a reasonable person would understand to demonstrate a propensity or intent to engage in [such] an act."⁶⁵ In short, military policy after 1982 constituted an outright ban on homosexuals, regardless of whether they actually engaged in homosexual activity.⁶⁶

Over the next decade, this policy faced a litany of constitutional challenges on procedural and substantive due process,⁶⁷ free speech,⁶⁸ and equal protection grounds.⁶⁹ Although some of these challenges succeeded in the district courts,⁷⁰ the military's exclusion policy was ultimately upheld as constitutional by all of the circuit courts that addressed the issue.⁷¹

62. *Id.* at 131-32.

63. *Id.* at 133 & nn.66-68 (citing 1982 DoD Directive 1332.14).

64. Department of Defense Directive 1332.14, E2.1.5. (Dec. 21, 1993) [hereinafter 1993 DoD Directive 1332.14].

65. *Id.* at E2.1.6.

66. See Krygowski, *supra* note 44, at 886 ("[T]he Department of Defense policy [in 1982] affirmed the military's fundamental goal—exclusion of homosexuals from service.") (citing Davis, *supra* note 44, at 97); Woodruff, *supra* note 47, at 132-33 (describing the 1982 policy as "exclud[ing] from service . . . homosexuals").

67. See, e.g., Steffan v. Aspin, 8 F.3d 57 (D.C. Cir. 1993); Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992); High Tech Gays v. Def. Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990); Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989); Meinhold v. United States Dep't. of Def., 808 F. Supp. 1455 (C.D. Cal. 1993), *aff'd in part and rev'd and vacated in part*, 34 F.3d 1469 (9th Cir. 1994); Steffan v. Cheney, 733 F. Supp. 121 (D.D.C. 1989), *rev'd*, 920 F.2d 74 (D.C. Cir. 1990).

68. See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454, 462 (7th Cir. 1989) (finding "absolutely no First Amendment violation" in connection with the 1982 DoD policy on homosexuals).

69. See Steffan v. Perry, 41 F.3d 677, 687 (D.C. Cir. 1994) (en banc) (overruling panel decision that military policy regarding homosexuals failed rational basis review under the Fourteenth Amendment).

70. Two district court decisions, Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994) and Dahl v. Sec'y of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993), concluded that the military's exclusionary policy toward homosexuals could not withstand rational basis review under the Fifth Amendment's Due Process Clause. Those decisions were later characterized, however, as "undisciplined rebellion against the governing constitutional doctrine" by the Ninth Circuit. Steffan, 41 F.3d at 689.

71. See cases cited *supra* notes 66-68. For a more thorough discussion of the challenges to the 1982 policy, see Krygowski, *supra* note 44, at 887-906, and Woodruff, *supra* note 47, at 135-42.

B. "Don't Ask, Don't Tell"

The military's treatment of homosexuals received its closest public scrutiny during the 1992 presidential campaign, when candidate Bill Clinton made the controversial announcement that he intended to lift the ban on homosexual service members.⁷² Once elected, President Clinton directed the Secretary of Defense to conduct a review of the existing ban.⁷³ In January of 1993, he enacted an interim policy that permitted homosexuals to remain in the military provided they refrain from homosexual activity.⁷⁴ After hearings in both houses, Congress enacted a new statutory policy, popularly known as "Don't Ask, Don't Tell" (DADT).⁷⁵

DADT's stated goal was to alter the prior military ban on homosexuals "to emphasize that DoD judges the suitability of persons to serve in the Armed Forces on the basis of conduct, not sexual orientation."⁷⁶ Sexual orientation was described as "a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . ."⁷⁷ The interim policy's suspension of the practice of questioning potential service members about their sexual preference was also preserved. Secretary of Defense Les Aspin explained that "no applicant will be asked about his or her sexual orientation as part of the accession process."⁷⁸

The actual statutory language of DADT, however, paints a different picture.⁷⁹ The statute begins with fifteen findings of fact that stress, as the driving forces behind the policy, the singular purpose of the military, the unique nature of military life, the importance of member morale and unit cohesion, and the need for personnel policies that exclude those who would threaten that morale or cohesion.⁸⁰ Congress's last finding states that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."⁸¹ Congress also makes clear that,

72. See President's Remarks Announcing the New Policy on Gays and Lesbians in the Military, 29 WEEKLY COMP. PRES. DOC. 1369 (July 19, 1993).

73. David A. Schlueter, *Gays and Lesbians in the Military: A Rationally Based Solution to a Legal Rubik's Cube*, 29 WAKE FOREST L. REV. 393, 394 (1994) (citing President's Memorandum for the Secretary of Defense on Ending Discrimination on the Basis of Sexual Orientation in the Armed Forces, 29 WEEKLY COMP. PRES. DOC. 112 (Jan. 29, 1993)); Woodruff, *supra* note 47, at 143.

74. *Id.* at 145.

75. 10 U.S.C. § 654.

76. Press Release, Navy News Service, *Secretary Aspin Releases New Regulations on Homosexual Conduct in the Armed Forces*, (Dec. 22, 1993) [hereinafter Aspin Press Release].

77. 1993 DoD Directive 1332.14, E3.A1.1.8.1.1.

78. Aspin Press Release, *supra* note 76.

79. 10 U.S.C. § 654.

80. 10 U.S.C. § 654(a).

81. 10 U.S.C. § 654(a)(15).

although the interim policy's prohibition on inquiring into potential service members' sexual preference should be continued, "the Secretary of Defense may reinstate that questioning" at his or her discretion.⁸²

The statute then goes on to define the circumstances under which a service member will be removed from the armed forces. First, removal is required if a member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act.⁸³ A homosexual act is defined as either "any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires," or "any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described [above]."⁸⁴ A "propensity" is defined in the regulations accompanying the statute as a "likelihood" of engaging in homosexual activity.⁸⁵ Once it is shown that a service member engaged in, attempted to engage in, or solicited another to engage in homosexual acts, the burden shifts to the service member to demonstrate that separation is not warranted.⁸⁶

A service member must also be removed if the member states that he or she is a homosexual.⁸⁷ DADT defines the term homosexual as a "person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts."⁸⁸ The regulations accompanying the statute describe a statement that a member is a homosexual as "[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts."⁸⁹ Such a statement creates a rebuttable presumption that the service member is homosexual.⁹⁰ Once this presumption is established, the burden shifts to the service member to justify his or her retention by demonstrating

82. National Defense Authorization Act, Pub. L. No. 103-160, 107 Stat. 1547 (codified as amended at 10 U.S.C. § 654).

83. 10 U.S.C. § 654(b)(1).

84. 10 U.S.C. § 654(f)(3).

85. 1993 DoD Directive 1332.14, E2.1.10.

86. In order to carry this burden, the service member must demonstrate that: (1) such conduct is a departure from the member's usual and customary behavior; (2) such conduct is unlikely to recur; (3) such conduct was not the result of force, coercion or intimidation; (4) the member's continued presence in the armed forces is consistent with the armed forces' interests in proper discipline, good order and morale; and (5) the member does not have a propensity or intent to engage in homosexual acts. 10 U.S.C. § 654(b)(1)(A)-(E).

87. 10 U.S.C. § 654(b)(2).

88. 10 U.S.C. § 654(f)(1). "The term 'bisexual' means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts." 10 U.S.C. § 654(f)(2). DADT applies equally to bisexuals and homosexuals. For convenience, this Article will use the term homosexuals to include both bisexuals and homosexuals.

89. 1993 DoD Directive 1332.14, E2.1.16.

90. 10 U.S.C. § 654(b)(2).

that the presumption is inaccurate.⁹¹ Finally, removal is mandatory under DADT if a member of the armed forces “has married or attempted to marry a person known to be of the same biological sex.”⁹²

Although initially publicized as an important compromise toward permitting homosexual service,⁹³ DADT actually offers little relief for homosexuals who are, or who aspire to be, service members. In many ways, DADT is virtually indistinguishable from the ban on homosexuals that preceded it.⁹⁴ First, the criteria for separation and the definitions of “homosexual” and “homosexual conduct” in DADT are practically identical to those in the 1982 versions of Directives 1332.14 and 1332.30. DADT and the prior ban also share a common justification — both policies were enacted in furtherance of the principle that “homosexuality is incompatible with military service.”⁹⁵ Even the most apparent difference between DADT and the preceding ban — the “don’t ask” provision of DADT — is somewhat of a misnomer. As an initial matter, it is rarely respected.⁹⁶ Perhaps more importantly, however, DADT’s “don’t ask” provision exists only as a congressional recommendation; the statute explicitly allows the Defense Secretary to reinstitute questioning about prospective service members’ sexual preference whenever he or she chooses.⁹⁷

Moreover, despite its stated focus on homosexual conduct over sexual preference,⁹⁸ DADT defines conduct broadly, such that any expression that

91. *Id.*

92. 10 U.S.C. § 654(b)(3).

93. *See, e.g.,* Krygowski, *supra* note 44, at 911 (noting that DADT “purports to make significant changes” in the previous policy).

94. *See, e.g., id.* at 875 (“The ‘Don’t Ask, Don’t Tell’ (DADT) policy, however, continues to ban admitted homosexuals or bisexuals from remaining in the armed forces.”); Osburn, *supra* note 56, at 236 (referring to “the military’s class-based exclusion of gay men and lesbians” under DADT); Scott W. Wachs, Note, *Slamming the Closet Door Shut: Able, Thomasson and the Reality of “Don’t Ask, Don’t Tell”*, 41 N.Y.L. SCH. L. REV. 309, 315 (1996) (“Through its practical effects, the ‘Don’t Ask, Don’t Tell’ policy has thus far done little to distinguish itself from the former total ban”); Woodruff, *supra* note 47, at 153 (“[T]he [DADT] statute was a codification of the 1981 policy in all material respects.”).

95. S. REP. NO. 103-112, at 293 (1993); H.R. REP. NO. 103-200, at 287 (1993); Woodruff, *supra* note 47, at 132 (citing 1982 DoD Directives 1332.14 and 1332.30).

96. *See* Wachs, *supra* note 94, at 316 (“[O]ne of the policy’s key prongs, refusing to ask new applicants about their sexual orientation, often is not enforced.” (citing Chris Black, *Gays in the Military Finding Backlash*, BOSTON GLOBE, Feb. 5, 1995, at 1)).

97. National Defense Authorization Act §160; *See* H.R. REP. NO. 103-200, at 288 (“This section would also express the sense of Congress that the Secretary of Defense has the discretion to continue the practice . . . of not asking prospective service members about homosexual conduct.”).

98. At its inception, Defense Secretary Les Aspin explained that DADT was intended to alter the prior military ban on homosexuals “to emphasize that DoD judges the suitability of persons to serve in the Armed Forces on the basis of conduct, not sexual orientation.” Aspin Press Release, *supra* note 76. DADT was meant to protect an applicant from being “asked about his or her sexual orientation as part of the accession process.” *Id.* DADT explained that sexual orientation is “a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct.” 1993 DoD Directive 1332.14, E3.A1.1.8.1.1.

demonstrates a propensity or intent to engage in a homosexual act is grounds for separation.⁹⁹ DADT prohibits statements by a service member that he or she is homosexual. As explained above, such statements are defined as “[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person . . . has a propensity or intent to engage in homosexual acts.”¹⁰⁰ DADT describes a homosexual act as any bodily contact that a reasonable person would conclude demonstrates a propensity or intent to engage in same-sex sexual contact.¹⁰¹ DADT therefore proscribes as “homosexual conduct” any verbal or physical expression that conveys a likelihood or desire to engage in bodily contact with a member of the same sex that would reasonably indicate a likelihood or desire to engage in sexual activity with that individual. In other words, DADT requires removal of a service member who does something that *could* indicate that they *may* touch someone of the same sex in a way that *could* mean that they want to have sex with that person. Under this standard, “conduct” can be described as nearly any form of personal expression or “revelation of ‘an abstract preference’ for persons of the same sex.”¹⁰² DADT therefore operates as a prohibition not just on specific actions, but on any activity that may reveal an individual’s homosexuality. The result is an effective prohibition on homosexual military service. The only apparent option under DADT for a homosexual seeking to join or remain in the military is to appear “straight” — to repress any and all expression that could be interpreted to hint at a homosexual preference.

The procedural aspects of DADT likewise do little to distinguish it from the prior ban on homosexual service. DADT grants commanding officers wide latitude in determining whether sufficient evidence exists to justify a presumption of homosexuality and whether a service member was able to rebut that presumption.¹⁰³ While discretionary decision-making could be exercised to the advantage of homosexual service members, that has not generally been the case.¹⁰⁴ Instead of triggering widespread compassion and recognition of loyal service, backlash against homosexual service members has led to “witch hunts” and coercion of allegedly gay service members either to confess or to inform on other members.¹⁰⁵ In short, the

99. 10 U.S.C. § 654(b); See H.R. REP. NO. 103-220, at 287 (“One non-verbal statement in and of itself could be grounds for separation.”).

100. 1993 DoD Directive 1332.14, E2.1.16.

101. 10 U.S.C. § 654(f)(3).

102. Woodruff, *supra* note 47, at 171.

103. See S. REP. NO. 103-112, at 291 (“The committee notes that military commanders and investigative agencies have broad powers to initiate inquiries, inspections, and investigations.”); H.R. REP. NO. 103-200, at 289 (“[T]he committee also believes that commanders . . . should have great discretion as to what constitutes sufficient information to begin an inquiry . . . about behavior or actions that could have an impact on unit cohesion, morale, welfare and discipline.”); Wachs, *supra* note 94, at 316 (“Enforcement of the ‘Don’t Ask, Don’t Tell’ policy rests within the discretion of individual commanders.”).

104. See Wachs, *supra* note 94, at 316-17 (stating that investigations have been commenced based on unsupported allegations).

105. *Id.* See Osburn, *supra* note 56, at 229 (referring to the “relentless attempts by

presumption in favor of removing alleged homosexuals has become “virtually irrebuttable.”¹⁰⁶

The same discretionary enforcement problem exists in the characterization of homosexual service members’ separation. A separation may be classified as “honorable” when a member’s service has, in the eyes of his or her commanding officer, “met the standards of acceptable conduct.”¹⁰⁷ Since DADT claims only to prohibit “conduct,”¹⁰⁸ behavior justifying removal under DADT could easily be characterized as unacceptable and, in turn, result in a less than honorable discharge.

A similar concern is present with general discharges. A general discharge is appropriate when a member’s service “has been honest and faithful,” but “significant negative aspects” outweigh the positive components of that service.¹⁰⁹ If the “negative aspects” of an individual’s service rise to the level of a “pattern of behavior that constitutes a significant departure from the conduct expected” of service members,¹¹⁰ that service member faces a discharge under “other than honorable conditions.”¹¹¹ In light of Congress’s conclusion that homosexuality is incompatible with military service,¹¹² it is not difficult to imagine how a commanding officer could justify a finding that homosexual conduct represents such a significant departure and merits a discharge under other than honorable conditions.

Although commanding officers are not prohibited from granting homosexual service members honorable discharges, the issue of discharge characterizations remains a serious concern for gay veterans.¹¹³ There exists a disturbing “lack of parity in the treatment of gay, compared to straight,

some military commanders to ‘witch hunt’ or otherwise ‘ferret-out’ lesbian, gay and bisexual servicemembers” [sic]; H.R. REP. NO. 103-200, at 289 (1993) (recalling testimony about military personnel abusing “their authority by conducting so-called ‘witch-hunts’ to ferret out homosexuals”).

106. Krygowski, *supra* note 44, at 921 (quoting *Able v. United States*, 847 F. Supp. 1038, 1044 (E.D.N.Y. 1994)); Woodruff, *supra* note 47, at 170 (describing the service member’s burden of rebuttal as “a very high burden” and stating that “no one has ever [met] it”).

107. 1993 DoD Directive 1332.14, E3.A2.1.3.2.2.1.

108. *See id.* at 4.1.1 (describing DADT as judging the “suitability of persons to serve in the Armed Forces on the basis of their conduct” (emphasis in original)).

109. *See id.* at E3.A2.1.3.2.2.2 (defining general discharge and “under honorable conditions”).

110. *Id.* at E3.A2.1.3.2.2.3.

111. *Id.* at E3.A2.1.3.2.2.3.1.1.

112. *See, e.g.*, S. REP. NO. 103-112, at 278 (“The presence in military units of persons who, by their acts or statements, demonstrate a propensity to engage in homosexual acts, would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are essential to effective combat capability.”); H.R. REP. NO. 103-200, at 287 (“[T]he committee concludes that homosexuality is incompatible with military service.”).

113. *Hearing on Veterans’ Issues Before the House Comm. on Veterans’ Affairs, Subcomm. On Oversight and Investigations*, 103d Cong. 4 (1994) [hereinafter *Hearing*] (testimony of Michelle M. Benecke, Co-Director, Servicemembers Legal Defense Network).

personnel,"¹¹⁴ which results in many removals under DADT being characterized as less than honorable.¹¹⁵

Not surprisingly, DADT has, like its predecessor, faced multiple constitutional challenges. Of the four federal appellate courts to entertain such challenges, all of them have found the policy constitutional for essentially the same reasons.¹¹⁶ After determining that the statute must be evaluated under the rational basis test, the courts all focused on the deference owed to legislative decision-making and to the judgment of military commanders in the military context.¹¹⁷ The courts went on to conclude that the statutes' and the military's stated interest in maintaining unit cohesion was legitimate, and that DADT is rationally related to that interest.¹¹⁸

114. *Id.*

115. *Id.* See STACEY L. SOBEL ET. AL., CONDUCT UNBECOMING: THE SEVENTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE, DON'T HARASS" 64 (2001) [hereinafter SEVENTH ANNUAL REPORT] (explaining that former members of the Navy receive lower discharge characterizations for being discharged under DADT); SERVICEMEMBERS LEGAL DEF. NETWORK, CONDUCT UNBECOMING: THE FIFTH ANNUAL REPORT ON "DON'T ASK, DON'T TELL, DON'T PURSUE" 16 (1999) [hereinafter FIFTH ANNUAL REPORT] (explaining that service members who admit to being gay receive "lower discharge characterizations").

116. *Able*, 155 F.3d at 636; *Holmes v. California Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997); *Philips v. Perry*, 106 F.3d 1420, 1429 (9th Cir. 1997); *Richenburg v. Perry*, 97 F.3d 256, 260 (8th Cir. 1996); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir. 1996). With the exception of *Able*, these cases also involved First Amendment challenges, which are beyond the scope of this discussion.

117. See *Able*, 155 F.3d at 632 (explaining that "we are required to give great deference to Congressional judgments in matters affecting the military"). "Courts are to 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'" *Id.* (quoting *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986)). See also *Holmes*, 124 F.3d at 1133 ("[O]ur review is especially deferential in the military context."). "Regulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." *Id.* (quoting *Philips*, 106 F.3d at 1425); *Richenburg*, 97 F.3d at 261-62 ("Substantive due process review is especially deferential when military policy is challenged. . . . Moreover, at a more practical level, deference to the considered professional judgment of military authorities is appropriate . . .") (citations omitted);

[J]udicial deference . . . is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged. . . . We are, in addition, to 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'

Philips, 106 F.3d at 1425 (quoting *Goldman*, 475 U.S. at 507); *Thomasson*, 80 F.3d at 921-26 (stating that courts have little competence when it comes to military judgments).

118. See *Able*, 155 F.3d at 634 ("[T]he United States has justified § 654's prohibition on homosexual conduct on the basis that it promotes unit cohesion, enhances privacy and reduces sexual tension."); *Holmes*, 124 F.3d at 1136 (concluding that DADT is "rationally related to the government's interest of [preventing risks to unit cohesion by] excluding persons from military service based on homosexual conduct"). The following cases stand for the same proposition stated in *Holmes*. *Philips*, 106 F.3d at 1429; *Richenburg*, 97 F.3d at 262.

It was legitimate . . . for Congress to conclude that sexual tensions and attractions could play havoc with a military unit's discipline and solidarity. . . . [I]t is legitimate for Congress to proscribe homosexual acts, it is also legitimate for the

Therefore, although the wisdom of these decisions has generated considerable discussion in scholarly literature,¹¹⁹ DADT's constitutionality as a military policy has been rendered virtually unassailable as a practical matter. Left unresolved, however, is the question of whether the application of DADT in the civilian context is constitutional, in particular with regard to veterans' preferences in public employment.¹²⁰

IV.

As explained above, veterans' preference statutes have survived allegations that they unconstitutionally discriminate against women and non-veterans in public employment,¹²¹ and DADT has survived constitutional challenges to its treatment of homosexuals in the military.¹²² The interaction of the two, however, has been effectively overlooked. Veterans' preferences rely on the military's admission standards, including DADT, to establish eligibility for benefits. As a result, they run the risk of replicating DADT's discriminatory treatment of homosexuals in the military¹²³ in their provision

government to seek to forestall these same dangers by trying to *prevent* the commission of such acts. The statements provision, by discharging those with a propensity or intent to engage in homosexual acts, operates in this preventative way.

Thomasson, 80 F.3d at 929 (emphasis in original).

119. See, e.g., Captain John A. Carr, *The Difference Between Can and Should: Able v. United States and the Continuing Debate About Homosexual Conduct in the Military*, 46 A.F. L. REV. 1 (1999); Wachs, *supra* note 94; Woodruff, *supra* note 47; Krygowski, *supra* note 44; Schlueter, *supra* note 73.

120. The constitutional question becomes even more significant in light of the lack of statutory remedies for employment discrimination against homosexuals. Federal and state veterans' preference statutes are expressly excluded from suit under Title VII. 42 U.S.C. § 2000e-11 (2000). Although eleven states—California, Connecticut, Hawaii, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, Rhode Island, Vermont and Wisconsin—and the District of Columbia have laws prohibiting employment discrimination on the basis of sexual orientation, it is unclear whether these statutes would provide a remedy for homosexuals excluded from their own state's veterans' preference program. Michelle Eisenmenger, *Sexual Orientation Discrimination: Teachers as Positive Role Models for Tolerance*, 31 J.L. & EDUC. 235, 235 (2002) (citing Tracy Davis & Sarah Oppenheim, *Legislative Focus: Extending Non-Discrimination in Employment to Gays and Lesbians*, 7 HUM. RTS. BR. 32 (2000)). At minimum, however, there is no statutory relief for homosexuals in the remaining 40 States or at the federal level who were denied veterans' preference benefits. See U.S. CONST. art. VI, § 1, cl.2 (Supremacy Clause).

121. See, e.g., *Feeney*, 442 U.S. at 256; *Koch*, 533 F.2d at 80; *Rios*, 499 F.2d at 329; *Russell*, 470 F.2d at 212; *August*, 369 F. Supp. at 195; *Koelfgen*, 355 F. Supp. at 254. See Glen, *supra* note 43, at 494-503 (listing earlier cases). But see *Soto-Lopez*, 755 F.2d at 268 (ruling that the residency requirement for veterans' preference failed equal protection scrutiny); *Markel*, 59 F.3d at 474 (holding that the promotional requirement of Pennsylvania absolute veterans' preference violated the Pennsylvania Constitution in context of promotions).

122. See, e.g., *Able*, 155 F.3d at 628; *Holmes*, 124 F.3d at 1126; *Philips*, 106 F.3d at 1420; *Richenburg*, 97 F.3d at 256; *Thomasson*, 80 F.3d at 915.

123. There is an argument as to whether DADT discriminates against homosexuals or, as its original proponents contend, against those who engage in homosexual *conduct*, regardless of sexual preference. In light of the breadth of DADT's language and the high level of discretion granted to commanding officers in its enforcement, it seems clear that

of civilian public employment benefits.¹²⁴ This civilian application of DADT raises an interesting, and heretofore unexamined, constitutional question — do veterans' preferences, by virtue of their incorporation of DADT, discriminate against homosexuals so as to unconstitutionally deny them equal protection of the laws?¹²⁵

A. Standard of Review

The question of the statutes' constitutionality depends heavily on the applicable standard of review. This question, in turn, depends on whether veterans' preference statutes' reliance on DADT constitutes a discriminatory classification of homosexuals and, if so, on the level of equal protection scrutiny applied to that classification.

DADT is not limited to precluding only overt, same-sex sexual contact, but indeed any perception of homosexual preference in the military. *See* 1993 DoD Directive 1332.14, E2.1.16 (prohibiting “[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person . . . has a propensity to engage in homosexual acts”). Moreover, DADT's provision granting those accused of violating DADT the opportunity to rebut the presumption of homosexual conduct insulates non-homosexual service members from removal under DADT even in cases where they may have otherwise met the policy's definition of homosexual conduct. *See also* 10 U.S.C. § 654(b)(1), (2) (explaining that removal under DADT may be avoided where the service member can establish that any alleged homosexual conduct was “a departure from the member's usual and customary behavior,” and that “the member does not have a propensity to engage in homosexual acts”). Therefore, despite its claim to focus on conduct rather than preference, DADT nevertheless inevitably extends to service members with a homosexual preference, regardless of whether they have engaged in same-sex sexual contact.

124. It may be argued that veterans' preferences are not purely civilian benefits because they are limited to former service members and are meant to serve purposes that are related to military service. This ignores, however, the statutes' many civilian qualities. First, they are civilian in the literal sense, in that they regulate civilian employment. They are also designed to serve a number of purely civilian goals, such as facilitating former service members' return to civilian society and attracting loyal and disciplined individuals to civilian employment. Even their goal of rewarding military service is primarily a civilian concern, as the military ostensibly has no direct interest in how or whether its former members are recognized for their efforts after leaving military service. In fact, incentivizing military service is the only stated goal of veterans' preferences that has any direct impact on the military. Finally, courts reviewing veterans' preferences have treated them as civilian statutes by not granting them the judicial deference reserved for military policies. Therefore, without attempting to articulate a definitive standard by which to differentiate between military and civilian statutes, there are strong arguments for treating veterans' preferences as civilian.

125. The answer cannot be found in the prior, independent analyses of either veterans' preferences or DADT. As an initial matter, the constitutionality of veterans' preferences' treatment of homosexuals is an issue of first impression. As for DADT, it has only been analyzed in the military context and, therefore, has only been subjected to the lenient standard of review reserved for military policies. *See, e.g., Able*, 155 F.3d at 632 (explaining that “we are required to give great deference to Congressional judgments in matters affecting the military”). “Courts are to ‘give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.’” *Id.* at 633 (quoting *Goldman*, 475 U.S. at 507). Therefore, in order to evaluate DADT's constitutionality in the public employment context, it is important that the standard governing veterans' preferences, rather than military policies, be applied.

1. *Veterans' Preferences' Classification of Homosexuals*

Veterans' preference statutes do not contain explicit language excluding or limiting homosexuals' access to benefits. They are, for present purposes, facially neutral.¹²⁶ This does not mean, however, that their treatment of homosexuals is not reviewable under the Equal Protection Clause. Where a facially neutral statute contains either a "covert or overt" discriminatory classification,¹²⁷ that classification is subject to the same equal protection scrutiny as a facially discriminatory provision.¹²⁸

Veterans' preferences contain such a discriminatory classification as a result of their reliance on DADT to establish eligibility for benefits. Unlike other facially neutral statutes that simply have an adverse effect on particular groups,¹²⁹ veterans' preferences rely on a policy — DADT — that overtly

126. Veterans' preferences are of course not entirely neutral on their face, as they explicitly exclude non-veterans. For purposes of this analysis, however, the statutes' classification of non-veterans will be treated as synonymous with neutrality, as their exclusion of non-veterans has survived equal protection review, and in any event, is not the determining factor in whether the statutes unconstitutionally discriminate against homosexuals. See discussion *supra* note 120.

127. *Feeney*, 442 U.S. at 274 (applying the disparate impact test through a "twofold inquiry"). "The first question is whether the statutory classification is indeed neutral in the sense that it is not gender based. If the classification itself, covert or overt, is not based upon gender, the second question is whether the adverse effect reflects invidious gender-based discrimination." *Id.*

128. See *id.* at 273 (explaining that any public employment law containing a discriminatory classification would be subject to "a constitutional challenge under the Equal Protection Clause").

129. Statutes that do not contain discriminatory classifications but nevertheless result in a discriminatory impact on a particular group are constitutionally reviewable under the disparate impact doctrine. Such statutes are unconstitutional under the disparate impact doctrine only where their disparate impact is the result of a discriminatory legislative purpose. *Id.* at 272 (citing *Washington v. Davis*, 426 U.S. 229 (1976) and *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977)). The disparate impact doctrine is based on the principle that the Equal Protection Clause guarantees "equal laws, not equal results." *Id.* at 273. It is also based on the premise that the social impact of a particular law is not a constitutional question, but rather one that should be addressed, if at all, by further legislation. See *id.* at 272 ("[T]he manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility."). The disparate impact doctrine is reserved for statutes that are not based on discriminatory classifications, but that, when combined with independent social conditions such as patterns of prejudice in "interrelated 'gateway' areas [such as] housing, employment and education," lead to unequal results for particular individuals or groups. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-20, at 1511 (2nd ed. 1988). See also, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (examining the effect of political redistricting statute as caused by racial prejudice); *Hernandez v. New York*, 500 U.S. 352 (1991) (jury selection); *Batson v. Kentucky*, 476 U.S. 79 (1986) (jury selection); *Rogers v. Lodge*, 458 U.S. 613 (1982) (political redistricting); *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457 (1982) (educational redistricting); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (political redistricting); *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449 (1979) (educational redistricting); *New York City Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (prohibition on narcotics use); *Vill. of Arlington Heights*, 429 U.S. at 252 (1977) (zoning); *Washington*, 426 U.S. at 229 (1976) (public hiring). These social conditions represent an intervening cause in disparate impact cases that creates a degree of attenuation between the

discriminates against homosexuals. Veterans' preference statutes' incorporation of DADT ensures that they will likewise discriminate. Their apparent neutrality is thus irrelevant, as there is no meaningful difference between a statute that itself singles out homosexuals and one that, although seemingly neutral on its face, incorporates a statute or policy that is overtly discriminatory. Therefore, veterans' preferences should not be considered neutral with respect to homosexuals, but should be subject to equal protection scrutiny of their discriminatory treatment of homosexuals through their application of DADT in the public employment context.

This conclusion is consistent with the Court's analysis in *Personnel Administrator of Massachusetts v. Feeney*. The *Feeney* Court concluded that Massachusetts' veterans' preference statute was not facially discriminatory against women. It then asked whether the statute established "a classification that is overtly or covertly based upon gender."¹³⁰ In answering that question in the negative, the Court relied on a number of facts and circumstances that do not exist with respect to veterans' preferences. It focused on the fact that women were not excluded from the military or veterans' benefits,¹³¹ and that Massachusetts' veterans' preference statute did not "intentionally incorporate[] . . . the panoply of sex-based and assertedly discriminatory federal laws that have prevented all but a handful of women from becoming veterans."¹³² In concluding that the statute was not facially discriminatory, the Court explained that "[t]he enlistment policies of the Armed Services may well have discrimination [sic] on the basis of sex. But the *history* of discrimination against women in the military is not on trial in this case."¹³³

These rationales do not apply, however, to veterans' preferences' treatment of homosexuals. In fact, the *Feeney* Court's refusal to find a classification based on gender provides a number of instructive considerations that counsel in favor of concluding that such a classification does exist in veterans' preferences with respect to homosexuals. For example, veterans' preferences' incorporation of DADT establishes classifications that are at least in part based on sexual preference. DADT creates a mandatory threshold for military enrollment and retention — and,

statute under review and the disparate results. This attenuation justifies application of the disparate impact doctrine, as it protects courts from assuming the legislative role of combating patterns of prejudice, and permits them to focus on an issue that is more properly the subject of judicial review, namely legislative purpose. See *TRIBE*, *supra* at 1511 (discussing the role of "patterns of . . . prejudice" in disparate impact cases); *Feeney*, 442 U.S. at 272 ("[T]he manner in which a particular law reverberates in a society, is a legislative and not a judicial responsibility."). By contrast, veterans' preference statutes' discriminatory treatment does not depend on such patterns of prejudice, but is the product of the statutes' incorporation of language—DADT—that explicitly discriminates against homosexuals. Veterans' preferences are therefore not the type of statute that the disparate impact doctrine was designed to address.

130. *Feeney*, 442 U.S. at 274.

131. *Id.* at 275 (stating that "Massachusetts has consistently defined veteran status in a way that has been inclusive of women," and that veteran status "is not uniquely male").

132. *Id.* at 276.

133. *Id.* at 278 (emphasis added) (citations omitted).

in turn, veterans' preference benefits — based on whether an individual is, or could reasonably appear to be, homosexual.¹³⁴ No such threshold exists regarding gender, either now or at the time *Feeney* was decided.¹³⁵ Veterans' preferences' reliance on DADT also constitutes an intentional incorporation of a discriminatory federal law in a way that the statutes' reliance on gender-related policies does not. Unlike the military's treatment of women at the time *Feeney* was decided, DADT is an explicit policy with the ability to effectively preclude homosexuals' access to veterans' benefits. Therefore, a review of veterans' preferences' constitutionality will not focus on the *history* of discrimination against homosexuals, as the *Feeney* Court described its gender-based review,¹³⁶ but instead will address active discrimination that seriously impacts the availability of benefits. For these reasons, veterans' preferences should be treated as discriminatory against homosexuals.¹³⁷

134. 10 U.S.C. § 654(b), (f); 1993 DoD Directive 1332.14, E2.1.16. *See also* discussion *supra* Part III.B.

135. *See Feeney*, 442 U.S. at 275 (“Veteran status is not uniquely male.”).

136. This is not to suggest that the military is entirely free of gender bias, but simply to point out that in the *Feeney* Court's view, the military's treatment of women at the time *Feeney* was decided did not pose a sufficient threat to female eligibility for veterans' benefits to justify categorizing the statutes as gender-based. *See id.* at 275, 278 (explaining that “Massachusetts has consistently defined veteran status in a way that has been inclusive of women,” and that veteran status “is not uniquely male,” and concluding that Massachusetts' veterans' preference was not gender-based because “the *history* of discrimination against women in the military is not on trial in this case”) (emphasis added). By contrast, DADT is responsible for the exclusion and removal of a large number of homosexual service members annually, and its highly discretionary application puts homosexuals in serious danger of being excluded from military service altogether. *See* Service Members' Legal Defense Network, *About Don't Ask, Don't Tell*, available at http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/1455.pdf (last visited Oct. 6, 2005) (providing statistics on number of service members removed annually under DADT from 1994 through 2003). *See also supra* notes 103–115 and accompanying text (describing the discretionary nature of DADT and its potential to act as a ban on homosexual service). This discriminatory treatment of homosexuals limits their ability to serve such that their ability to receive veterans' preferences is constantly in danger of being eradicated. As a result, veterans' preferences' reliance on DADT is distinct from the military's treatment of women such that the *Feeney* Court's conclusion that Massachusetts' veterans' preference was not gender-based does not preclude a different conclusion with respect to veterans' preference statutes' treatment of homosexuals.

137. This seems to beg the question whether *Feeney* would have been decided differently if the military had a clearer policy of discriminating against women. Besides being beyond the scope of this Article, that question is difficult to answer because the constitutional analysis of veterans' preferences' treatment of women is different from the analysis of the statutes' treatment of homosexuals. First, depending on when the challenge was brought, different levels of equal protection scrutiny could be applied. Gender classifications, unlike classifications based on sexual preference, are currently reviewed under intermediate scrutiny. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985) (“A gender classification fails unless it is substantially related to a sufficiently important governmental interest.”). Even assuming, however, that veterans' preferences' treatment of women would be reviewed under the rational basis test, the military's purpose behind its policy on women may be different from that for DADT. The constitutional questions of whether the policies are rationally related to a legitimate government purpose

The obvious critique of this analysis is that it is largely a matter of semantics. To say that neutral statutes that incorporate discriminatory standards must be treated as if they are facially discriminatory is indistinguishable from the uncontroversial position that every discriminatory provision must pass constitutional muster. In situations where a neutral statute adopts a discriminatory provision, the discriminatory provision can be just as easily challenged on its own. If it is ruled unconstitutional, it would presumably also be invalid if incorporated into other statutes. The question of whether the neutral statute should be subject to an equal protection challenge would be moot.

This is not the case, however, with veterans' preferences. Unlike the hypothetical situation just described, veterans' preferences incorporate DADT, a discriminatory military policy. Because of the judicial deference afforded military policies,¹³⁸ the safeguard of a direct challenge to DADT is less meaningful because such a challenge would not be subject to the same standard that is applied to civilian statutes like veterans' preferences. Therefore, where seemingly neutral statutes incorporate explicitly discriminatory military policies, those statutes should receive two layers of review: one to determine the constitutionality of the neutral language, and another to evaluate the constitutionality of the facially discriminatory military policy in its current context. Under this formulation, veterans' preference statutes' constitutionality depends not only on whether the statutes' preferential treatment of veterans is constitutional, a question that has been largely answered in the affirmative,¹³⁹ but on whether the statutes' treatment of homosexuals through their incorporation of DADT passes constitutional muster in the civilian public employment context. Any other approach would lead to unacceptable results both doctrinally and normatively by insulating veterans' preferences' civilian treatment of homosexuals from anything other than the deferential constitutional review afforded military policies, and subjecting homosexuals to a second layer of discriminatory treatment in public employment.¹⁴⁰

are thus distinct. In general, however, there does not appear to be any reason why the analysis of veterans' preference statutes' treatment of homosexuals suggested herein could not be applied in similar situations where a different group's access to veterans' preferences was inhibited by an explicitly discriminatory military policy.

138. See, e.g., *Able*, 155 F.3d at 632 (explaining that "we are required to give great deference to Congressional judgments in matters affecting the military"). "Courts are to 'give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.'" *Id.* at 632-33 (quoting *Goldman*, 475 U.S. at 507)). See *Holmes*, 124 F.3d at 1133 ("[O]ur review is especially deferential in the military context."); *id.* (stating that "[r]egulations which might infringe constitutional rights in other contexts may survive scrutiny because of military necessities." (quoting *Philips*, 106 F.3d at 1425)).

139. See, e.g., *Feeney*, 442 U.S. at 256.

140. Although not necessary in light of the above argument that veterans' preference statutes should be treated as discriminatory against homosexuals, it is worth noting that even if that argument were to fail, veterans' preferences' treatment of homosexuals would not necessarily be immune from equal protection review. On the contrary, their treatment of homosexuals would be subject to constitutional review if their incorporation of DADT

2. Rational Basis Review

Once the issue is framed to focus on veterans' preferences' application of DADT in the civilian context, the next question is the proper level of equal protection scrutiny.¹⁴¹ The Equal Protection Clause does not prohibit all statutory classifications, but instead requires that such classifications be properly related to a sufficient government interest.¹⁴² In the case of suspect or quasi-suspect classifications such as race or gender, statutes must undergo a more rigorous standard of judicial review.¹⁴³ In all other cases, however,

was found to be the result of a "discriminatory purpose." *Id.* at 272. In *Washington*, the Supreme Court refused to treat a verbal skills examination for admission into the District of Columbia police department (Test 21) as racially discriminatory despite the fact that blacks failed the test four times more than whites. 426 U.S. at 229. The Court announced the rule that the "invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose," and concluded that the fact that a disproportionate number of black applicants failed to qualify was not sufficient to conclude that the requirement was purposefully discriminatory. *Id.* at 240. This conclusion was affirmed in *Village of Arlington Heights*, where the Court denied a developer's equal protection challenge to the local authorities' refusal to change the zoning classification for a particular tract of land from single-family to multi-family housing. *Vill. of Arlington Heights*, 429 U.S. at 252. The developer claimed that the refusal to classify the property was racially motivated, because it prevented him from building racially integrated low and moderate-income housing on the tract. *Id.* at 254. The Court held that although the "historical background of the [governmental] decision is one evidentiary source" for determining if the decision was racially motivated, there was no reason not to accept the Village's neutral justification that it was committed to "single-family homes as its dominant residential land use." *Id.* at 267-69. The Court elaborated on its definition of discriminatory purpose in *Feeney* when it explained that a finding of discriminatory intent requires that the decision maker drafted a provision "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney*, 442 U.S. at 279. The Court went on, however, to explain that proof of discriminatory purpose will typically depend on objective factors, such as the background and legislative history of a decision, and the results it achieves. *Id.* at 279 n.24. It also explained that the inevitability or foreseeability of adverse effects can create a "strong inference" in favor of intent. *Id.* at 279 n.25. While it seems unlikely that individual legislatures adopted veterans' preferences out of malice toward homosexuals, it is easy to identify the statutes' harmful results for homosexuals and to establish that these adverse effects were inevitable. Unlike veterans' preferences' negative effects on women, which the *Feeney* Court described as the product of a "history of discrimination against women in the military," the negative effects on homosexuals from veterans' preferences are the result of an ongoing explicit, discriminatory policy against homosexuals. *Id.* at 278. It is at best extremely difficult to argue that legislators were anything other than certain that their classification of veterans would negatively impact homosexuals. *Id.* at 279 n.24. If the *Feeney* Court drew a strong inference of legislative intent with regard to gender, veterans' preference statutes' treatment of homosexuals must carry an even stronger one. Therefore, in light of the inevitability that veterans' preferences would negatively impact homosexuals, it is at least arguable that their treatment of homosexuals should be subject to equal protection review, regardless of whether they are deemed to contain a "covert or overt" classification of homosexuals. *Id.* at 274.

141. See *Cleburne Living Center*, 473 U.S. at 439-42 (outlining the three distinct levels of review under the Equal Protection Clause).

142. See, e.g., *Feeney*, 442 U.S. at 271 ("The equal protection guarantee of the Fourteenth Amendment does not take from the States all power of classification.").

143. See *Cleburne Living Center*, 473 U.S. at 440 ("[W]hen a statute classifies by race,

statutory classifications satisfy the Equal Protection Clause when they are rationally related to a legitimate governmental purpose — the “rational basis test.”¹⁴⁴

Historically, homosexuals have not been treated as a constitutionally suspect or quasi-suspect class.¹⁴⁵ As a result, statutes discriminating against homosexuals have not been subject to heightened scrutiny.¹⁴⁶ This is evidenced in all of the cases addressing the constitutionality of DADT, as well as in the overwhelming majority of cases involving DADT's predecessor policies.¹⁴⁷ Therefore, for the time being it appears that homosexuals will remain a non-suspect class for equal protection purposes, and statutes that discriminate against them will be reviewed under the rational basis test.¹⁴⁸

alienage, or national origin . . . [it is] subjected to strict scrutiny and will be sustained only if [it is] suitably tailored to serve a compelling state interest.”). “A gender classification fails unless it is substantially related to a sufficiently important governmental interest.” *Id.* at 441.

144. *See, e.g., Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (“Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights . . . this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.”).

145. *See, e.g., Romer v. Evans*, 517 U.S. 620, 624 (1996) (applying rational basis test to State constitutional amendment prohibiting “legislative, executive or judicial action . . . designed to protect” homosexuals); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (applying rational basis test to sodomy statute).

146. *See supra* note 145.

147. *See, e.g., Able*, 155 F.3d at 628 (upholding DADT against constitutional challenge); *Holmes*, 124 F.3d at 1126; *Philips*, 106 F.3d at 1420; *Richenburg*, 97 F.3d at 256; *Thomasson*, 80 F.3d at 915. *See also Steffan*, 41 F.3d at 684 (overruling panel decision that 1982 military policy regarding homosexuals failed rational basis review under the Fourteenth Amendment). For a more thorough discussion of the failed challenges to the 1982 policy, see Krygowski, *supra* note 44, at 887-906, and Woodruff, *supra* note 47, at 135-42.

148. *See, e.g., Schweiker*, 450 U.S. at 230 (“Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights . . . this Court consistently has required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives.”). Recent decisions of the United States and Massachusetts Supreme Courts, however, may mark the beginning of a change in the way sexual preference is treated under the Constitution. In *Lawrence*, 539 U.S. at 558, the United States Supreme Court struck down a Texas law prohibiting homosexual sodomy among consenting adults. Although *Lawrence* relied on the Due Process Clause, it acknowledged the “emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.” *Id.* at 558. This reference to a constitutional right to privacy for homosexuals evidences a potential shift toward homosexuals being considered a suspect or quasi-suspect class under the Equal Protection Clause, and has inspired new attacks on DADT's constitutionality. *See Cook*, No. 04-12546. A similar message was conveyed by the Supreme Judicial Court of Massachusetts in *Goodridge*, 798 N.E.2d at 941, and by the New York Supreme Court in *Hernandez*, 794 N.Y.S.2d at 579. In *Goodridge*, the court struck down a Massachusetts law limiting the definition of marriage to the union of a man and a woman on the grounds that it violated both the due process and equal protection clauses of the Massachusetts Constitution. *Goodridge*, 798 N.E.2d at 941. In striking the statute, the court concluded that the exclusion of same-sex couples from civil marriage could not satisfy the rational basis test under either constitutional provision. *Id.* at 968. The court then went on to

In cases involving discrimination against a non-suspect but politically unpopular group, however, the precise application of the rational basis test has been the target of some debate. In *Williamson v. Lee Optical*,¹⁴⁹ the Supreme Court explained that “the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that . . . the particular legislative measure was a rational way to correct it.”¹⁵⁰

In a number of other cases applying rational basis review, however, the Court has indicated that a higher standard must be met where a statute exhibits “animus toward the class it affects,”¹⁵¹ or “a bare . . . desire to harm a politically unpopular group.”¹⁵² In *Dep’t of Agriculture v. Moreno*,¹⁵³ for example, the Court concluded that a statute excluding households with one or more unrelated inhabitants from receiving food stamps was unconstitutional because it was not rationally related to the statutory “declaration of policy” and because its stated purpose — to prevent “hippies” from participating in the food stamp program — was not legitimate for equal protection purposes.¹⁵⁴ Similarly, in *City of Cleburne v. Cleburne Living Center*,¹⁵⁵ the Supreme Court struck down a statute requiring a special use permit for a group home for the mentally retarded on the grounds that it failed the rational basis test. In addition to finding many of the city council’s

reject arguments that “community consensus” favors outlawing homosexual marriage. *Id.* at 967. A request to enjoin the enforcement of the Supreme Judicial Court’s decision was denied. *Largess*, 373 F.3d at 229. In an analogous case, the *Hernandez* court held that New York’s domestic relations law violated the due process and equal protection clauses of the New York constitution to the extent it prohibited gay marriage. *Hernandez*, 794 N.Y.S.2d at 579. In reaching its conclusion, the court noted that simply because “prejudice against gay people may still prevail elsewhere cannot be a legitimate justification for maintaining it in the marriage laws of this State. ‘Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.’” *Id.* at 610 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)). Although only binding in Massachusetts and New York, respectively, the acknowledgement in *Goodridge* and *Hernandez* that public opposition to gay marriage is insufficient to justify legally prohibiting it could prove an important early step toward the development of federal constitutional jurisprudence regarding homosexual rights. Finally, there is empirical evidence that service members’ attitudes toward homosexuals are changing. A recent study showed that fifty percent of junior enlisted officers are opposed to DADT, up from only sixteen percent in 1992. *New Poll Shows Shift*, *supra* note 9. Therefore, although not necessary to this analysis, it is worth acknowledging the possibility that homosexuals may one day be treated as a suspect or quasi-suspect class. If that were to happen, it would only further support the conclusions herein. Although judicial deference to military policy may assist DADT in surviving strict or intermediate scrutiny, it seems much less likely that a civilian statute that discriminates against homosexuals, like a veterans’ preference statute, would be sufficiently tailored toward serving a compelling or important government interest to survive such scrutiny.

149. 348 U.S. 483 (1955).

150. *Id.* at 487-88.

151. *Romer*, 517 U.S. at 632.

152. *Id.* at 634 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

153. *Moreno*, 413 U.S. at 534.

154. *Id.* at 533-34.

155. *City of Cleburne*, 473 U.S. at 440.

justifications not credible, the Court based its ruling, at least in part, on the principle that the “negative attitude” of property owners adjacent to the facility toward its residents did not constitute a rational basis for requiring the special use permit.¹⁵⁶

The Court has also applied this heightened rational basis standard to classifications of homosexuals. In *Romer v. Evans*,¹⁵⁷ the Court struck a proposed amendment to the Colorado constitution prohibiting all governmental action designed to protect homosexuals from discrimination. In concluding that the amendment was not rationally related to a legitimate government interest, the Court relied on the fact that the amendment seemed “inexplicable by anything but animus toward [homosexuals]; it lacks a rational relationship to legitimate state interests.”¹⁵⁸ It went on to explain that the rational basis test “ensure[s] that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.”¹⁵⁹ *Romer* represents a shift in the Court’s rational basis jurisprudence toward a more rigorous standard of review for statutes containing classifications that disadvantage non-suspect groups, such as homosexuals, based on political popularity or cultural standing.

This shift was acknowledged by Justice O’Connor in her concurrence in *Lawrence v. Texas*,¹⁶⁰ when she noted that the Court has applied a “more searching form of rational basis review” and has been most likely to overturn a statute on rational basis grounds in cases where the statute in question “exhibits such a desire to harm a politically unpopular group” or “inhibits personal relationships.”¹⁶¹ Justice O’Connor went on to conclude that Texas’s statute outlawing homosexual sodomy was unconstitutional because “[m]oral disapproval of [homosexuals], like a bare desire to harm [homosexuals], is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.”¹⁶²

Veterans’ preference statutes’ treatment of homosexuals seems likely to qualify for this “more searching form” of rational basis review.¹⁶³ Although DADT’s primary purpose may not be to harm homosexuals, there is strong evidence that it is motivated by homosexuals’ status as “politically unpopular.” DADT’s primary justification as a military policy is to promote unit cohesion by protecting its members from even the appearance of

156. *Id.* at 448.

157. *Romer*, 517 U.S. at 635-36.

158. *Id.* at 632.

159. *Id.* at 633.

160. 539 U.S. at 580 (O’Connor, J., concurring).

161. *Id.* (O’Connor, J., concurring).

162. *Id.* at 582 (O’Connor, J., concurring).

163. See, e.g., Jeremy B. Smith, Note, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769 (2005) (advocating heightened rational basis scrutiny for classifications based on sexual preference).

homosexuality among them.¹⁶⁴ This approach presupposes that homosexuals are so disfavored by other service members that the mere perception of a homosexual presence will inhibit their ability to form cohesive units. Such a justification for excluding a group seems to be precisely the sort that the Court considered deserving of heightened rational basis scrutiny.¹⁶⁵ Therefore, while it remains unclear exactly how and when courts apply *Romer*'s elevated rational basis review, it is nevertheless significant because the majority of cases in which statutes have been overturned on rational basis grounds applied that higher standard.¹⁶⁶

The availability of heightened rational basis review is also relevant as a means of distinguishing DADT's role in veterans' preference statutes from other military enrollment requirements.¹⁶⁷ For example, physical enrollment standards¹⁶⁸ may exclude handicapped individuals from military service and, in turn, veterans' preference benefits in much the same way that DADT may prevent homosexuals from receiving those benefits. A closer look, however, reveals that the military's treatment of the handicapped, unlike its treatment of homosexuals, is not necessarily based on problems of public perception. The military justifies its physical requirements on the grounds that they are necessary to ensure job performance.¹⁶⁹ By contrast, it justifies DADT by contending that homosexuals' presence in the military will endanger morale

164. See, e.g., S. REP. NO. 103-112, at 278 ("The presence in military units of persons who, by their acts or statements, demonstrate a propensity to engage in homosexual acts, would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are essential to effective combat capability."); H.R. REP. NO. 103-200, at 287 ("[T]he committee concludes that homosexuality is incompatible with military service."); 1993 DoD Directive 1332.14, E2.1.16 (defining statements by a service member that he or she is homosexual as "[l]anguage or behavior that a reasonable person would believe was intended to convey the statement that a person . . . has a propensity or intent to engage in homosexual acts").

165. See *Lawrence*, 539 U.S. at 582 (O'Connor, J., concurring) ("Moral disapproval of [homosexuals], like a bare desire to harm [homosexuals], is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause."); *Romer*, 517 U.S. at 632 (striking the constitutional amendment because its adoption was "inexplicable by anything but animus toward [homosexuals]; it lacks a rational relationship to legitimate state interests").

166. *Lawrence*, 539 U.S. at 584 (O'Connor, J., concurring).

167. DADT is not the only means by which the military excludes potential service members. Physical and intellectual aptitude standards, for example, are standard admissions criteria. See, e.g., Department of Defense Directive No. 6130.3 (Dec. 15, 2000) [hereinafter 2000 DoD Directive 6130.3] (describing physical standards for appointment, enlistment or induction); Department of Defense Directive No. 1304.26 (Dec. 21, 1993) (describing qualification standards for appointment, enlistment or induction). See also Department of the Navy, FAQ, <http://www.navy.com/faq> (last visited July 20, 2005) (explaining some of the requirements for admission into the Navy). While these criteria may themselves raise constitutional issues, any such issues are distinct from, and beyond the scope of, this Article.

168. See, e.g., 2000 DoD Directive 6130.3 (setting forth physical enrollment standards).

169. See *id.* at 3.3.1, 3.3.2 (explaining that physical enrollment standards are designed to ensure that potential service members are "free of contagious diseases . . . [and] medical conditions," and that they are medically capable of completing their training and military duties).

and unit cohesion due to their disfavored status in the community.¹⁷⁰ While the former justification has not been identified as grounds for heightened rational basis review, the latter has. In cases where groups other than homosexuals are prevented from serving in the military, the fact that those other classifications are not due to those groups' political unpopularity may be important to understanding why veterans' preferences' civilian application of DADT should be judged more harshly than the civilian effects of other military admission standards.

For these reasons, it is important to bear in mind the possibility that courts may choose to perform a more searching rational basis review of veterans' preferences' treatment of homosexuals. In the interest of simplicity, however, this analysis will rely on the traditional rational basis standard, particularly because application of this more conservative standard does not affect the ultimate conclusion that veterans' preference statutes' treatment of homosexuals is constitutionally suspect.

B. Equal Protection Analysis

In order to apply the rational basis test to veterans' preference statutes' incorporation of DADT, it is important to define the policy. DADT lends itself to two distinct interpretations, each of which affects the constitutional analysis differently. For instance, DADT's early proponents described the policy as a conditional acceptance of, rather than a ban on, homosexual military service.¹⁷¹ By contrast, a more literal reading of DADT and a comparison of DADT to its predecessor policies suggest that DADT is, in effect, nothing more than a continuation of the 1982 ban on homosexual service.¹⁷² In order to evaluate the constitutionality of veterans' preferences' treatment of homosexuals, both of these interpretations must be considered.

What follows are two alternative rational basis analyses, each of which focuses on a different interpretation of DADT. Once it is established that the statutes contain a discriminatory classification,¹⁷³ the question under the

170. See, e.g., S. REP. NO. 103-112, at 278 ("The presence in military units of persons who, by their acts or statements, demonstrate a propensity to engage in homosexual acts, would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are essential to effective combat capability.").

171. 1993 DoD Directive 1332.14, E3.A1.1.8.1.1 (describing sexual orientation as "a personal and private matter . . . not a bar to continued service . . . unless manifested by homosexual conduct"); Aspin Press Release, *supra* note 76 (stating that DADT was designed "to emphasize that the DoD judges the suitability of persons to serve in the Armed Forces on the basis of conduct, not sexual orientation").

172. See, e.g., discussion *supra* Part III.B; Wachs, *supra* note 94, at 315 (finding "little to distinguish" DADT from "the former total ban" on homosexuals in the military); Woodruff, *supra* note 47, at 153 ("[DADT] was a codification of the 1981 policy in all material respects."); Krygowski, *supra* note 44, at 875 ("The 'Don't Ask, Don't Tell' (DADT) policy, however, continues to ban admitted homosexuals or bisexuals from remaining in the armed forces.").

173. See discussion *supra* Part IV.A.1.

rational basis test becomes: (1) whether the statutes address any legitimate governmental purpose and (2) whether they are rationally related to that purpose.¹⁷⁴

1. *Legitimate Governmental Purpose?*

The Supreme Court in *Feeney* cited four legitimate purposes for veterans' preferences: (1) to reward veterans' service; (2) to incentivize that service; (3) to attract loyal and well-disciplined people to public employment; and (4) to facilitate the return of former service members to civilian society.¹⁷⁵ *Feeney*, however, only analyzed the Massachusetts veterans' preference statute's exclusion of non-veterans — it did not address its disparate impact on women because it determined that the statute was neither gender-based nor born of a discriminatory purpose.¹⁷⁶ By contrast, veterans' preference statutes — through their incorporation of DADT — are based on sexual preference¹⁷⁷ and, as a result, are subject to constitutional review of their treatment of homosexuals. In order to conduct that inquiry, it is necessary to also consider the justification advanced by DADT for its discriminatory treatment of homosexuals.

DADT's legislative history justifies the policy on the grounds that it promotes unit cohesion among service members,¹⁷⁸ and courts have agreed that military unit cohesion is a legitimate governmental aim.¹⁷⁹ In the veterans' preference context, however, it makes no sense to consider cohesion within military units as a statutory purpose because the statutes do not apply to active service members.¹⁸⁰ Thus, two alternatives arise.¹⁸¹

174. *Cleburne Living Ctr.*, 473 U.S. at 446.

175. *Feeney*, 442 U.S. at 265. Although the Court in *Feeney* did not explicitly focus on discharge characterizations in analyzing Massachusetts' veterans' preference statute, it understood the statute to include only former service members who were honorably discharged. *Id.* at 262.

176. *See id.* at 277-78 (“The basic distinction between veterans and non-veterans, having been found not gender-based, and the goals of the preference having been found worthy, [the statute] must be analyzed as is any other neutral law . . .”).

177. *See discussion supra* Part IV.A.1.

178. *See, e.g.*, S. REP. NO. 103-112, at 278 (“The presence in military units of persons who, by their acts or statements, demonstrate a propensity to engage in homosexual acts, would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are essential to effective combat capability.”).

The committee believes that military service is a unique calling that has no counterpart in civilian society, and the primary purpose of the armed forces is to prepare for and prevail in combat when necessary. Moreover, the committee firmly believes that the maintenance of military unit cohesion—which is the key to combat capability—and the promotion of morale, welfare, and discipline must remain paramount over the desires of a single individual or group.

H.R. REP. NO. 103-200, at 287.

179. *See Able*, 155 F.3d at 628 (upholding DADT); *Holmes*, 124 F.3d at 1126; *Philips*, 106 F.3d at 1420; *Richenburg*, 97 F.3d at 256; *Thomasson*, 80 F.3d at 915.

180. As explained above, evaluating DADT and veterans' preferences separately is doctrinally and normatively unacceptable. It not only insulates DADT from traditional rational basis review by granting it the judicial deference afforded military policies, but it also leads to unjust results by replicating DADT's discriminatory treatment of homosexual

DADT can either be interpreted as serving no governmental purpose when applied in the civilian context (in which case it fails to satisfy equal protection scrutiny and the analysis is complete) or, more plausibly, DADT can be understood to retain a similar purpose in every context — to promote group cohesion and morale. If this second interpretation is adopted, determining DADT's constitutionality in the civilian context requires projecting the policy's stated purpose into that context. In the case of veterans' preferences, the applicable governmental purpose is, therefore, the promotion and maintenance of unit cohesion among public employees.

2. *Rationally Related?*

After establishing the purposes behind veterans' preference statutes, the second portion of the rational basis test asks whether those statutes are rationally related to those ends. This requires a separate analysis of veterans' preference statutes under each of the alternative interpretations of DADT.

a. DADT as a Conditional Acceptance

If DADT is interpreted as a conditional acceptance of homosexual service members, veterans' preference statutes are not categorically vulnerable to a constitutional challenge. Because homosexuals are permitted to serve under this interpretation,¹⁸² they may also be eligible for veterans' preferences, provided they receive a discharge characterization that meets the statutory requirements.¹⁸³ Any equal protection challenge to veterans' preference statutes under this interpretation must, therefore, be brought "as applied" to an individual service member who was discharged and rendered ineligible for veterans' preference benefits because he or she violated

service members in the public employment context. *See* discussion *supra* Part IV.A.1 (arguing that veterans' preferences should receive two layers of review because of their incorporation of DADT into a civilian context).

181. Of course additional alternatives arise if additional justifications are presented for DADT. That seems improbable, however, as DADT is a military policy with the singular stated purpose of promoting unit cohesion in the military. "The presence in military units of persons who, by their acts or statements, demonstrate a propensity to engage in homosexual acts, would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are essential to effective combat capability." S. REP. NO. 103-112, at 278. It is therefore unlikely that DADT serves any additional military purposes, let alone an independent civilian objective.

182. As discussed *supra* Part III.B, homosexual "service" is often at the pleasure of the service members' commanding officers and is conditioned upon those service members not "practicing" or "admitting" their homosexuality. 10 U.S.C. § 654; 1993 DoD Directive 1332.14.

183. *See* S. REP. NO. 103-112, at 290 ("The committee notes that military commanders and investigative agencies have broad powers to initiate inquiries, inspections, and investigations."); H.R. REP. NO. 103-200, at 289 ("[T]he committee also believes that commanders . . . should have great discretion as to what constitutes sufficient information to begin an inquiry . . . about behavior or actions that could have an impact on unit cohesion, morale, welfare and discipline."); Wachs, *supra* note 94, at 316 ("Enforcement of the 'Don't Ask, Don't Tell' policy rests within the discretion of individual commanders.").

DADT.¹⁸⁴ In these cases, a challenger would seek reinstatement or benefits, rather than invalidation of the statute. The constitutional inquiry in these situations is whether veterans' preference statutes' exclusion of homosexuals who were discharged under DADT is rationally related to any of the statutes' legitimate governmental purposes. The answer appears to be no.

First, the exclusion of homosexual former service members from veterans' preferences does nothing to promote unit cohesion in public employment.¹⁸⁵ There is absolutely no evidence or reason to believe that civil servants will somehow be inhibited in their duties because of the presence of homosexuals in the workplace. To the contrary, studies have shown that police and fire departments, the public employment contexts that involve the most intimate working conditions and that are most closely analogous to military service, have not experienced any cohesion deficiencies due to the presence of homosexuals.¹⁸⁶

Similarly, there is no connection between excluding homosexual former service members from veterans' preference benefits and incentivizing those individuals to serve in the military. Unlike the exclusion of non-veterans, which offers veterans' preferences in exchange for military service, the exclusion of former service members who were discharged under DADT only incentivizes individuals to avoid violating DADT. It has nothing to do with their decision to serve in the first place and, therefore, cannot provide an incentive for them to serve. To the extent that veterans' preferences can be construed as wanting to encourage compliance with DADT, they likewise fail rational basis review. As explained above, DADT forbids service

184. See, e.g., *W.E.B. DuBois Clubs of America v. Clark*, 389 U.S. 309, 311 (1967) (explaining that if an "Act does cover appellants, they may challenge its constitutionality either as applied or on its face"). Despite appearing somewhat limited in their scope, these "as applied" challenges are nevertheless important due to the large number of homosexual service members who are discharged every year for violating DADT. See SEVENTH ANNUAL REPORT, *supra* note 115, at 4 (reporting the following number of discharges under DADT in each of these years: 2001 (1273); 2000 (1241); 1999 (1046); 1998 (1163); 1997 (1007); 1996 (870); 1995 (772); 1994 (617)). In addition to being removed from the military, many of these former service members will be precluded from receiving veterans' preference benefits because their discharge characterizations will not meet the statutory threshold. Discharge characterizations under DADT are subject to broad discretion by commanding officers, and are often unfavorable. See *Hearing*, *supra* note 113 (testimony of Michelle M. Benecke, Co-Director, Servicemembers Legal Defense Network) (explaining that the issue of discharge characterizations still "poses significant problems for gay veterans").

185. Although Congress and the courts have found that DADT promotes unit cohesion in the military, that rationale is not applicable in the civilian context. Congress acknowledged as much when it explained that "[m]ilitary life is fundamentally different from civilian life in that . . . the unique conditions of military service, and the critical role of unit cohesion, require that the military . . . exist as a specialized society." 10 U.S.C. § 654(a)(8).

186. See Osburn, *supra* note 56, at 226 ("[I]t was the shared consensus of leaders across each of the departments studied that a policy of non-discrimination had in no way compromised their ability to perform their mission." (quoting RAND, NATIONAL DEFENSE RESEARCH INSTITUTE, SEXUAL ORIENTATION AND U.S. MILITARY PERSONNEL POLICY: OPTIONS AND ASSESSMENT 141 (1993))).

members from creating the perception that they are gay — it mandates removal of any service member found to have *attempted* to engage in conduct that *may* indicate a *propensity* to engage in same-sex sexual contact.¹⁸⁷ It does not require that the alleged “conduct” be intentional or even knowing.¹⁸⁸ As a result, compliance with DADT is less a volitional act and more a confluence of conduct, public perception, and official discretion. Because of the number of factors beyond service members’ control, withholding benefits from those who violate DADT should not be considered a rational means of incentivizing compliance.

As for the goal of attracting loyal and well-disciplined people to public employment, legislators may indeed conclude that military training makes service members more loyal and disciplined than civilians.¹⁸⁹ Even if that conclusion is considered rational, it is still wholly unrelated to the exclusion of homosexual former service members from veterans’ preferences. Homosexual service members receive the same lessons in loyalty and discipline as their heterosexual colleagues, and there does not appear to be any evidence that they are less receptive to those lessons — DADT does not require service members to admit their homosexuality, nor does it claim to be targeting disloyal or otherwise inadequate soldiers.¹⁹⁰ Therefore, there is no rational relationship between excluding homosexual former service members from veterans’ preferences and assembling a loyal, well-disciplined public workforce.

Finally, there is no rational basis for denying homosexual former service members the rewards of veterans’ preferences. Veterans’ preference statutes are designed to reward veterans with advantages in public employment and to help facilitate their return to civilian life. Homosexual former service members are no less deserving or needing of those benefits merely because they were discharged under DADT. Removal under DADT does not require that a service member fail to fulfill his or her duties as a soldier, but only that the service member did as little as unknowingly behave in a way that was interpreted as indicating a propensity to engage in homosexual sexual contact.¹⁹¹ Although a violation of DADT under these conditions can hardly be blamed on the service member, the broad discretion

187. See discussion *supra* Part III.B.

188. See discussion *supra* Part III.B.

189. This is not to endorse this conclusion. Rather, it is important to note that a rational conclusion for purposes of the rational basis test does not necessarily have to be a factually correct one. “Where rationality is the test, a State ‘does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.’” *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 84 (2000) (quoting *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 316 (1976)). “Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it ‘is probably not true’ that those reasons are valid in the majority of cases.” *Id.* at 86.

190. See National Defense Authorization Act of 1994, 10 U.S.C. § 654 (2000) (stating that Secretary of Defense will not ask about potential service members’ sexual orientation); S. REP. NO. 103-112, at 278 (explaining that DADT is designed to promote unit cohesion by removing apparent homosexuals from the military).

191. 10 U.S.C. § 654(e)(3)(B).

afforded commanding officers in enforcing DADT and in assigning discharge characterizations nevertheless results in homosexual service members' removal with unfavorable discharges that render them ineligible for veterans' preferences.¹⁹² At minimum, in those situations where a service member is rendered ineligible for a veterans' preference benefit solely because they unknowingly violated DADT, it is irrational to deny them that benefit on the basis that they do not deserve a reward for their service. On the contrary, denying a preference to such an individual would constitute irrational exclusion of an otherwise deserving former service member solely on the basis of their sexuality — an outcome that even DADT claims to disfavor.¹⁹³

In short, if DADT is interpreted as a conditional acceptance of, rather than a ban on, homosexual military service, veterans' preference statutes may be successfully challenged under the Equal Protection Clause when they deny benefits to homosexual service members who were discharged under DADT. These "as applied" challenges, although relevant to service members who may be in jeopardy of violating DADT, do not, however, implicate the broader constitutional question of whether veterans' preference statutes' reliance on DADT violates the rights of homosexuals generally. That question is addressed under the second interpretation of DADT — as an outright ban on homosexual military service.

b. DADT as Exclusion

If DADT is interpreted as prohibiting homosexuals from serving in the military and, in turn, from being eligible for veterans' preferences, the analysis changes. The constitutionality of veterans' preference statutes turns on whether there is a rational basis for denying homosexuals veterans' preferences.

Veterans' preference statutes' exclusion of non-veterans has already been deemed rationally related to the goals of incentivizing and rewarding service, attracting loyal and well-disciplined people to public employment, and facilitating veterans' return to civilian life.¹⁹⁴ If DADT is read to ban

192. See *Hearing*, *supra* note 113 (testimony of Michelle M. Benecke, Co-Director, Servicemembers Legal Defense Network) (explaining that the issue of discharge characterizations still "poses significant problems for gay veterans," and that there exists a disturbing "lack of parity in the treatment of gay, compared to straight, personnel"); SEVENTH ANNUAL REPORT, *supra* note 115, at 64 (explaining that former members of the Navy receive lower discharge characterizations for being discharged under DADT); FIFTH ANNUAL REPORT, *supra* note 115, at 16 (explaining that service members who admit to being gay receive "lower discharge characterizations").

193. See *Aspin Press Release*, *supra* note 76 ("DoD judges the suitability of persons to serve in the Armed Forces on the basis of conduct, not sexual orientation."); 1993 DoD Directive 1332.14, E3.A1.1.8.1.1 (explaining that sexual orientation is "a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct").

194. See, e.g., *Koch*, 533 F.2d at 80; *Rios*, 499 F.2d at 329; *Russell*, 470 F.2d at 212; *August*, 369 F. Supp. at 190; *Koelfgen*, 355 F. Supp. at 243. See *Glen*, *supra* note 43, at 494-503 (listing earlier cases).

homosexual service, then homosexuals are, for purposes of this portion of the analysis, merely a subset of non-veterans. For example, the exclusion of non-veterans is designed to incentivize service by offering veterans' preferences in exchange for military service. Because, under this interpretation of DADT, homosexuals cannot serve in the first instance, it is perfectly rational not to include them in benefits related to service. The same conclusion can be reached with regard to the statutes' other purposes. The exclusion of non-veterans from veterans' preferences is rationally related to the goal of attracting loyal and disciplined people to public employment — it is not irrational¹⁹⁵ for legislators to conclude that military training promotes loyalty and discipline, and, therefore, that the exclusion of non-veterans from veterans' preferences attracts more loyal and disciplined people to public employment. Finally, veterans' preference statutes' reservation of benefits for former service members is a rational means of rewarding prior service and easing former service members' transition into civilian life.

At first blush, then, it seems that veterans' preference statutes are, when interpreted as excluding homosexuals, rationally related to many of their governmental purposes. Therefore, the statutes would be constitutional.¹⁹⁶ The situation at hand, however, merits further consideration. As explained above, veterans' preference statutes distinguish between veterans and non-veterans.¹⁹⁷ They also, however, incorporate DADT, a policy that explicitly discriminates against homosexuals, as a threshold requirement for eligibility. These distinct forms of discrimination deserve distinct constitutional scrutiny — veterans' preference statutes' treatment of homosexuals should not be deemed constitutional simply because the statutes' distinction between veterans and non-veterans is permissible. On the contrary, two layers of constitutional review are necessary. Veterans' preferences' exclusion of non-veterans must be analyzed separately from their treatment of homosexuals in order to ensure that the military's discrimination against homosexuals is not inadvertently expanded into other aspects of society and law. This is especially important in the context of a rational basis review, where a single rational justification is sufficient to pass constitutional muster.¹⁹⁸

DADT has been upheld as constitutional in the military context primarily due to the deference afforded military policies by Congress and the

195. See *Kimel*, 528 U.S. at 84 (“[W]here rationality is the test, a State ‘does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.’” (quoting *Murgia*, 427 U.S. at 316)).

196. See, e.g., *id.* at 83-84 (“As we have explained, when conducting rational basis review ‘we will not overturn such [government action] unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [government’s] actions were irrational.’” (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979))).

197. More specifically, they discriminate between veterans with a sufficient discharge characterization and those without one. See *supra* notes 32-35 and accompanying text.

198. *Kimel*, 528 U.S. at 83-84.

courts.¹⁹⁹ As the courts have explained in cases analyzing its constitutionality, DADT passes the rational basis test because military personnel and members of Congress have determined that military life is so radically different from civilian life that the military cannot tolerate even apparent homosexuality without losing the ability to function in cohesive units.²⁰⁰ Veterans' preference statutes, however, implicate DADT in the process of determining eligibility for preferences in civilian public employment. Not only does civilian public employment not require the degree of unit cohesion necessary in the military,²⁰¹ but attempts at justifying discrimination against homosexuals on the basis of unit cohesion have been rejected in those areas of civilian life most military in nature — police and fire departments²⁰² — and have even been statutorily precluded in some states.²⁰³ There is no rational relationship between veterans' preference statutes' exclusion of homosexuals and unit cohesion in public employment.

Despite the fact that they serve many of their stated goals, veterans' preference statutes require closer scrutiny. Rather than simply evaluating their proffered reasons for excluding non-veterans, veterans' preference statutes' incorporation of DADT necessitates that their constitutionality also be examined in light of DADT's reasons for excluding homosexuals from service. Since veterans' preference statutes do not satisfy the rational basis test with respect to the latter, they should not pass muster under the Equal Protection Clause.

199. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981) ("The case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference.").

200. See *supra* note 118 (citing cases).

201. H.R. REP. NO. 103-200, at 287.

The committee believes that military service is a unique calling that has no counterpart in civilian society, and the primary purpose of the armed forces is to prepare for and prevail in combat when necessary. Moreover, the committee firmly believes that the maintenance of military unit cohesion—which is the key to combat capability—and the promotion of morale, welfare, and discipline must remain paramount over the desires of a single individual or group. The committee further concludes that combat capability is unalterably tied to the ability of the armed forces to foster mutual trust and confidence among service members; to ensure integrity of the system of rank and command; to facilitate assignment and worldwide deployment of service members 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.

Id.

202. See *Osburn*, *supra* note 56, at 226 ("[I]t was the shared consensus of leaders across each of the departments studied that a policy of non-discrimination had in no way compromised their ability to perform their mission." (quoting *RAND*, *supra* note 186, at 141)).

203. See *Eisenmenger*, *supra* note 120, at 235 (citing *Davis*, *supra* note 120, at 32) (noting that eleven states and the District of Columbia forbid discrimination based on sexual orientation in public employment).

V.

An analysis of the constitutionality of veterans' preference statutes' treatment of homosexuals raises a number of questions, the answers to which support the conclusion that the statutes violate the Equal Protection Clause. Veterans' preferences discriminate against homosexuals through their incorporation of DADT. However, because DADT's status as a military policy entitles it to a more lenient standard of constitutional review, its application in the civilian veterans' preference context must be examined independently from its military application. Regardless of how DADT is interpreted, this examination reveals constitutional problems. If DADT is viewed as a conditional acceptance of homosexual service members, veterans' preferences are vulnerable to "as applied" constitutional challenges because the exclusion of homosexual former service members from benefits is not rationally related to any of the statutes' stated purposes. Alternatively, if DADT is considered a prohibition on homosexual service, veterans' preferences are likewise constitutionally infirm, as there is no rational basis for excluding homosexuals from public employment benefits.

This is not to ignore, however, the dilemma created by the suggestion that veterans' preference statutes are unconstitutional. Their goals of incentivizing, rewarding, and assisting service members' return home are admirable pursuits. The unavoidable problem, however, is that homosexuals, prohibited from military service for reasons particular to the military, find themselves disadvantaged a second time by preference statutes. Just because veterans may be deserving of preferential treatment over non-veterans does not mean that civilian law can adopt otherwise unconstitutional military standards with impunity.

Although there is not one clear solution to this problem, there are some potentially constitutionally acceptable measures available in both the military and civilian contexts. If DADT is interpreted as a conditional acceptance of homosexual service members, one solution may be simply to amend DADT to require that service members discharged solely for violating DADT receive honorable discharges. While this would virtually eliminate the need for as-applied challenges to veterans' preferences, it may prove politically difficult. Putting the onus for change on DADT, rather than veterans' preferences themselves, requires the amendment of a controversial military policy for civilian purposes, a prospect that may not resonate with Congress or the military.

In lieu of seeking to change DADT, veterans' preference statutes may be able to avoid a constitutional problem by focusing less on discharge characterization to determine eligibility — a practice subject to commanding officers' broad discretion — and more on the actual grounds for discharge. DADT is too broad and discretionary to be relied upon as an accurate measure of an individual's service; as explained above, a violation of DADT does not require any knowing or conscious conduct by the offending service member. Therefore, a violation of DADT should not be considered sufficient to support a less favorable discharge characterization and, in turn, the denial of veterans' benefits.

Instead, where a service member was discharged with an unacceptable discharge characterization, veterans' preference statutes could avoid unconstitutionally discriminating against that service member by basing his or her eligibility for benefits on the reason for their unfavorable discharge. If the service member was discharged solely for violating DADT, he or she would not be excluded from receiving veterans' benefits. This would protect homosexuals discharged under DADT from commanders' broad discretion in assigning discharge characterizations, and would help ensure that benefits are available to all those who served honorably, not only to those who served honorably and did not happen to be perceived as homosexual. An additional advantage of this approach is that it does not require amending either the statutes' or DADT's standards with respect to discharge characterizations. Instead, it simply guarantees that homosexuals who earned a discharge characterization that entitles them to benefits are not denied that characterization simply because they were deemed to have violated DADT.²⁰⁴

Alternatively, if DADT is interpreted (as this Article contends it should be) as a ban on homosexual service, a workable solution is more elusive. The constitutional infirmity under this interpretation lies in the total exclusion of homosexuals from veterans' preferences, and the fact that their exclusion is not rationally related to promoting unit cohesion in public employment. Because homosexuals cannot satisfy the statutes' threshold requirement of military service in this scenario, the only means of addressing the constitutional problem is either through redefining the term "veterans" in veterans' preference statutes, or by making DADT less exclusive. The first suggestion would require expanding the definition of veterans to include groups of civil or public servants that are worthy of public employment benefits but that do not discriminate against homosexuals. This approach, however, would not only expand the number of people eligible for public employment benefits in such a way as to dilute their value, but would fail to meet the statutes' goal of rewarding former service members.

The remaining source of reform lies within DADT itself. Although DADT is constitutional as a military policy, it is clearly flawed. Until DADT is either repealed or amended, such that it does not effectively prohibit homosexual service, the term "veteran" will be synonymous with

204. This is not to say that the military should be required to maintain and divulge a discharge file for each and every service member that is removed from the military. DADT grants service members a hearing to rebut any presumption that they engaged in homosexual conduct. See 1993 DoD Directive 1332.14, E3.A1.1.8.1.2.2 ("The Service member shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence that he or she does not engage in, attempt to engage in, have a propensity to engage in, or intend to engage in homosexual acts."). The record of that hearing could be made available upon request by a service member as evidence that he or she was discharged solely for violating DADT. This would grant the service member control over whether information about his or her discharge became public, would prevent service members who were discharged for reasons other than DADT from attempting to take advantage of the exception, and would avoid creating any increased administrative costs for the military.

discrimination against homosexuals, and any attempt by civilian society to single out veterans as a class will be constitutionally suspect. Moreover, if current trends in civil rights jurisprudence continue, constitutional challenges to veterans' benefits will likely be more successful. Therefore, taking DADT as a ban on homosexual military service, veterans' preference statutes stand to survive constitutional scrutiny only if veterans' benefits are made available to groups that do not exclude homosexuals, or if DADT is amended to treat homosexuals in a way that is constitutionally acceptable outside of the military. Such measures, although seemingly drastic, may be necessary to protect homosexuals from being discriminated against twice by the same policy – once when they are rejected or removed from the military, and again when that rejection or removal precludes them from qualifying for veterans' preferences.

In short, veterans' preference statutes' incorporation of DADT renders them constitutionally infirm under the Equal Protection Clause. This is significant with respect to veterans' preferences because they are an important part of state and federal employment law. It also raises the larger question of whether any civilian legislation or policy favoring veterans is constitutional as long as DADT exists in its current form. While judicial deference to military policy may be justifiable, it should not be so easily transferred into the civilian context. Military policies like DADT must be newly examined when applied to civilian life in order to avoid unconstitutionally replicating their discriminatory effects.

