Homosexuals and the Military: Integration or Discrimination?

Troy R. Holroyd
COMMENTARIES

HOMOSEXUALS AND THE MILITARY:
INTEGRATION OR DISCRIMINATION?

Throughout the various cultures of the world, a variety of sexual practices exist. However, no sexual practice receives more attention or is more controversial than homosexuality. Historically, some societies have accepted homosexuality while others have rejected it. A few cultures view homosexuality as a right of passage on the way to manhood. The Greeks and Carthaginians encouraged homosexual behavior and considered it a military virtue by associating homosexuality with superior intellectual, aesthetic, and ethical qualities. For example, if a noble male youth in Crete did not have a male lover it spoke ill of his character. In ancient Greece, homosexual soldiers were prized as fierce fighters.

In the United States, however, society does not accept homosexual behavior. One explanation for this may be the influence of Judeo-Christian teachings. Christianity's intolerance of homosexuality is best summarized by the Bible's admonition: "Thou shalt not lie with man, as with woman, it is an abomination." The English Parliament under Henry VIII incorporated Judeo-Christian teachings about homosexuality into law by prohibiting homosexual conduct. These early English statutes formed the foundation of today's American laws proscribing homosexual conduct.

2. Id.
3. Id.
4. Id.
6. Id.
7. ARNO KARLEN, SEXUALITY AND HOMOSEXUALITY 27 (1971). The author states that "[t]he famous sacred band of Thebes' was a force of elite shock troops composed of pairs of [homosexual] lovers." Because of the belief that men would fight hard in order to impress their lovers, these troops were paired in fighting units in order to enhance fighting ability. Id.
8. Tharpes, supra note 1, at 538.
9. Id. (citing a "flagrant Judeo-Christian condemnation of all forms of homosexual expression"); see also Stodola, supra note 5, at 688-89.
10. Stodola, supra note 5, at 689 (citing Leviticus 18:22).
11. Id.; see ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN FEMALE 483
Discrimination based upon sexual orientation affects almost every aspect of a homosexual's life. Because of their sexual orientation, homosexuals have been barred from employment in the public, private, governmental, and military sectors of American society. However, there is no area where homosexuals have been more severely discriminated against than in the United States military. According to current policy, homosexuals are banned from the United States armed forces and, if discovered, are discharged through either courts-martial or administrative proceedings.

(1953) ("There appears to be no other major culture in the world in which public opinion and the statute law so severely penalize homosexual relationships as they do in the United States today.").

12. Tharpes, supra note 1, at 538.


15. See Singer v. United States Civ. Serv. Comm'n, 530 F.2d 247 (9th Cir. 1976) (holding that Civil Service Commission's dismissal of government employee who openly advertised his homosexuality was proper and not arbitrary and capricious), vacated, 429 U.S. 1034 (1977); McConnell v. Anderson, 451 F.2d 193 (8th Cir. 1971) (holding that university's refusal to employ activist homosexual is not arbitrary and capricious), cert. denied, 405 U.S. 1046 (1972); Anonymous v. Macy, 398 F.2d 317 (5th Cir. 1968) (holding that dismissal of post office employee for alleged homosexual acts is constitutional), cert. denied, 393 U.S. 1041 (1969); Dew v. Halaby, 317 F.2d 582 (D.C. Cir. 1963) (holding that removal of an Air Force veteran for alleged preemployment homosexual acts was not arbitrary and capricious), cert. dismissed, 399 U.S. 951 (1964).

16. For cases holding that the military's policy of discharging homosexuals is constitutional, see infra note 20.

17. Rivera, supra note 14, at 837. The inscription on the tombstone of Leonard Matlovitch, a gay Vietnam veteran, reads: "When I was in the military they gave me a medal for killing two men and a discharge for loving one." Mary Jane Solomon, Where the Somebodies Are Buried, WASH. POST, Oct. 25, 1991, Weekend Mag., at 8.

18. Rivera, supra note 14, at 837; see also Nick Bartolomeo, Pentagon Says There's "No Change" in Policy on Gays in the Military, WASH. BLADE, Jan. 18, 1991, at 1, 9. Under a "Stop Loss" policy instituted by President Bush, the military told Donna Lynn Jackson, an admitted lesbian Army Reserve Support Specialist, that she would not be discharged and would have to serve in Operation Desert Storm despite her revelation that she was a lesbian. However, upon Jackson's return from Saudi Arabia, the military told her that she would prob-
Department of Defense policy regarding homosexuals states:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale; to foster mutual trust and confidence among service members, to ensure the 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 services; and to prevent breaches of security.¹⁹


**U.S. Army**
- U.S. Army Regulation 635-200
- SECNAVINST 1900.9C (Policy for members of naval service involved in homosexual conduct.)
  - SECNAVINST 1920.4A (Enlisted Administrative Separations)
  - SECNAVINST 1920.6A (Administrative Separations of Officers)
  - NAVMILPERSCOMINS 1910.1C
  - MILPERSMAN 3630400 (Separation by reason of homosexuality)

**U.S. Marine Corps**
- Marine Corps Separation and Retirement Manual, 1900-16C, paragraph 6207 (Officers and Enlisted)

**U.S. Air Force**
- Air Force Regulation 39-10 (Administrative Discharge of Airmen), Ch. 5, § 6.
- Air Force Regulation 36-2 (Separation of Officers), Ch. 3, ¶ 4.

**U.S. Coast Guard**
- Personnel Manual Articles:
  - 12-B-16 discharge for unsuitability
  - 12-B-18 discharge for homosexuality
  - 12-B-33 discharge processing

*Id.* at A13.
With little success, homosexuals have tried a variety of methods\textsuperscript{20} to invalidate regulations barring them from serving in the United States military. This Comment will examine the constitutionality of military regulations under various theories: procedural due process, substantive due process, the First Amendment, the fundamental right strand of equal protection analysis, and the suspect class strand of equal protection analysis. In light of precedent, this Comment argues that to successfully attack these regulations, homosexuals must persuade courts to employ the suspect class strand of equal protection analysis. Specifically, to invalidate regulations of this nature, homosexuals must demonstrate the constitutional criteria for recognition as a suspect class. If this strategy proves successful, the Supreme Court will be compelled to apply strict scrutiny analysis to regulations that discriminate against homosexuals. This Comment suggests that when the Court applies strict scrutiny it should find these regulations unconstitutional because they fail to further a compelling governmental interest.

I. PROCEDURAL DUE PROCESS

The Fifth Amendment to the Constitution, which applies to the federal government, provides that “no person shall . . . be deprived of life, liberty, or property, without due process of law.”\textsuperscript{21} The Fourteenth Amendment, which applies to the states, dictates: “nor shall any state deprive any person of life, liberty, or property without due process of law.”\textsuperscript{22} When a government attempts to deprive an individual of life, liberty, or property, procedural due process requires that the individual be granted an opportunity to be heard.\textsuperscript{23} In the case of a discharge from the military, procedural due process protection attaches when a person has been deprived of a property or

\textsuperscript{20} See, e.g., Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir. 1989) (rejecting First Amendment and equal protection attacks on regulations barring homosexuals from the military), cert. denied, 110 S. Ct. 1296 (1990); Woodward v. United States, 871 F.2d 1068 (Fed. Cir. 1989) (rejecting right to privacy attack on regulations barring homosexuals from the military), cert. denied, 110 S.Ct 1295 (1990); Rich v. Sec’y of the Army, 735 F.2d 1220 (10th Cir. 1984) (rejecting procedural due process attack on regulations barring homosexuals from the military); Dronenburg v. Zech, 741 F.2d 1388 (D.C. Cir. 1984) (rejecting right to privacy and equal protection attack on regulations barring homosexuals from the military); Beller v. Middendorf, 632 F.2d 788 (9th Cir. 1980) (rejecting substantive due process attack on regulations barring homosexuals from the military), cert. denied, 452 U.S. 905 (1981).

\textsuperscript{21} U.S. CONST. amend. V.

\textsuperscript{22} U.S. CONST. amend. XIV.

\textsuperscript{23} LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-7, at 664 (2d ed. 1988); see also, Mathews v. Eldridge, 424 U.S. 319, 332 (1976) (“Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the due process clause of the Fifth or Fourteenth Amendments.”); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter J., concurring) (stating that procedural due process involves “the right to be heard
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liberty interest. Therefore, the inquiry in a procedural due process claim is whether the government deprived the plaintiffs of a property or liberty interest within the scope of the Fifth or Fourteenth Amendments.24

In the 1980s, two cases exemplified judicial reluctance to interfere with the discharge of homosexuals from the military on procedural due process grounds. In Belier v. Middendorf25 and Rich v. Secretary of the Army,26 the Court of Appeals for the Federal Circuit held that discharge proceedings and the ultimate separations from the military did not deprive the plaintiffs of either property or liberty interests; thus, the courts refused to afford procedural due process protection.

In Belier, an action was brought by Navy personnel challenging the constitutionality of a Navy regulation that ordered the discharge of those who engage in homosexual conduct.27 The Ninth Circuit Court of Appeals first examined whether the discharge deprived the plaintiffs of their property interests in continued employment. The court held that once the plaintiffs admitted to performing homosexual acts, the Navy's regulations requiring the termination of homosexuals divested them of any property interest in continued employment.28 After admitting to a basis for dismissal, the plaintiffs renounced any "legitimate claim of entitlement" to employment.29

Similarly, in Rich, the plaintiff, an admitted homosexual, alleged that the government deprived him of a property interest in his position as a military serviceman by discharging him from the Army because of his sexual orientation.30 As in Belier, the Rich court held that the "plaintiff has no property right in continued military service."31 Once the plaintiff admitted his homosexuality, Army regulations required discharge, and the plaintiff no longer had a property interest in the continuance of his career.32 In addition, the court acknowledged that it is "well established that there is no right to enlist before condemned to suffer grievous loss of any kind."); Grannis v. Ordean, 234 U.S. 385, 394 (1914) ("The fundamental requisite of due process of law is the opportunity to be heard.").

24. Board of Regents v. Roth, 408 U.S. 564 (1972) (holding that there is no Fourteenth Amendment property interest in reemployment for nontenured professor).

25. 632 F.2d 788, 810 (9th Cir. 1980) (rejecting substantive due process attack on regulations barring homosexuals from the military), cert. denied, 452 U.S. 905 (1981).

26. 735 F.2d 1220, 1227 (10th Cir. 1984) (rejecting procedural due process attack on regulations barring homosexuals from the military).

27. 632 F.2d at 792.

28. Id. at 805.

29. See Perry v. Sinderman, 408 U.S. 593, 599 (1972) (holding that state university professor has a Fourteenth Amendment right to a hearing on the cause for nonrenewal of his contract); Board of Regents v. Roth, 408 U.S. 564, 569-70 (1972) (holding that there is no Fourteenth Amendment property interest in reemployment for professor with no tenure).

30. Rich v. Secretary of the Army, 735 F.2d 1220, 1226 (10th Cir. 1984).

31. Id.

32. Id.
in this country's armed services.\textsuperscript{33} Therefore, because military enlistment is not a property interest, a procedural due process challenge to discriminatory military regulations will not prevent the discharge of an admitted homosexual.

The second element examined in a procedural due process challenge is whether a plaintiff has been deprived of a liberty interest.\textsuperscript{34} In order to demonstrate deprivation of a liberty interest, a plaintiff must show that the government’s action “might seriously damage . . . [the plaintiff’s] standing and associations in his community”\textsuperscript{35} and result in “a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities.”\textsuperscript{36} In \textit{Beller}, the court held that because honorable discharge documentation does not contain the reason for discharge,\textsuperscript{37} no stigma attaches, and the plaintiff’s ability to obtain employment is not impaired. Therefore, no liberty interest is affected.

In \textit{Rich v. Secretary of the Army}, Army records that had been disclosed to the public mentioned the plaintiff’s homosexuality.\textsuperscript{38} The court found that this information would neither stigmatize the plaintiff nor jeopardize future employment because he had consented to its release.\textsuperscript{39}

\textit{Rich} and \textit{Beller} illustrate that courts will not hold military regulations mandating the discharge of homosexuals unconstitutional on procedural due process grounds. Therefore, to successfully challenge such regulations on due process grounds, plaintiffs must attack on substantive due process grounds.

\textsuperscript{33} \textit{Id.} (citing Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981)).

\textsuperscript{34} \textit{See} Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (holding that a state law forbidding the teaching of a foreign language to any child who has not passed the eighth grade invades the liberty guaranteed by the Fourteenth Amendment). The Supreme Court describes a liberty interest as follows:

Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

\textit{Id.; see also} Miller v. City of Mission, 705 F.2d 368, 373 (10th Cir. 1983) (describing a liberty interest as (1) the protection of one's good name, reputation, honor, and integrity; and (2) freedom to take future employment opportunities).

\textsuperscript{35} Board of Regents v. Roth, 408 U.S. 564, 573 (1972) (holding that there is no Fourteenth Amendment property interest in reemployment for professor with no tenure).

\textsuperscript{36} \textit{Id.}


\textsuperscript{38} Rich v. Secretary of the Army, 735 F.2d 1220, 1227 (10th Cir. 1984).

\textsuperscript{39} \textit{Id.}
II. SUBSTANTIve DUE PROCESS

The Fifth and Fourteenth Amendments provide individuals with substantive due process protection from governmental deprivation of fundamental liberties. Substantive due process requires not only that legislation be fair and reasonable in its content but also in its application.

When challenging regulations that bar homosexuals from the military, plaintiffs have argued that the line of privacy cases applies to homosexual behavior. More precisely, they contend that courts should extend the right to privacy, which recognizes an individual's autonomy in private sexual matters, to protect consensual homosexual conduct. For example, in *Dronenburg v. Zech*, a twenty year-old petty officer admitted that he was a homosexual and had engaged in homosexual conduct. Because these actions violated Navy regulations, he was discharged. Dronenburg argued that mandatory discharge for homosexual conduct violated his constitutional right to privacy. He cited *Griswold*, *Eisenstadt*, and *Roe*, arguing that the government should not interfere with personal decisions pertaining to one's own body. Relying on the principles of privacy set forth in these cases, Dronenburg argued that "private consensual homosexual activity must be held to fall within the zone of constitutionally protected privacy."

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40. *See* *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding a fundamental right to privacy in the marital relationship); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (finding a fundamental right to raise and educate children according to parental wishes); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923) (finding that parents have a fundamental right to have their children educated as they choose). Subsequent decisions broadened the rights of privacy to include other situations and individuals. *See* *Roe v. Wade*, 410 U.S. 113, 153 (1973) (extending the right to privacy to include a woman's right to choose whether or not to abort a pregnancy); *Eisenstadt v. Baird*, 405 U.S. 438, 454-55 (1972) (extending the right to privacy beyond the marital relationship and recognizing the right to distribute contraceptives to unmarried adults).


42. *See* *Dronenburg v. Zech*, 741 F.2d 1388, 1391 (D.C. Cir. 1984) (rejecting right to privacy and equal protection attack on regulations barring homosexuals from the military); *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980) (rejecting substantive due process attack on regulations barring homosexuals from the military), *cert. denied*, 452 U.S. 905 (1981).

43. 741 F.2d at 1391; 632 F.2d at 807.

44. 741 F.2d at 1389.

45. *Id.*

46. *Id.* at 1391.


50. 741 F.2d at 1391.

51. *Id.*
Responding to the plaintiff’s argument, Judge Robert Bork cited Doe v. Commonwealth’s Attorney for Richmond. The district court in Doe found that the right to privacy did not extend to private, consensual homosexual conduct because it bore no relation to marriage, the sanctity of the home, procreation, or family life. In Dronenburg, Judge Bork stated, “The Court has listed as illustrative of the right of privacy such matters as activities relating to marriage, procreation, contraception, family relationships, and child rearing and education. It need hardly be said that none of these covers a right to homosexual conduct.” The court observed that the judiciary does not possess the power to make law and therefore should not create new rights that are not firmly rooted in the Constitution. As such, it held that because there is no constitutional right to engage in homosexual conduct, the court has no authority to create one.

In 1986, Bowers v. Hardwick foreclosed the possibility of an extension of the right to privacy to homosexual conduct. In Bowers, the Supreme Court recognized that the right to privacy is limited to marriage, family, and procreative choice and does not extend to homosexual acts. Therefore, there is no fundamental right to engage in homosexual sodomy. Bowers employed the Dronenburg reasoning solidifying the constitutionality of military regulations discharging homosexuals from the armed services.

Woodward v. United States relied on Bowers and rejected a Navy officer’s claim “that homosexuality is constitutionally protected under the right of privacy.” The Court of Appeals for the Federal Circuit held that there was no fundamental constitutional right for homosexuals to engage in consensual sodomy. The court held: “Protection of homosexuality as a

52. 425 U.S. 901 (1976) (holding that a Virginia statute that criminalizes private homosexual conduct is constitutional).
54. 741 F.2d at 1395-96.
55. Id. at 1396.
56. Id.
57. Id. at 1397.
58. 478 U.S. 186 (1986) (holding that there is no constitutional right to engage in homosexual sodomy).
59. Id. at 190-91.
60. Id. at 191. See Powell Regrets Backing Sodomy Law, WASH. POST, Oct. 26, 1990, at A3. Retired Supreme Court Justice Powell told a group of law students that his 1986 vote in Bowers, which supported the majority’s holding that consensual homosexual sodomy is a criminal offense, was probably “a mistake.”
62. Id. at 1075.
63. Id.
private right . . . is not an apparent or necessary result that can be reached from the Supreme Court's precedent."

The fundamental right to privacy argument is weakened further by the courts' insistence that there are fewer privacy expectations in the military than in the civilian world. In *Ben-Shalom v. Marsh* the plaintiff, a sergeant in the Army Reserve, was discharged for being an admitted lesbian. The court in *Ben-Shalom* stated that "'[t]he privacy expectations of a civilian, wherever their outer limit may be, cannot be compared to the substantially more limited privacy expectations accompanying military life.'" Hence, homosexuals cannot rely on the established constitutional rights of privacy to protect them from regulations mandating their discharge from the military.

III. THE FIRST AMENDMENT

The discharge of admitted homosexuals from the military, and regulations upon which the discharge is based, may be challenged under the First Amendment rights of free speech and association. In the military, however, freedom of speech is severely limited and the First Amendment is not a useful tool in the homosexual's fight to serve. The Supreme Court has repeatedly recognized the military's special need to restrict its members' First Amendment rights. In *Brown v. Glines*, the Court stated: "Speech

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64. Id.
65. 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990). *See* Lou Chibbaro Jr., *Army Vet Wants Pentagon to Establish an All-Gay Regiment*, WASH. BLADE, NOV. 16, 1990, at 9. Lesbian Army veteran Miriam Ben-Shalom recently sent a letter to the Pentagon requesting that an all homosexual regiment serve active duty in the Persian Gulf. *Id.* She wanted the Pentagon to reactivate the Army's 54th Massachusetts Volunteer Regiment, a unit famous for its involvement in the Civil War because it consisted of freed American slaves. *Id.* In her call to arms, she said, "the 54th is the regiment of choice because it, too, was a segregated regiment of African-American men, freed slaves, who were told, as we [homosexuals] are, that they were unfit to serve, a threat to morale and good order and security." *Id.* at 9. The Pentagon has stated that it has no plans to change its policy towards homosexuals. *Id.*
66. 881 F.2d at 456.
67. *Id.* at 465.
68. U.S. CONST. amend. I.
69. *See* Brown v. Glines, 444 U.S. 348, 352-54 (1980) (finding that requiring members of the Air Force to obtain approval from their commanders before circulating petitions on Air Force bases does not violate the First Amendment); Parker v. Levy, 417 U.S. 733, 758-59 (1973) (holding that the First Amendment overbreadth argument is not applicable to Articles 133 and 134 of the Uniform Code of Military Justice (UCMJ)).
70. *See* United States v. Priest, 21 C.M.A. 564, 570 (1972), 45 C.M.R. 338, 344 (1972). The Court of Military Appeals stated that "'[d]isrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community, for it does not directly affect the capacity of the Government to discharge its responsibilities." *Id.* However, in the military contemptuous speech or speech advocating change can damage the military's ability to carry
that is protected in the civil population may . . . undermine the effectiveness of response to command . . . . Speech likely to interfere with these vital prerequisites for military effectiveness therefore can be excluded from a military base."\textsuperscript{72}

In \textit{Ben-Shalom v. Marsh},\textsuperscript{73} the United States Court of Appeals for the Seventh Circuit addressed a claim that a discharge for admitting homosexuality violated the plaintiff's First Amendment right of free speech.\textsuperscript{74} Because the only evidence of the plaintiff's homosexuality was her own admission, she argued that the Army regulation barring homosexuals from the military "had the effect of chilling her freedom of expression as she would no longer be able to make statements regarding her sexual orientation, statements that she would otherwise be free to make."\textsuperscript{75} The court explained that the military world is very different from the civilian world, and therefore speech that threatens discipline and readiness is not allowed.\textsuperscript{76}

Homosexuals are likely to encounter difficulty in challenging regulations on First Amendment grounds because of judicial deference to military decisions.\textsuperscript{77} In \textit{Goldman v. Weinberger},\textsuperscript{78} an Air Force officer challenged a regulation that prohibited the indoor display of religious garb on the grounds that the regulation infringed his rights under the First Amendment's free exercise of religion clause.\textsuperscript{79} The Supreme Court upheld this restriction and stated that "when evaluating whether military needs justify a particular restriction . . . courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular mili-

\begin{itemize}
\item \textsuperscript{71} 444 U.S. 348 (1980) (finding that requiring members of the Air Force to obtain approval from their commanders before circulating petitions on Air Force bases does not violate the First Amendment).
\item \textsuperscript{72} \textit{Id.} at 354 (citations omitted).
\item \textsuperscript{73} 881 F.2d 454 (7th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 1296 (1990).
\item \textsuperscript{74} \textit{Id.} at 458-60.
\item \textsuperscript{75} \textit{Id.} at 457.
\item \textsuperscript{76} \textit{Id.} at 460 (citing Brown v. Glines, 444 U.S. 348, 354 (1980)). The court held that admitting one's homosexuality constitutes speech that will damage the ability of the military to carry out its mission because it will affect heterosexuals, damage morale, and detract from the cohesiveness of the fighting unit. \textit{Id.} at 460-61.
\item \textsuperscript{77} \textit{See id.} at 461 ("[T]he branches of the military have great leeway in determining what policies will foster the military mission, and courts will rarely second-guess those decisions.").
\item \textsuperscript{78} 475 U.S. 503 (1986).
\item \textsuperscript{79} \textit{Id.} at 506.
\end{itemize}
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The Ben-Shalom court explained: "This deference means, among other things, that policies that might not pass constitutional muster if imposed upon a civilian population will be upheld in the military setting." In addition to relying on the military's need to curtail the exercise of free speech and the deference traditionally afforded military decisions, courts have refused to recognize that the regulations discharging admitted homosexuals violate the First Amendment. For example, the Ben-Shalom court concluded that "Ben-Shalom's First Amendment argument fails because it is not speech per se that the regulation against homosexuality prohibits." Under the regulation, the plaintiff was free to discuss homosexuality and complain about the military's policy regarding homosexuals. She was also free to associate with homosexuals. However, the regulation prohibited her admission of homosexuality. The court reasoned that although Ben-Shalom's admission was speech, it was primarily an act of identification, and "it is the identity that makes her ineligible for military service, not the speaking of it aloud." In Rich v. Secretary of the Army, a plaintiff brought similar claims of First Amendment violations. In accord with Ben-Shalom, Rich held that the military regulations discharging admitted homosexuals did not directly

80. Id. at 507. The reason this regulation was in effect was to provide for uniformity in military attire. Id.
81. Ben-Shalom, 881 F.2d at 461 (stating that the application of the Constitution is different in a military setting than in a civilian setting because the military must protect and defend the United States); see also Goldman v. Weinberger, 475 U.S. 503, 507 (1986) (stating that in a First Amendment setting the "military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment."); Chappell v. Wallace, 462 U.S. 296, 300 (1983) ("[C]ompliance with military procedures and orders must be virtually reflex with no time for debate or reflection."); Brown v. Glines, 444 U.S. 348, 354 (1980) (stating that unlike civilians, military personnel must be prepared to act on the battlefield without question).
82. 444 U.S. at 354; Parker v. Levy, 417 U.S. 733, 743-44 (1974) (holding that First Amendment overbreadth argument is not applicable to Articles 133 and 134 of the Uniform Code of Military Justice (UCMJ)).
83. See supra notes 80-81 and accompanying text.
84. See Ben-Shalom, 881 F.2d at 458-62; Rich v. Secretary of the Army, 735 F.2d 1220, 1228-29 (10th Cir. 1984) (rejecting procedural due process attack on regulations barring homosexuals from the military).
85. 881 F.2d at 462.
86. Id.
87. Id.
88. Id.
89. Id.
90. Rich v. Secretary of the Army, 735 F.2d 1220, 1228-29 (10th Cir. 1984).
91. Id. at 1228 (discussing plaintiff's allegations that the Army's regulation infringed upon his First Amendment rights of free speech and free association with other homosexuals).
curtail freedom of speech or association. As one commentator noted:

All of these courts . . . have drawn a distinction between the words spoken and the reality they represent—the expression is protected, the lifestyle is not. This distinction can be defended by reference to a vision of the [F]irst [A]mendment that protects homosexuality only as a competitor in a necessary free marketplace of ideas.

In summary, the First Amendment is not an effective weapon in homosexuals' fight to enter and remain in the military. For many reasons "[F]irst Amendment jurisprudence cannot accurately conceptualize or adequately protect all aspects of gay identity." First, the government curtails freedom of speech on all subjects in the military. Second, the courts show deference to military decisions to curtail speech. Third, courts state that admitting one's homosexuality is not speech per se, nor is it protected by the First Amendment. Instead, it constitutes a form of identification.

IV. EQUAL PROTECTION

Despite significant constitutional impediments, homosexuals may have a realistic expectation of constitutional protection under the equal protection clause of the Fifth Amendment. If homosexuals are found to be a "suspect class," desiring of enhanced constitutional protection, the Supreme Court will apply a strict scrutiny analysis to regulations barring their integration into the military. Under the equal protection provisions of the Fifth and Fourteenth Amendments, no government official, agent, or entity may deprive any person of the equal protection of the laws. Homosexuals and

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92. Id. at 1229.
94. Id. at 1296. The author bases his assertion on the decision in Mathews v. Marsh, 755 F.2d 182 (1st Cir. 1985), where the court ordered reenrollment of a Reserve Officer Training Corps (ROTC) cadet that declared she was a lesbian. Even though the court decided in favor of the plaintiff on First Amendment grounds, "the court left unanswered how much expression beyond pure speech would be protected by the First Amendment." Id.
96. See infra text and accompanying notes 128-31 (describing the elements necessary for suspect class identification and protection by the Court's application of strict scrutiny to discriminatory laws).
97. Denise Dunigan, Note, Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military?, 42 OKLA. L. REV. 273, 274 (1989); TRIBE, supra note 23 § 16-13 at 1465 ("The core idea of equal protection strict scrutiny . . . is to subject governmental choices to close inspection in order to preserve substantive values of equality and autonomy.").
98. U.S. CONST. amends. V, XIV. The Fourteenth Amendment of the Constitution affords equal protection to citizens and is incorporated into the Fifth Amendment which applies
heterosexuals in the military are similarly situated\(^9\) individuals. However, homosexuals are treated differently by being excluded from serving in the military. Therefore, homosexuals who are barred from serving in the military may have a legitimate claim that they are being denied equal protection of the laws.\(^{100}\)

### A. Two Strands of Equal Protection Analysis

There are two strands to equal protection analysis. The first is the fundamental rights strand and the second is the suspect class strand.\(^{101}\)

Under the fundamental rights strand, a court examines the constitutionality of a statute by using strict scrutiny to determine whether the discriminatory nature of a statute impinges on a specially protected constitutional right.\(^{102}\) Under the suspect class strand, courts apply strict scrutiny analysis when examining the constitutionality of a statute that discriminates against a
When applying strict scrutiny, a court will uphold a discriminatory classification only if it is necessary to promote a compelling state interest.\textsuperscript{104} If the classification does not burden a fundamental right or the class is not suspect, the courts will apply a more deferential, rational basis test.\textsuperscript{105} The rational basis test requires only that the classification bear "some rational relationship to legitimate state purposes."\textsuperscript{106} Under a rational basis test, courts presume that a rational relationship exists between a statute and the legitimate goals of the state. Therefore, the challenger has a heavy burden of proof to show that a rational relationship does not exist.\textsuperscript{107} This burden is heavy because under rational basis scrutiny the court defers to the legislature.\textsuperscript{108} If a law neither violates a fundamental right, nor discriminates against a suspect class, the court will defer to the legislature because the law was presumably enacted after informed deliberation and meaningful debate. Additionally, the legislature is theoretically the branch of government which is the most responsive to the will of the people.

\textbf{B. Bowers v. Hardwick and Equal Protection}


\textsuperscript{103} Loving v. Virginia, 388 U.S. 1, 11 (1967) (invalidating a law on equal protection grounds that prohibited interracial marriages).

\textsuperscript{104} City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding that mental retardation is not a quasi-suspect classification). See infra note 158 and accompanying text.

\textsuperscript{105} Tribe, supra note 23, \$ 16-6, at 1451. There is also a middle tier of equal protection analysis that falls between rational basis and strict scrutiny. \textit{Polyvou}, supra note 101, at 221. Intermediate level scrutiny requires that a discriminatory statute substantially relates to an important state interest or it will be struck down. \textit{Polyvou}, supra note 101, at 268-69. Intermediate scrutiny is most often applied to gender and illegitimacy cases. See \textit{Mills v. Habluetzel}, 456 U.S. 91 (1982) (applying intermediate scrutiny to illegitimacy classification); \textit{Craig v. Boren}, 429 U.S. 190 (1976) (applying intermediate scrutiny to gender classification); \textit{Frontiero v. Richardson}, 411 U.S. 686 (1972) (applying intermediate scrutiny to gender classification).

\textsuperscript{106} San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (holding that wealth is not a suspect classification and education is not a fundamental right).

\textsuperscript{107} Under rational basis review, "[t]he traditional deference both to legislative purpose \textit{and} to legislative selections among means continues, on the whole, to make the rationality requirement largely equivalent to a strong presumption of constitutionality." Tribe, supra note 23, \$ 16-2, at 1442-43. For examples of rational basis review, see id., \$ 16-2, at 1442-43 n.18.

\textsuperscript{108} Separation of powers principles motivate the Court to be deferential to the decisions of the legislature. See, e.g., Cass R. Sunstein, \textit{Public Values Interests, and the Equal Protection Clause}, 1982 SUP. CT. REV. 127, 142 n.59 (stating that because of separation of powers concerns, the Court is reluctant to intervene with the legislature's decisions).
Homosexuals and the Military

Protection to homosexuals. Holding that there is no fundamental right to homosexual sodomy between consenting adults, the Bowers decision effectively made it impossible for homosexuals to derive protection from the fundamental right strand of equal protection. However, Bowers did not foreclose the suspect class strand of equal protection from protecting homosexuals from discriminatory military regulations. In Bowers, the Court limited its holding to the substantive due process issue—whether homosexual sodomy between consenting adults was a fundamental right protected by the right to privacy. The Bowers Court never addressed the issue of whether homosexuals constitute a suspect class. Bowers “dealt only with the constitutional status of laws that criminalize sodomy, and only considered the validity of those laws in the context of a substantive due process challenge.”

Even though the Bowers analysis and holding were limited to a substantive due process issue, Ben-Shalom v. Marsh applied Bowers in its equal protection analysis of the regulation calling for Ben-Shalom’s discharge. The Ben-Shalom court stated that “[i]f homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.”

Bowers should not be viewed as foreclosing the possibility that homosexuals constitute a suspect class. Its holding “should not be expanded into an adjudication of homosexuals’ equal protection status . . . . [T]he constitutionality of laws against homosexual acts [like sodomy in Bowers] does not neces-

109. 478 U.S. 186 (1986) (holding that there is no constitutional right to engage in homosexual sodomy).
110. Id. at 191.
112. 478 U.S. at 190. Under a due process analysis like that used in Bowers, the focus is on historical practice and tradition. However, equal protection analysis takes a different focus. Equal protection “protects disadvantaged groups of individuals from governmental discrimination, even where the discrimination is enshrined in a deep historical tradition.” Jantz v. Muci, 759 F. Supp. 1543, 1546 (D. Kan. 1991) (holding that a government classification based on an individual’s sexual orientation is suspect). Bowers established that homosexual sodomy was not an historically protected right, but the Court did not address the issue of whether discrimination against homosexuals is constitutional. Id. at 1546.
113. Id.
114. Note, Developments, supra note 111, at 1568.
116. Id. at 464.
117. Id.
sarily imply the constitutionality of laws discriminating against homosexuals [like the regulations in the military requiring the discharge of homosexuals]."\textsuperscript{118} Therefore, despite the \textit{Bowers} holding, an equal protection analysis should be available to individuals challenging military regulations banning homosexuals.

\textbf{C. Futility of Rational Basis Test and Military Regulations}

If courts do not declare that homosexuals are a suspect class, they will only apply minimal scrutiny to discriminatory military regulations.\textsuperscript{119} Minimal scrutiny requires only that the regulation further some legitimate state interest.\textsuperscript{120} Courts are free to hypothesize about any possible legitimate state interests, and thus any regulation receiving rational basis review will pass constitutional muster.\textsuperscript{121} Commentators argue that a rational basis review is used "merely as a rubber-stamp . . . .\textsuperscript{122} Under the rational relationship test, the court will defer to the legislature's decisions.\textsuperscript{123} Therefore, a homosexual challenging a discriminatory regulation will bear the difficult burden of proving that a regulation has "no rational basis for any possible legitimate

\textsuperscript{118} Rich, \textit{supra} note 111, at 793. ("This situation is analogous to that in the case of \textit{Robinson v. California} [370 U.S. 660 (1962)]. In \textit{Robinson}, the Supreme Court held that drug use (conduct) could be criminalized, but that drug addiction (the desire to engage in the conduct) could not be criminalized.").

\textsuperscript{119} See Ben-Shalom v. Marsh, 881 F.2d 454, 463-64 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).


\textsuperscript{121} Miller, \textit{supra} note 120, at 808; see also Steffan v. Cheney, 60 U.S.L.W. 2389, 2389 (D. D.C. Dec. 9, 1991) (applying rational basis review to regulations barring homosexuals from the military, the court held that protecting the armed forces from AIDS is a legitimate governmental interest). This is the first time that the AIDS epidemic has been used as a rational basis to support the military's homophobic regulations. However, because the AIDS epidemic is spread not only by homosexuals but also heterosexuals, it falls short of a genuine rational basis for banning homosexuals from the armed forces.

\textsuperscript{122} \textit{Id.}

\textsuperscript{123} \textit{See, e.g.,} Exxon Corp. v. Eagerton, 462 U.S. 176, 196 (1983) (upholding royalty owner exemption from oil and gas severance tax because the legislature "could reasonably have determined" that an exemption would encourage investments into oil or gas production); Julia K. Skullens, Note, \textit{Thus Far and No Further: The Supreme Court Draws the Outer Boundary of the Right to Privacy}, 61 TUL. L. REV. 907, 926 n.153 (1986-87); see also McGinnis v. Royster, 410 U.S. 263, 270 (1973) (stating that a government regulation will generally be presumed to be valid under equal protection analysis as long as the classification drawn by the regulation "rationally furthers some legitimate, articulated state purpose").
good."

Because deference to the legislature is given under a rational basis review, homosexuals must be recognized as a suspect class in order to receive enhanced judicial review of discriminatory military regulations. If homosexuals are a suspect class, courts will examine legislative decisions more closely, applying strict scrutiny, and thereby requiring the presence of a compelling state interest to justify discrimination against a homosexual.

V. AN ARGUMENT FOR SUSPECTNESS

The Supreme Court rarely designates new suspect classes. Homosexuals share the same characteristics as race, yet courts have given no convincing reasoning why suspect class status has been denied to homosexuals.

The Supreme Court's refusal to grant homosexuals suspect class status is unfounded after examining their status in light of the traditional suspect class characteristics. The Court has recognized that the following factors indicate a suspect class: whether the group has suffered a history of discrimination, whether the class is a "discrete and insular minority," whether the classification is based on an "immutable" characteristic, and whether the classification is based upon incorrect stereotypes.

Each of these characteristics applies to homosexuals. First, homosexu-

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124. Miller, supra note 120, at 808 ("In virtually every case in which rationality review is the standard, the Court upholds the challenged law.").

125. See infra notes 158-59 and accompanying text for interpretation of the "necessary to further a compelling state interest" language.

126. Dunnigan, supra note 97, at 288.

127. POLYVIOU, supra note 101, at 239-40. But in Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990), the court stated that suspect class status need not be given to homosexuals because homosexual conduct may constitutionally be criminalized. However, this is no longer a valid reason to deny homosexuals suspect class status because homosexual conduct has been decriminalized in 25 states. SARBIN & KAROLS, supra note 19, at A-21.

128. See Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976) (declining to hold that age classifications are suspect).

129. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (Stone, J.) (stating that the passing of the Filled Milk Act of Mar. 4, 1923, is within the scope of congressional power to regulate interstate commerce and consistent with due process); Plyler v. Doe, 457 U.S. 202, 216 n.14 (1981) (stating that class exclusion from the political process may be a factor in finding a class to be suspect).

130. See Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (holding that differential treatment to male and female members of the military for the sole purpose of achieving administrative convenience, violates the due process clause of the Fifth Amendment).

131. Id. at 685 (Brennan, J.).

132. See Watkins v. United States Army, 847 F.2d 1329, 1345-49 (9th Cir. 1988), cert. denied, 111 S. Ct. 384 (1990); see also supra note 111 and accompanying text.
als have historically been subject to hostility and discrimination. They face dismissal from employment if their sexual orientation is discovered. They are barred from serving in the military and have continually been precluded from raising children. As the federal district court concluded in High Tech Gays v. Defense Industrial Security Clearance Office, "lesbians and gay men have been the object of some of the deepest prejudice and hatred in American society."

Second, homosexuals constitute a "discrete and insular minority." They lack the numbers and the political power to effect changes in the laws. The existence of laws that discriminate against homosexuals evidences their lack of political power. Widespread discrimination against homosexuals has impaired the political recourse of their community in state and local legislatures, as well as in Congress. Because of society's contempt for homosexuality, homosexuals are generally unwilling to declare their homosexuality or seek public office.

Third, regulations discriminating against homosexuals are based upon an "immutable" characteristic. An individual does not choose to be homo-

134. Id. at 24.
135. Note, Developments, supra note 111, at 1567.
137. Id. at 1369.
138. Id. at 1370. See supra note 90.
139. Id. at 1370. In High Tech Gays v. Defense Industrial Security Clearance Office, 895 F.2d 563 (9th Cir. 1990), the Ninth Circuit Court of Appeals cited antidiscrimination provisions in three states, an executive order in New York, and some local ordinances and stated that "homosexuals are not without political power; they have the ability to and do attract the attention of the lawmakers, as evidenced by such legislation." Id. at 574. However, piecemeal successes in local legislation are not proof of political power and not a reason to deny homosexuals the benefit of heightened scrutiny. Jantz v. Muci, 759 F. Supp. 1543, 1550 (D. Kan. 1991). The Jantz court stated that "[t]he existence of isolated, local anti-discrimination successes is clearly insufficient to deprive homosexuals of the status of a suspect classification." Id. If blacks, who are protected by three constitutional amendments; major federal Civil Rights Acts of 1866, 1870, 1871, 1875, 1957, 1960, 1964, 1965, and 1968; and antidiscrimination laws in 48 states are politically powerless and thus a suspect class, then homosexuals should be classified similarly. Id. Despite a small homosexual lobby, homosexuals still need the protection of the courts. Politicians may not respond to gay concerns because by legislating against gay-prejudice, politicians themselves become the target of prejudice. Miller, supra note 120, at 825-27.
140. Id.
143. See id. at 163.
144. Volumes of scientific data exist to prove that homosexuality is an immutable characteristic. See, e.g., Alan P. Bell et al., Sexual Preference: its Development in Men and Women 211, 222 (1981); Eli Coleman, Changing Approaches to the Treatment of Homo-
Homosexuality should be classified as an immutable trait because it is so central to "a person's identity that it would be irrational for the government to penalize a person for an unwillingness to change." Scientific research has shown that an individual's sexual orientation is established so early in life that it is practically impossible to change it.

Despite this evidence, homosexuality has been characterized as a mental disease that can be cured. In the 1930s and 1940s, homosexuals were sent to psychiatrists for diagnosis and treatment designed to purge their sexual orientation. However, in the 1950s, 1960s, and 1970's, in-depth studies concluded that homosexuality was not a mental illness. In 1974, the American Psychiatric Association deleted the diagnosis of homosexuality from its Diagnostic Manual. The findings of these studies combined with the deletion of homosexuality from the Manual of the American Psychiatric Association support the premise that homosexuality is immutable. Aside from the scientific evidence showing homosexuality is an immutable characteristic, "complete and absolute immutability simply is not a prerequisite for

145. Simon LeVay, a neuroscientist at the Salk Institute in San Diego, completed a study that suggests homosexuality may have a biological component. LeVay examined the brain tissue of 41 persons through routine autopsies. He examined the hypothalamus, which plays a role in regulating sexual behavior, and found that one small node of the hypothalamus is nearly three times larger in heterosexual men than in homosexual men. Curt Suplee, Brain May Determine Sexuality, WASH. POST, Aug. 30, 1991, at A1. Richard C. Pillard of Boston University School of Medicine stated that "if this research holds up, it would be the first physiological difference of this kind ever shown." Id. In a study at Northwestern and Tufts universities, researchers found that the genes men inherit from their parents may account for up to 70% of the probability that a man will be a homosexual. Malcolm Gladwell, Genes Tied To Sexual Orientation, WASH. POST, Dec. 15, 1991, at A1.

146. Watkins v. United States Army, 847 F.2d 1329, 1347 (9th Cir. 1988) (holding that homosexuals are a suspect class and military regulations discriminating against them require strict scrutiny), cert. denied, 111 S. Ct. 384 (1990).

147. See Coleman, supra note 144, at 81-88.

148. SARBIN & KAROLS, supra note 19, at 16.

149. Id.

150. Id. at 17.

151. Id. at 16.
Finally, statutes which discriminate against homosexuals are based upon stereotypes that have no bearing on their ability to perform in or contribute to society. The American Psychological Association passed a resolution in 1975 explaining that no foundation exists for the stereotype that homosexuals cannot contribute to society. The American Psychiatric Association passed an identical resolution in 1976.

VI. STRICT SCRUTINY APPLIED TO MILITARY REGULATIONS

Because homosexuals meet the Supreme Court's traditional criteria of suspectness, military regulations discriminating against them should be strictly scrutinized by the judiciary. Under such a test, the regulation must serve a compelling state interest and be specifically tailored to protect that interest. Military regulations discriminating against homosexuals will fail under strict scrutiny because they are not specifically tailored to meet the compelling state interests asserted by the military.

The military has given several justifications to explain its policy of discrimination against homosexuals. Under rational basis review, courts have accepted these justifications and the regulations have passed constitute


153. Note, Developments, supra note 111, at 1567.

154. SARBIN & KAROLS, supra note 19, at 16-17.

155. Id.

156. Id.

157. See supra notes 126-56 and accompanying text.


160. The justifications are set forth in Beller v. Middendorf, 632 F.2d 788, 811 (9th Cir. 1980) (rejecting substantive due process attack on regulations barring homosexuals from the military), cert. denied, 452 U.S. 905 (1981) and Dronenburg v. Zech, 741 F.2d 1388, 1398 (D.C. Cir. 1984) (rejecting right to privacy and equal protection attack on regulations barring homosexuals from the military).
The first justification advanced by the military is that the presence of homosexuals would harm organizational effectiveness and discipline. The services’ fear that prejudice towards homosexuals would detrimentally affect military cohesiveness, morale, and discipline. There is a concern that gay officers would not be able to serve as effective leaders because of their subordinates’ lack of trust or respect for them due to their sexual orientation.

Prejudice is not a valid justification for discriminating against homosexuals. Prejudice against Blacks was the justification for not allowing them to serve in the military. Resistance against integrating Blacks in the military was based upon many of the same reasons for not allowing homosexuals to serve. Many feared that prejudice would harm discipline, morale, and cohesiveness; however, none of these problems came to fruition and crippled the military. When the armed forces desegregated, social science specialists assisted in developing programs to combat racial prejudice.

Later, women seeking to enter the military faced the same arguments. However, the military has also successfully integrated women into its ranks. The military now serves as a model for racial and gender integration. One commentator notes that “[i]t would be wise to consider applying the experience of the past 40 years [of integration of Blacks] to the integration of homosexuals.”

Indirect evidence shows that the military can successfully integrate homosexuals. First, the majority of homosexuals with military service records have received honorable discharges and compiled exceptional performance records. Second, quasi-military organizations have successfully inte-
 grated homosexuals. In 1979, the San Francisco Sheriff’s Department initiated a program to integrate homosexuals into its ranks. Integration was successful and nondisruptive to the mission of the Sheriff’s Department. Studies showed that the homosexual members of the department received better job performance ratings than heterosexual officers. As a result, the majority of law enforcement agencies in California now hire without regard to sexual orientation.

The military also justifies its discriminatory regulations by asserting that homosexuals are unable to perform their jobs effectively because of emotional involvement with other homosexuals. This assertion is based upon the stereotype that homosexuals are detrimentally affected by their relationships. An inconsistency arises, however, because heterosexuals may just as easily be involved in relationships that could affect their job performance. The rationale for the regulations applies to heterosexuals as well as to homosexuals, thus the regulations are not specifically tailored to promote a compelling governmental interest and would fail under strict scrutiny review.

The third reason the military gives for its discriminatory regulations is that homosexuals may become involved in sexual relationships with other soldiers under their command. As with the previous justification given by the military, this problem may just as easily arise between heterosexuals.

A final justification used by the military to bar homosexuals from serving in the military is the fear that homosexuals may be a security risk due to their susceptibility to blackmail. However, adulterous heterosexuals are

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175. Sarbin & Karols, supra note 19, at 26-27.
176. Id. at 27.
177. Id. at 26.
178. Id.
179. Id. at 27.
180. Note, Developments, supra note 111, at 1561.
181. For example, a heterosexual male may break up with his girlfriend and it may harm his job performance.
182. See Note, Developments, supra note 111, at 1561.
183. A heterosexual woman may just as easily get involved sexually with a man under her command as could a lesbian with a woman under her command. See supra notes 180-81, and accompanying text.
just as susceptible to blackmail as are homosexuals. Additionally, because a number of states have decriminalized homosexual behavior, the danger of homosexuals being blackmailed has greatly diminished.

The Uniform Code of Military Justice (UCMJ) has laid to rest the military's fears of integration. All of the government's concerns are covered by the UCMJ. For example, if subordinates disobey gay officers or if homosexuals develop emotional relationships across ranks, the UCMJ punishes or otherwise deters such action.

VII. REASONS FOR INTEGRATION: BEYOND STRICT SCRUTINY ANALYSIS

In addition to the constitutional mandate of homosexual integration in the military under the equal protection clause, there are certain realities that call for integration. These realities include the large number of undetected homosexuals presently serving in the military. One commentator observed that they "are performing their military roles satisfactorily and their sexual conduct has not come to the attention of their commanders." Furthermore, "[t]he fact that only a[n] infinitesimal percentage of men and women are identified as homosexuals leads to an inescapable inference. Many undetected homosexuals serve in the military, enlisted and officers, men and

185. Sarbin & Karols, supra note 19, at 29. The Pentagon commissioned this report to determine whether homosexuals in the military pose a security risk. The report concluded that they do not and recommended that the military integrate homosexuals into the military. The Pentagon rejected the entire report claiming that it was biased, flawed, offensive, wasteful of government resources, and beyond the mandate of the commission. Elaine Sciolino, Report Urging End of Homosexual Ban Rejected by Military, N.Y. Times, Oct. 22, 1989, at A1.

186. Sciolino, supra note 185, at A26. As of 1988, there were no laws prohibiting sodomy in 25 states. Id.


188. Articles 77-134 of the UCMJ list the offenses for which members of the military can be court-martialed. 10 U.S.C. §§ 877-934 (1988).

189. For a full analysis of each UCMJ provision and how it would affect the integration of homosexuals into the military, see Harris, supra note 187, at 205-06.

190. Sarbin & Karols, supra note 19, at 21-24. This paper cites the studies of Kinsey and Mahalek that estimated the percentage of homosexuals in the population. Id. at 22-23. The authors conclude that fewer military personnel have been discharged for being homosexual than should have been under the Kinsey and Mahalek estimates of the number of homosexuals in the population. Id. The National Lawyers Guild and the San Diego Veterans Association state that 5 to 10% of military personnel are gay, and approximately 1,000 are discharged every year for homosexuality. Mary Lang, Operation Closet Shield, CAL., April 1991, at 15.

191. Sarbin & Karols, supra note 19, at 23.
women."  

In *Watkins v. United States Army*, the Ninth Circuit recognized that homosexuals presently serve in the military without disturbing morale or discipline. In *Watkins*, the Army allowed an admitted homosexual with an outstanding fourteen year record of military service to reenlist. When the Army tried to deny Watkins' most recent reenlistment request, the court held that the military was equitably estopped from refusing to reenlist Watkins on the basis of his homosexuality because the Army overlooked his homosexuality in the past. The court stated:

To estop the Army from denying Sgt. Watkins reenlistment on the basis of his homosexuality would not disrupt important military policies or adversely affect internal military affairs. It would simply require the Army to continue to do what it has repeatedly done for fourteen years with only positive results: reenlist a single soldier with an exceptionally outstanding military record.

By allowing a fourteen year veteran who is a homosexual to remain in the Army, the Ninth Circuit acknowledged that homosexuals can function in the military without affecting the cohesiveness or morale of the Army. By referring to Watkins' outstanding record, the court inferred that sexual orientation is not relevant in a discharge proceeding; rather, a soldier's performance in his or her job should prevail.

A final reason for integration, beyond strict scrutiny analysis, is the changing tide of public opinion. The percentage of the public favoring admission of homosexuals into the military has steadily increased.

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192. Id. at 24.
194. Id. at 709.
195. Id. at 701-02.
196. Id. at 711.
197. Id. at 706.
198. See Lou Chibbaro, Jr., *Poll Reveals 81% Oppose Ousting Gays From Military*, WASH. BLADE, April 19, 1991, at 1. In a nationwide poll commissioned by the Human Rights Campaign Fund, 81% of those polled opposed the military's policy of discharging members for being homosexual. Id.
199. A poll released in April 1991 conducted for the Human Rights Campaign Fund asked the public if they favored admission of homosexuals to the armed forces. The poll revealed a growing acceptance of homosexuals:
   1977 - 51% favored admission of homosexuals into the military
   1982 - 55% favored admission
   1989 - 60% favored admission
   1991 - 65% favored admission
In another poll conducted for the same organization, 81% of those questioned stated that if homosexuals in the armed forces are doing good jobs they should not be discharged. Chibbaro, *supra* note 198, at 1. Further evidence of changing attitudes has emerged on college campuses. On May 3, 1991 at the Indiana University Board of Trustees meeting, the Board voted to keep
CONCLUSION

Homosexuals do not currently receive constitutional protection against the military's discriminatory regulations under procedural due process, substantive due process, the First Amendment, or the fundamental rights strand of the equal protection clause of the Fourteenth Amendment. In order for homosexuals to serve in the United States military without the threat of discharge, courts must declare homosexuals to be a suspect class under the equal protection clause of the Fourteenth Amendment. As a suspect class, homosexuals will be protected from the military's discriminatory regulations under heightened strict scrutiny review.

Judges and the Department of Defense must set aside their homophobic attitudes and recognize the fallacy and illogic of preventing able-bodied, highly motivated soldiers from serving their country simply because they are homosexuals. The Supreme Court must break down the archaic legal and social barriers that allow discrimination against homosexuals and realize that homosexuals can ensure the high quality of the American military. The Supreme Court should recognize that homophobic discriminatory military regulations are improper and proclaim homosexuals to be a suspect class.

Troy R. Holroyd

the Reserve Officers Training Corps (ROTC) on the campus. However, in response to student concerns about the military's discriminatory policies against homosexuals, the Board called for an examination of the U.S. Department of Defense's policy of barring homosexuals from the military. Students were concerned because the ROTC's policy conflicts with the University's Code of Student Ethics which bars discrimination based on sexual orientation. Jay Judge, ROTC to Stay Despite USA Opposition, IND. DAILY STUDENT, May 4, 1991, at 1. Similar dissatisfaction with the military's policy has emerged on other college campuses. At the Buffalo campus of the State University of New York, military recruiters were ordered off the campus on Sept. 20, 1991, in protest of the military's discrimination against homosexuals. Dartmouth College in Hanover, NH will force ROTC programs off campus in April 1993 unless the military changes its policy of banning homosexuals. At the University of Pennsylvania, ROTC will be banned from campus by June 1993 unless the program agrees to admit homosexuals. In Florida, at the University of Tampa, credit for ROTC courses may be dropped if the ROTC continues banning homosexuals from enrolling. On Sept. 23, 1991, students at Georgetown University Law Center marched in favor of banning the Judge Advocate Corps from employment recruiting unless the ban on homosexuals is ended. William Mathews, Colleges Challenging DoD Ban on Homosexuals, AIR FORCE TIMES, Oct. 14, 1991, at 18. At the University of Pennsylvania, ROTC will be banned from campus by June 1993 unless the program agrees to admit homosexuals. Huntly Collins, Penn Panel: ROTC Must Enroll Gays, PHIL. INQUIRER, Oct. 16, 1991, at B2.

200. As one commentator noted, "[A]t a minimum, judges, in particular, as well as attorneys, need to examine their homophobic attitudes and the many popularly held myths and stereotypes. Only after such a reevaluation of judicial and social attitudes can our legal system begin to achieve a fair and equal application of the laws to all persons." Rivera, supra note 14, at 848.