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Analyzing the Military's Justifications for Its Exclusionary Policy: Fifty Years without a Rational Basis

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**ANALYZING THE MILITARY’S JUSTIFICATIONS FOR
ITS EXCLUSIONARY POLICY: FIFTY YEARS
WITHOUT A RATIONAL BASIS**

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I. INTRODUCTION

WAR IS PEACE
 FREEDOM IS SLAVERY
 IGNORANCE IS STRENGTH¹

To Big Brother’s “doublethink”² slogans listed above one could add the slogan “SUITABLE IS UNSUITABLE.” This fourth slogan, however, would be based not on George Orwell’s bleak vision of the future.³ Rather, this new slogan symbolizes the United States Military’s anti-gay policy,⁴ which deems otherwise “suitable” lesbian and gay⁵ service members “unsuitable,” based solely on their sexual orientation.⁶

Between 1980 and 1990, the United States Military discharged an average of 1500 service members per year because of their homosexual

1. GEORGE ORWELL, 1984, at 7, 17, 26 (Penguin Books 1961) (1949). This quote recounts Big Brother’s slogans from George Orwell’s novel, *1984*. The military’s illogical conclusion that equates opposites—“suitable is unsuitable”—sounds frighteningly similar to Big Brother’s slogans. Compare the military’s exclusionary policy, *see infra* note 33, with the stories of service members whose performance was exceptional but who the military discharged solely based on their homosexual orientation, *see infra* notes 63-133 and accompanying text.

2. ORWELL, *supra* note 1, at 176 (“*Doublethink* means the power of holding two contradictory beliefs in one’s mind simultaneously, and accepting both of them.”).

3. Erich Fromm, *Afterword* to ORWELL, *supra* note 1 at 257, 260 (stating that *1984* depicts “completely bureaucratized society, in which man is a number and loses all sense of individuality”).

4. *See* 32 C.F.R. pt. 41, app. A, pt. 1.H.1.c.(1)-(3) (1991).

5. This Comment uses the terminology “lesbian and gay” instead of “homosexual.” The term homosexual “is [arguably] problematic because it echoes with implications of diagnosis and pathology, it is archaic, and its root meanings are not entirely accurate.” John C. Gonsiorek & James D. Weinrich, *The Definition and Scope of Sexual Orientation*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 1, 2 (John C. Gonsiorek & James D. Weinrich eds., 1991).

6. *Id.*

orientation.⁷ Many of these people have excellent military records.⁸ For example, the Army discharged Colonel Margarethe Cammermeyer in June of 1992 despite 27 years of outstanding military service.⁹ Colonel Cammermeyer "volunteered for duty in Vietnam, where she was awarded a Bronze Star," and in 1985 the Veterans Administration named her nurse of the year.¹⁰ "Colonel Cammermeyer is just the latest casualty of a Defense Department directive that bans homosexuals from military service while allowing them to serve in civilian jobs. The policy has destroyed thousands of careers and lives—all for no good reason."¹¹

The military has been aware since at least 1957 that a service member's sexual orientation¹² has no relevance to the performance of his or her military duties.¹³ The Pentagon can no longer claim that lesbians and gays are incapable of performing military duty.¹⁴ Yet, 1993 will mark the fiftieth anniversary of the military's exclusionary policy,¹⁵ and until the Ninth Circuit Court of Appeals decided *Pruitt v. Cheney*¹⁶ in

7. Kate Dyer, *Foreword* to GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS at xiv-xv (Kate Dyer ed., 1990); see also NAT'L SEC. AND INT'L AFFAIRS DIV., U.S. GEN. ACCOUNTING OFFICE, PUB. NO. 92-98, DEFENSE FORCE MANAGEMENT: DOD'S POLICY ON HOMOSEXUALITY 4 (1992) [hereinafter GAO REPORT] ("During fiscal years 1980 through 1990, approximately 17,000 servicemen and women (an average of about 1,500 per year) were separated from the services under the category of "homosexuality.").

8. See *infra* notes 63-133 and accompanying text.

9. Bettina Boxall, *A Different Battlefield*, L.A. TIMES, Aug. 9, 1992, at A3.

10. *Id.*

11. *The High Cost of Military Prejudice*, N.Y. TIMES, June 2, 1992, at A22.

12. The term "sexual orientation [denotes] erotic and/or affectional disposition to the same and/or opposite sex." Gonsiorek & Weinrich, *supra* note 7, at 1.

13. Report of the Board Appointed to Prepare and Submit Recommendations to the Secretary of the Navy for the Revision of Policies, Procedures and Directives Dealing with Homosexuals (Dec. 21, 1956 to Mar. 15, 1957) [hereinafter Crittenden Report] (unpublished report, on file with the *Loyola of Los Angeles Law Review*).

The Crittenden Report, prepared by Captain S. Crittenden, Jr., of the United States Navy, acknowledged the assistance and testimony of all branches of the Armed Forces. *Id.* The Board convened to provide appropriate procedures and standards governing the discharge of lesbians and gays. Citing the Kinsey findings that "approximately 37.5% of nineteen year old American males have had one or more homosexual experiences," the Report recognized that homosexual behavior is far more widespread than previously thought. *Id.* at 4. The Report recognized the implications of an anti-homosexual policy and cautioned that "[t]he exclusion from service of all persons who, on the basis of their personality structure, could conceivably engage in homosexual acts is totally unfeasible in view of the large proportion of the young adult male population which falls in this category." *Id.* at 38. See E. GIBSON, GET OFF MY SHIP app. E at 357-65 (1978), for a synopsis of the Board's principal findings.

14. *The Pentagon's Sexual Politics*, BOSTON GLOBE, Aug. 26, 1992, at 16.

15. See Randy Shilts, *Bush Asked To OK Gays In Military: 40 House Members Want President to Reverse Ban*, S.F. CHRON., Mar. 18, 1991, at Back Page.

16. 963 F.2d 1160, 1167 (9th Cir. 1992) (remanding for lower court to determine if military's policy is rationally based). Just how deferential the court will be to the military's decision to exclude lesbian and gay service members remains to be seen.

1992 no court had required the military to show a rational basis for excluding lesbian and gay service members.¹⁷

Military policy, as expressed by the Office of the Secretary of Defense, mandates the discharge of all lesbians and gays from military service.¹⁸ According to the Department of Defense (DOD) policy, "[h]omosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission."¹⁹ Yet, the military's own studies refute this conclusion.²⁰ Moreover, the General Accounting Office released a report in June 1992 that said: "[M]any experts believe that the military's policy is unsupported, unfair, and counterproductive; has no validity according to current scientific research and opinions; and appears to be based on the same type of prejudicial suppositions that were used to discriminate against blacks and women before these policies were changed."²¹

Part II of this Comment provides a brief historical overview of the military's anti-gay and anti-lesbian policy.²² This overview summarizes important court battles waged against the military's sexual-orientation-

17. Rather than requiring the military to show a rational basis for its policy, courts have presumed that the military's rationales for its anti-gay policy are rationally based. *See, e.g.,* Steffan v. Cheney, 780 F. Supp. 1 (D.D.C. 1991); Pruitt v. Weinberger, 659 F. Supp. 625 (C.D. Cal. 1987), *aff'd in part, rev'd in part sub nom.* Pruitt v. Cheney, 963 F.2d 1160 (9th Cir. 1992).

18. Dep't Def. Directive No. 1332.30 at 2-1 (1986) (Separation of Regular Commissioned Officers for Cause); Dep't Def. Directive No. 1332.14 at 1-9 (1982) (Enlisted Administrative Separation); *current version at* 32 C.F.R. pt. 41, app. A, pt. 1.H. (1991) ("Reasons for Separation," listing homosexuality). *See infra* note 33 for the text of the military's exclusionary policy. This policy is declared by the Office of the Secretary of Defense and implemented through the Uniform Code of Military Justice (UCMJ) (addressing criminal acts) and DOD directives (covering administrative separation of service members for homosexuality). *See* Theodore R. Sarbin & Kenneth E. Karols, Defense Personnel Security Research and Education Center, *Nonconforming Sexual Orientation and Military Suitability*, in *GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS*, *supra* note 7, at 65-67. In addition, each military branch promulgates its own regulations derived from the DOD directives. *Id.* at 67. The rules for officers and enlisted personnel are the same, but are listed in different regulations. *Id.*

19. 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a. (1991). *See infra* note 391 for the portion of the military's policy that states its rationales.

20. *See* Michael A. McDaniel, Defense Personnel Security Research and Education Center, *Preservice Adjustment of Homosexual and Heterosexual Military Accessions: Implications for Security Clearance Suitability*, in *GAYS IN UNIFORM: THE PENTAGON'S SECRET REPORTS*, *supra* note 7, at 111; Sarbin & Karols, *supra* note 18, at 3; Crittenden Report, *supra* note 13.

21. GAO REPORT, *supra* note 7, at 37.

22. *See infra* notes 34-55 and accompanying text.

based policy by highly qualified lesbian and gay service members²³ and critiques the military's exclusionary policy.²⁴

Part III of this Comment analyzes the DOD's exclusionary policy under the equal protection guidelines established by the United States Supreme Court. Part III first summarizes how the Supreme Court analyzes equal protection challenges.²⁵ It then suggests that lesbians and gays should constitute a suspect class under the criteria stated by the Supreme Court.²⁶ Third, Part III reviews the unlikelihood that the Supreme Court will bestow suspect class status on lesbians and gays and discusses the future of equal protection challenges by lesbian and gay service members.²⁷ Fourth, this part considers "active" rational basis review as the level of review that is probably the strictest that today's Supreme Court would employ with respect to sexual-orientation-based discrimination.²⁸ Finally, Part III addresses the high level of deference the Court gives to military decisions.²⁹ Against this backdrop, this Comment analyzes each of the military's stated justifications for its exclusion of admittedly gay or lesbian military personnel under active rational basis review.³⁰

Finally, this Comment recommends that the President promulgate an Executive Order to eliminate the military's exclusionary policy.³¹ Meanwhile, lesbian and gay military personnel should continue to challenge the military's anti-gay and anti-lesbian policy on equal protection grounds with the prospect of receiving at least active rational basis review.³²

II. HISTORICAL OVERVIEW OF THE MILITARY'S EXCLUSIONARY POLICY

A. Background

The United States Military presently excludes lesbians and gays from military service.³³ The military's official exclusionary policy will

23. See *infra* notes 63-133 and accompanying text.

24. See *infra* notes 137-39 and accompanying text.

25. See *infra* notes 142-80 and accompanying text.

26. See *infra* notes 189-245 and accompanying text.

27. See *infra* notes 312-27 and accompanying text.

28. See *infra* notes 329-35 and accompanying text.

29. See *infra* notes 270-310 and accompanying text.

30. See *infra* notes 387-484 and accompanying text.

31. See *infra* part IV.

32. See *infra* part IV.

33. Under the military's policy, a member shall be separated if one or more of the following approved findings is made:

have been in place for fifty years in 1993.³⁴ According to the military policy, "[h]omosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission."³⁵

Since George Washington's Continental Army, the military branches have aggressively driven out lesbian and gay service members.³⁶ Notably, many of the military's concerns about lesbian and gay service members sound familiar because the military used these same rationales to justify racially segregating the armed forces.³⁷ For example, on the eve of World War II, the official policy of the War Department, as expressed in a memorandum dated October 8, 1940, from the Assistant Secretary of War to President Roosevelt, mandated segregation of "colored and white enlisted personnel in the same regimental organizations."³⁸ The memorandum stated the same fear of an adverse affect on morale that the military presently argues to justify its exclusion of lesbians and gays from military service.³⁹

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior;

(b) Such conduct under all the circumstances is unlikely to recur;

(c) Such conduct was not accomplished by use of force, coercion, or intimidation by the member during a period of military service;

(d) Under the particular circumstances of the case, the member's continued presence in the Service is consistent with the interest of the Service in proper discipline, good order, and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

Dep't Def. Directive No. 1332.14 encl. 3, pt. 1.H.1.c.(1)-(3) (1982) (Enlisted Administrative Separations) (current version at 32 C.F.R. pt. 41, app. A, pt. 1.H.1.c.(1)-(3) (1991); *accord* Dep't Def. Directive No. 1332.30, encl. 2, B.4 (1986) (Separation of Regular Commissioned Officers for Cause).

34. Shilts, *supra* note 15, at 5.

35. 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a. (1991).

36. Dyer, *supra* note 7, at xiii.

37. *Id.* at xviii.

38. BLACKS IN THE MILITARY: ESSENTIAL DOCUMENTS 108 (Bernard C. Nalty & Morris J. MacGregor eds., 1981).

39. *Compare id.* ("This policy has been proven satisfactory over a long period of years and to make changes would produce situations destructive to morale and detrimental to the prepa-

Five years later, "against the advice and protests of almost every admiral and general, as well as most of his civilian advisers on military affairs," President Truman ordered the racial integration of the Military Services, thereby ending a chapter of national disgrace.⁴⁰ "Today, it is unthinkable that the judiciary would defer to the Army's prior 'professional' judgment that black and white soldiers had to be segregated to avoid interracial tensions."⁴¹ Likewise, it should be unthinkable that the judiciary should defer to the military's judgment that talented and well-qualified lesbian and gay service members must be excluded from military service to avoid homophobic⁴² tensions that might adversely affect morale.⁴³

Both President Truman, who integrated the Military Services,⁴⁴ and Chief Justice Warren, who wrote the opinion aimed at integrating the nation's schools,⁴⁵ recognized that majority sentiment portrayed as morality cannot justify oppression of a minority's constitutional rights.⁴⁶ Lesbians and gays constitute such a minority,⁴⁷ which has been subject to a history of discrimination.⁴⁸ The military contends that lesbian and gay

rations for national defense.") with 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a. (1991) ("Homosexuality is incompatible with military service. . . . The presence of such members adversely affects the ability of the Military Services to maintain discipline, good order, and morale."); see *infra* text accompanying note 391.

40. MERLE MILLER, *PLAIN SPEAKING: AN ORAL BIOGRAPHY OF HARRY S. TRUMAN* 79 (1973); see also GAO REPORT, *supra* note 7, at 31 n.1, 32 (citing Presidential Executive Order 9981, July 26, 1948, as order to integrate military).

41. *Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990).

42. A term used to connote one who is inexplicably fearful of homosexuality. See GAO REPORT, *supra* note 7, at 37 n.4.

43. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985) (stating that, even under rational basis review, catering to private prejudice is not legitimate state interest); *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (stating that law cannot give effect to private biases); see also GAO REPORT, *supra* note 7, at 31 (noting that level of prejudice against lesbians and gays may be of same intensity as existed against blacks in 1948, when military was ordered to integrate).

44. Dyer, *supra* note 7, at xviii.

45. *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

46. Similarly, in *Watkins*, Judge Norris concluded, in the context of an equal protection challenge by a gay service person, that "even accepting *arguendo* [the] proposition that anti-homosexual animus is grounded in morality (as opposed to prejudice masking as morality), . . . notions of majoritarian morality [cannot] serve as compelling justification for laws that discriminate against suspect classes." *Watkins v. United States Army*, 875 F.2d 699, 703 (9th Cir. 1989), (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990).

47. Elvia Rosales Arriola, *Sexual Identity and the Constitution: Homosexual Persons as a Discrete and Insular Minority*, 10 WOMEN'S RTS. L. REP. 143, 154 (1988); Sarbin & Karols, *supra* note 18, at 23-24, 39.

48. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 (9th Cir. 1990) LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-33, at 1616 (2d ed.

service members interfere with the military mission.⁴⁹ The Supreme Court, however, has rejected the notion that private prejudices can justify official discrimination, even when those prejudices create real and legitimate problems.⁵⁰

Before President Truman ordered the Armed Forces desegregated in 1948, the military discriminated against African Americans.⁵¹ Using similar arguments to justify excluding lesbians and gays, the military stubbornly resisted desegregation.⁵² For example, "Pentagon officials claimed that Truman's order would 'seriously impair the accomplishment of the military mission,' and that 'no white man will ever take an order from a black man.'" ⁵³ Similarly, the military says the presence of lesbian and gay service members in the military seriously impairs the accomplishment of the military mission.⁵⁴ Although President Truman ordered the racial desegregation of the military, the military's anti-gay and anti-lesbian policy persists.⁵⁵

1988); Gregory M. Herek, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY*, *supra* note 5, at 60, 63; Harris M. Miller II, Note, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797, 824-25 (1984).

49. See *infra* text accompanying note 391.

50. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). The Court in *Palmore* stated:

It would ignore reality to suggest that racial and ethnic prejudices do not exist or that all manifestations of those prejudices have been eliminated. . . .

The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations We have little difficulty concluding that they are not. The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.

Id. (footnotes omitted); see also *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439-42 (1985) (stating that, even under rational basis review, catering to private prejudice is not legitimate state interest).

51. Dyer, *supra* note 7, at xviii.

52. Memorandum from Navy Department (Dec. 24, 1941) (on file with *Loyola of Los Angeles Law Review*) [hereinafter Navy Memorandum] (outlining basis of military's exclusion of African Americans).

The close and intimate conditions of life aboard ship, the necessity for the highest possible degree of unity and esprit-de-corps; the requirement of morale—all these demand that nothing be done which may adversely affect the situation. Past experience has shown irrefutably that the enlistment of Negroes [sic] (other than mess attendants) leads to disruptive and undermining conditions.

Id. Compare the stated purpose behind this policy to the rationales presently stated by the military in attempting to justify excluding lesbians and gays from the military. See *supra* text accompanying note 35.

53. Dyer, *supra* note 7, at xviii.

54. See *infra* text accompanying note 391.

55. See *supra* note 33.

Notably, ending segregation and ending racial discrimination are not the same. Notwithstanding the DOD's successful program of training its personnel in race relations, the services are not free from the effects of racism. Kenneth L. Karst, "*Let Me Fight*": *Why Judges Must*

B. Statement of Existing Law and Its Effect on Some "Unqualified" Service Members

Under the DOD's policy, no person who is admittedly lesbian or gay may join the Army, Navy, Air Force, Marines, Coast Guard or college campus Reserve Officers' Training Corps (ROTC) program.⁵⁶ Consequently, many people lie about their sexual orientation so they can enlist, and military investigators vigorously seek out and discharge about 2000 service members each year because of their homosexual orientation.⁵⁷

Attempts aimed at forcing the military to at least provide a rational basis for its sexual-orientation-based policy include cases brought by lesbian and gay former military personnel,⁵⁸ campus activism waged against discrimination by the ROTC programs⁵⁹ and opposition to on-campus military recruiters' denial of jobs to openly gay and lesbian students.⁶⁰ The following description of service members who have challenged the military's exclusionary policy in the courts indicates that the military's ban of lesbian and gay service members is irrational because it excludes excellent service members.⁶¹

Attack Policies that Exclude Women from Combat, L.A. DAILY J., Jan. 14, 1991, at A6 [hereinafter Karst, "Let Me Fight"]. On this score, however, "it is hard to find any other institution in American society that has done better. Today 30 percent of the Army's enlisted personnel and more than 10 percent of its officers are black. General Colin Powell, the Chair of the Joint Chiefs of Staff, is no token." *Id.* Although ending segregation is not the same as ending discrimination, it does end governmentally sponsored discrimination, which sends a message to society.

56. See *supra* note 33 for the DOD's exclusionary policy. For a list of the various service regulations, see Sarbin & Karols, *supra* note 18, at 67.

57. Dyer, *supra* note 7, at xiv-xv.

58. See *infra* notes 63-133 and accompanying text.

59. Kenneth L. Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 567 n.254 (1991) [hereinafter Karst, *Pursuit of Manhood*].

60. See Laurie J. Falik, Comment, *Exclusion of Military Recruiters from Public School Campuses: The Case Against Federal Preemption*, 39 UCLA L. REV. 941 (1992); Steven Wylie, Comment, *The Unruh Civil Rights Act: A Weapon to Combat Homophobia in Military On-Campus Recruiting*, 24 LOY. L.A. L. REV. 1333 (1991); Kurt Hermansen & Molly White, Coalition of Loyola Law Students Against Military Recruiting on Campus, *We Don't Want Your Kind Here: The Military Interviewing Controversy*, 16 LOY. REP. (L.A.), Sept. 1992, at 1 (on file with *Loyola of Los Angeles Law Review*).

61. See *infra* notes 63-133 and accompanying text.

1. Leonard Matlovich

Technical Sergeant Leonard P. Matlovich appeared on the cover of *Time*⁶² in 1975 because he challenged the military's exclusionary policy.⁶³ After twelve years of excellent service in the military,⁶⁴ Sergeant Matlovich wrote to the Secretary of the Air Force in March 1975 to declare he had concluded he was homosexually oriented.⁶⁵ In this letter, Matlovich stated that he considered himself fully qualified for further military service and that, in his view, his sexual orientation would not interfere with his Air Force duties.⁶⁶ He requested that the Air Force provision relating to the discharge of lesbians and gays be waived in his case.⁶⁷ "[Matlovich's] letter triggered an investigation by the Air Force Office of Special Investigation during which [Matlovich] provided information concerning his homosexual experiences."⁶⁸ He stated that his experiences were all consensual acts with males over twenty-one that occurred in private while he was off duty and off base.⁶⁹ After the investigation, the Air Force convened an Administrative Discharge Board.⁷⁰ The Discharge Board recommended that Matlovich be given a general discharge for unfitness because of his homosexual acts.⁷¹ Matlovich challenged this discharge before U.S. District Court Judge Gesell who, while

62. See TROY D. PERRY & THOMAS L.P. SWICEGOOD, PROFILES IN GAY & LESBIAN COURAGE 124 (1991) (including reproduction of *Time* cover); TIME, Sept. 8, 1975, at Cover (Matlovich appeared in uniform on cover with caption "I am a Homosexual").

63. See *Matlovich v. Secretary of the Air Force*, 591 F.2d 852 (D.C. Cir. 1978).

64. See *infra* notes 74-80 and accompanying text. See generally PERRY & SWICEGOOD, *supra* note 62, at 139 (chronicling Matlovich's twelve years of service, which included receipt of Bronze Star, Purple Heart, three Commendations for performance above and beyond call of duty and highest possible rating on Air Force's quarterly rating scale during each quarter of enlistment).

65. *Matlovich*, 591 F.2d at 853.

66. *Id.*

67. *Id.*

68. *Id.* at 854.

69. *Id.*

70. *Id.*

71. Matlovich's commanding officer accepted the Board's recommendation of discharge but decided that the discharge should be honorable. *Id.* "The Secretary of the Air Force then declined to waive the provisions of AFM [Air Force Manual] 39-12 . . . and directed that an honorable discharge be executed." *Id.* The Air Force honorably discharged Matlovich on October 22, 1975. *Id.*

denying Matlovich relief,⁷² recognized the superior quality of Matlovich's service.⁷³

In his oral opinion, Judge Gesell noted that Matlovich had a "most commendable, highly useful service in the military over a long period."⁷⁴ Judge Gesell briefly mentioned several of Matlovich's qualifications.⁷⁵ For instance, Matlovich volunteered for assignment to Vietnam and served there with distinction.⁷⁶ On more than one occasion, Matlovich volunteered for and carried out hazardous duties, and though he was once wounded in a mine explosion, he volunteered for such duties.⁷⁷ He also excelled as a training officer, a counselling officer and in various military social action and race-relation programs.⁷⁸ Moreover, his superiors always gave him the highest possible ratings in all aspects of his performance.⁷⁹ Finally, in addition to receiving the Bronze Star when he was just an Airman First Class, Matlovich was awarded the Purple Heart, two Air Force Commendation Medals and a Meritorious Service Medal.⁸⁰

Judge Gesell went on to express his view that the Armed Forces should approach the problems raised by the presence of lesbians and gays in the military "in perhaps a more sensitive and precise way."⁸¹ Ironically, Judge Gesell then upheld the military's discharge of Matlovich, finding that it was rationally based.⁸²

This decision, however, was vacated.⁸³ The Court of Appeals for the District of Columbia summed up Matlovich's case as involving "a serviceman with an admittedly outstanding record of considerable duration, with minimal sexual involvement with Air Force personnel and none with those with whom he worked."⁸⁴ Matlovich's case also in-

72. Judge Gesell granted the Air Force's summary judgment motion by holding that: (1) there was no constitutional right to engage in homosexual activity; (2) under the standards he deemed to govern judicial review of military decisions, the Air Force policy of discharging service members who have engaged in homosexual acts was rationally based; and (3) Matlovich had not proved his case required an exception to the policy. *Id.*

73. *Id.*

74. *Id.* at 854 n.4.

75. *See id.*; see also PERRY & SWICEGOOD, *supra* note 62, at 139 (chronicling Matlovich's distinguished military record).

76. *Matlovich*, 591 F.2d at 854 n.4.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 855.

82. *Id.* at 854.

83. *Id.* at 861.

84. *Id.* at 856.

cluded "substantial testimony that the Air Force community would be able to accept his homosexuality."⁸⁵ Further, the Correction Board, the Secretary and the Administrative Discharge Board did not suggest that Matlovich's ability to perform military service had been compromised due to his homosexual orientation.⁸⁶

Yet the Air Force claimed the "unusual circumstances" that must exist to warrant retention were missing.⁸⁷ The court of appeals vacated the lower court decision and found for Matlovich. The court held that the meaning of the "most unusual circumstances" exception to the Air Force's exclusionary regulation was "uncertain and unknown."⁸⁸ With respect to Matlovich, the Air Force said that it had considered whether to make an "unusual circumstances" exception in his case but had decided against it.⁸⁹

The Court of Appeals for the District of Columbia was disturbed that it was impossible to tell upon which grounds the Air Force refused to make an exception or how it distinguished this case from those in which the Air Force had retained lesbians and gays.⁹⁰ Both the Correction Board and the Secretary of the Air Force said that an outstanding record was not enough to constitute "unusual circumstances."⁹¹ Both failed, however, to state what "unusual circumstances" could be or what was missing in Matlovich's case.⁹² In the "absence of articulated standards," the court of appeals found it impossible to decide whether the Air Force had abused its discretion or whether improper factors had played a material role in Matlovich's discharge.⁹³

Although Matlovich won his battle to stay in the military, lesbian and gay service members are still fighting the war against the military's exclusionary policy.⁹⁴ In fact, Matlovich's challenge prompted the military to implement an even stricter policy. Instead of clarifying which

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* The exclusionary regulation provided for a policy of discharging Air Force members determined to have performed homosexual acts. *Id.* at 853 n.1. The Air Force contemplated exceptions to the policy if "the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised." *Id.*

89. *Id.* at 855.

90. *Id.* at 856.

91. *Id.*

92. *Id.*

93. *Id.*

94. *See, e.g.,* *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992); *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991); *see also* *Boxall*, *supra* note 9, at A3 (detailing Army's discharge of Colonel Margarethe Cammermeyer despite 27 years of outstanding military service and Cammermeyer's determination to fight discharge in court); *Board Rejects Gay Pilot's Request*

circumstances warrant an exception to the exclusionary policy, the military deleted the "unusual circumstances" exception altogether.⁹⁵

2. Perry Watkins

Consequently, Matlovich's battle against the military's anti-gay and anti-lesbian policy did not prevent the military from discharging other outstanding service members, like Perry Watkins. Though Sergeant Perry Watkins was an excellent soldier, the Army brought discharge proceedings against him because he was gay.⁹⁶ Sergeant Watkins's commanding officer "testified that Watkins was 'the best clerk I have known,' that he did 'a fantastic job—excellent,' and that Watkins' homosexuality did not affect the company."⁹⁷ A sergeant also testified that "Watkins' homosexuality was well-known but caused no problems and generated no complaints from other soldiers."⁹⁸

In 1975, the Army convened a board of officers to determine whether Watkins should be discharged because of his homosexuality.⁹⁹ The four-officer board unanimously found Watkins "suitable for retention in the military service" and recommended that Watkins be retained because there was "no evidence suggesting that his behavior has had either a degrading effect upon unit performance, morale or discipline, or upon his own job performance."¹⁰⁰ The Secretary of the Army adopted the board's recommendation as his final decision.¹⁰¹

Watkins's homosexual orientation was well-known while he was in the service, yet this knowledge had no adverse effects.¹⁰² Watkins's exemplary record shows that the military's fears—that the system of rank

to *Remain in Navy*, L.A. TIMES, July 25, 1992, at A20 (detailing Navy Captain's discharge and his determination "to fight" regulation).

95. Compare the text of the military's current exclusionary policy, *supra* note 33, which does not include the "unusual circumstances" exception, with Air Force Regulation 39-12, ¶ 2-103, which stated that an exception may be made to the Air Force's policy requiring discharge of members who have engaged in homosexual acts "where the most *unusual circumstances* exist and provided the airman's ability to perform military service has not been compromised." *Id.* (emphasis added).

96. *Watkins v. United States Army*, 875 F.2d 699, 702-03 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990).

97. *Id.* at 702 (quoting testimony before Army board of officers convened to determine whether Watkins should be discharged because of his homosexual tendencies).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

and command and esprit-de-corps would break down¹⁰³—were unfounded.

The United States Army Artillery Group (USAAG) granted Watkins a security clearance for information classified as "Secret."¹⁰⁴ However, the Army initially rejected his application for a position in the Nuclear Surety Personnel Reliability Program (PRP) because his records showed that he had homosexual tendencies.¹⁰⁵ After this preliminary rejection, however, the Army reversed its decision to deny Watkins a position in the PRP because Watkins's commanding officer in the USAAG, Captain Pastain, requested that Watkins be re-qualified for the position.¹⁰⁶ Captain Pastain attested to the "outstanding professional attitude, integrity, and suitability for assignment within the PRP, of [Sergeant] Watkins."¹⁰⁷ Watkins had "no problems what-so-ever in dealing with other assigned members" at PRP.¹⁰⁸ Rather, he had "become one of [the Army's] most respected and trusted soldiers, both by his superiors and his subordinates."¹⁰⁹

3. Miriam Ben-Shalom

As with Watkins, Miriam Ben-Shalom's military record was impeccable. At various times during her enlistment, Ben-Shalom acknowledged that she was a lesbian.¹¹⁰ The Army conducted a hearing before a board of officers to determine if Ben-Shalom should be discharged because she had "publicly acknowledged her homosexuality during conversations with fellow reservists, in an interview with a reporter for her division newspaper, and in class, while teaching drill sergeant candidates."¹¹¹ The Army had no proof that she engaged in homosexual conduct or had done anything that could be interpreted as a sexual advance toward female reservists.¹¹² Further, the Army recognized that Ben-Shalom "was a fine candidate for drill sergeant school, a capable soldier, and an excellent instructor."¹¹³ Nevertheless, the board of officers rec-

103. See *supra* note 33.

104. *Watkins*, 875 F.2d at 702.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *benShalom v. Secretary of Army*, 489 F. Supp. 964, 969 (E.D. Wis. 1980). Note that the courts have spelled Ben-Shalom's name inconsistently. See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990).

111. *benShalom*, 489 F. Supp. at 969.

112. *Id.*

113. *Id.*

commended that the Army honorably discharge her on the grounds that she was "unsuitable" because she was a lesbian.¹¹⁴ Accordingly, the Army acknowledged that except for her homosexual status, Ben-Shalom was suitable.¹¹⁵ The Army did not explain why an otherwise suitable lesbian or gay service member is unsuitable.¹¹⁶ Instead, the Army avoided rationalizing its policy by merely concluding that she was unsuitable and by discharging her.¹¹⁷

4. Dusty Pruitt

Like Matlovich, Watkins and Ben-Shalom before her, Reverend Dusty Pruitt was discharged because of her homosexual orientation.¹¹⁸ The Army first learned Pruitt was a lesbian from an interview with Pruitt, published in the *Los Angeles Times*, in which she revealed that she was a lesbian and had twice taken marriage vows with other women.¹¹⁹

Reverend Pruitt ultimately rose to the rank of Captain in the Army.¹²⁰ After leaving active service to seek ordination as a Methodist minister, Pruitt remained an officer in the Army Reserve.¹²¹ On May 25, 1982, Pruitt was notified of her selection for promotion to the rank of Major, effective February 6, 1983.¹²² Pruitt had an outstanding record in both active and reserve service.¹²³ Despite her outstanding military record, the Army had no choice but to discharge Reverend Pruitt because she was a lesbian.¹²⁴

114. *Id.*

115. *See id.*

116. *See id.*

117. *Cf. ORWELL, supra* note 1 and accompanying text.

118. *Pruitt v. Cheney*, 963 F.2d 1160, 1161 (9th Cir. 1992).

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. The Army discharged Pruitt under regulations that the Army promulgated pursuant to Department of Defense Directive Nos. 1332.30 and 1332.14. *See Sarbin & Karols, supra* note 18, at 62, 67. The Army's implementing regulations are: Army Reg. 135-178 ¶ 10 (1989) (governing discharge of Army Reserve Officers) and Army Reg. 140-111, tbl. 4-2, rule E (1989) (governing reenlistment of Army Reserve Officers). *Pruitt*, 963 F.2d at 1161, 1163-64.

At the time of this writing, the Ninth Circuit Court of Appeals had remanded Pruitt's case to the District Court for the Central District of California to determine "whether the Army's discrimination is rationally related to a permissible governmental purpose." *Id.* at 1167.

5. Joseph Steffan

Joseph Steffan was a midshipman in good standing at the United States Naval Academy in Annapolis, Maryland.¹²⁵ A few months before his expected graduation, Steffan learned he was under investigation by the Naval Investigative Service for his alleged homosexuality.¹²⁶ Steffan's Commandant later told him that he could not graduate because of the service-wide regulations that prohibit lesbians and gays from participating in the military.¹²⁷

Academically, Steffan was in the top ten percent of his class at the Naval Academy.¹²⁸ After graduation he would have served on a nuclear submarine—one of the most prestigious naval assignments.¹²⁹ Steffan was also a talented performer and singer who, according to the district court that decided the case, made the Academy and this country proud on several occasions.¹³⁰ In his senior year at the Academy, Steffan sang the National Anthem at the beginning of the Army-Navy football game in front of a nationally televised audience.¹³¹ He was the lead soloist for the Naval Academy Glee Club and the President of the Catholic Choir at Annapolis.¹³² Yet the military policy mandated his discharge because he was "unsuitable."¹³³

The court battles waged by qualified lesbian and gay military personnel exemplify why the military's ban of lesbian and gay service members is irrational: It excludes excellent service members.¹³⁴ Moreover, the stories of these outstanding lesbian and gay service members demonstrate that "[s]exual orientation plainly has no relevance to a person's 'ability to perform or contribute to society.'" ¹³⁵ Viewed together, their stories show that the military's anti-gay and anti-lesbian policy is not in

125. Steffan v. Cheney, 780 F. Supp. 1, 2 (D.D.C. 1991).

126. *Id.*

127. *Id.* at 2-3.

128. *Id.* at 5.

129. *Id.*

130. *Id.* at 6, 7.

131. *Id.* at 6 n.10.

132. *Id.*

133. For a list of the Navy regulations under which the Navy discharged Steffan, see *id.* at 3 n.4. The Navy promulgated these regulations pursuant to the DOD Directive quoted in part *supra* note 33.

For Joseph Steffan's story about his experiences at the Naval Academy and his struggle against the military's exclusionary policy, see JOSEPH STEFFAN, HONOR BOUND: A GAY AMERICAN FIGHTS FOR THE RIGHT TO SERVE HIS COUNTRY (1992).

134. See *supra* notes 63-133 and accompanying text.

135. *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring) (quoting *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion)).

the best interest of the military or of the United States because it mandates the exclusion of highly qualified personnel.

C. Critique of Military Exclusionary Policy

As the preceding examples show, the military excludes highly qualified service members solely because of their homosexual status.¹³⁶ These discharges also result in great cost to taxpayers.¹³⁷ This policy is not rationally based.¹³⁸ Instead, according to some commentators, the policy is based on prejudice and a desire to maintain a "macho military culture."¹³⁹ Furthermore, many experts believe that the DOD's exclusionary policy perpetuates homophobia and leads to further discrimination against lesbians and gays.¹⁴⁰ This in turn sends a message to society that discriminating against lesbians and gays is acceptable.¹⁴¹

III. EQUAL PROTECTION ANALYSIS

A. Traditional Equal Protection Analysis

The Equal Protection Clause of the Fourteenth Amendment declares that no state shall "deny to any person within its jurisdiction the

136. See *supra* notes 63-133 and accompanying text.

137. *Pentagon Cost of Discharging Gays Put at \$500 Million*, L.A. TIMES, June 19, 1992, at A14.

A report from the General Accounting Office (GAO), the investigative arm of Congress, stated that the service branches have discharged an average of 1500 people each year because of their homosexual orientation. *Id.* The study found that it cost \$28,226 to recruit and train each enlisted person and \$120,772 per officer. *Id.* Due to the military's exclusionary policy, the Pentagon has spent nearly \$500 million over the last 10 years replacing the 16,692 enlisted men and women and 227 officers who left the service because of homosexuality. *Id.* This \$500 million figure, however, does not include the money and effort the government has expended in pursuing thousands of cases of alleged homosexuality. *Id.*

138. See *infra* notes 387-484 and accompanying text; see also GAO REPORT, *supra* note 7, at 36 ("Scientific and medical studies disagree with the military's long-standing policy holding that homosexuality is incompatible with military service.").

139. Karst, *Pursuit of Manhood*, *supra* note 59, at 499; Sarbin & Karols, *supra* note 18, at 39; Karst, "Let Me Fight", *supra* note 55, at A6; see Michelle M. Benecke & Kirstin S. Dodge, Recent Developments, *Military Women in Nontraditional Fields: Casualties of the Armed Forces' War on Homosexuals*, 13 HARV. WOMEN'S L.J. 215 (1990).

For a discussion of prejudice against lesbians and gays, see EDITORS OF THE HARVARD LAW REVIEW, *SEXUAL ORIENTATION AND THE LAW* (1989) (discussing prejudice in areas of, inter alia, criminal justice, employment and public schools), and John C. Hayes, Note, *The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick*, 31 B.C. L. REV. 375, 377-405 (1990) (discussing prejudice, stereotypes and discrimination that lesbians and gays face in America, with particular attention to government-sponsored discrimination and its consequences).

140. GAO REPORT, *supra* note 7, at 37.

141. See *id.*; Herek, *supra* note 48, at 73-75; Karst, *Pursuit of Manhood*, *supra* note 59, at 509.

equal protection of the laws,"¹⁴² which is essentially a mandate that persons similarly situated be treated equally.¹⁴³ The United States Supreme Court has devised standards for determining the validity of legislation and other official action that is challenged on equal protection grounds.¹⁴⁴

Generally, the Court presumes that legislation is valid and will sustain governmental discrimination if the classification drawn is rationally related to a legitimate governmental interest.¹⁴⁵ This minimum standard is commonly known as the "mere rationality standard," which the Court usually applies when testing the constitutionality of economic or social legislation.¹⁴⁶ Under this standard, unless an action impinges upon a "suspect class"¹⁴⁷ or a "fundamental right,"¹⁴⁸ the Supreme Court gives state and federal legislatures wide latitude in legislating with respect to economic and social issues.¹⁴⁹ The Court presumes that "even improvident decisions will eventually be rectified by the democratic processes."¹⁵⁰ A heavy presumption exists in favor of constitutionality because the Court may consider conceivable objectives that hypothetically might have motivated the legislature when precise governmental objectives are not clear.¹⁵¹ "Often only the Court's imagination has limited the allowable purposes ascribed to government."¹⁵²

142. U.S. CONST. amend. XIV, § 1.

The Court has required the same of the federal government through the Fifth Amendment's Due Process Clause, which applies to the federal government. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954) (stating that due process component of Fifth Amendment includes equal protection requirement); *see also* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 14.1, at 568-69 (4th ed. 1991) (stating that equal protection under Fifth Amendment is basically coterminous with equal protection under Fourteenth Amendment).

143. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920); *TRIBE, supra* note 48, § 15-9, at 1437 & n.13.

144. *See infra* notes 145-80 and accompanying text.

145. *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973).

146. *Fritz*, 449 U.S. at 178-79; POLYVIOS G. POLYVIUO, THE EQUAL PROTECTION OF THE LAWS 79 (1980).

147. *See infra* note 153 and accompanying text.

148. *See infra* note 154 and accompanying text.

149. *Fritz*, 449 U.S. at 174-75; *Dukes*, 427 U.S. at 303.

150. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (refusing to apply heightened level of scrutiny to law discriminating against mentally retarded).

151. *See, e.g., Fritz*, 449 U.S. at 178-79; *Allied Stores v. Bowers*, 358 U.S. 522, 530 (1959); *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955).

152. *TRIBE, supra* note 48, § 16-3, at 1443.

When a law discriminates against a suspect class¹⁵³ or impinges on a fundamental right,¹⁵⁴ the mere rationality rule gives way to the most stringent standard, commonly known as "strict scrutiny."¹⁵⁵ To justify this special treatment of legislative classifications, the Court has noted the need to protect "discrete and insular minorities,"¹⁵⁶ which are thought to be "relatively powerless to protect their interests in the political process."¹⁵⁷ If a law treats similarly situated individuals differently, and those individuals are part of a suspect class based on race,¹⁵⁸ alienage¹⁵⁹ or national origin,¹⁶⁰ the Court will strictly scrutinize the law.

Race, alienage and national origin constitute suspect classifications because they are seldom relevant to the achievement of any legitimate state interest.¹⁶¹ Rather, the Court will assume that laws based on such

153. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (race-based discrimination triggered strict scrutiny); *Hernandez v. Texas*, 347 U.S. 475 (1954) (national origin-based discrimination triggered strict scrutiny).

154. See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (infringement of fundamental right to travel triggered strict scrutiny).

155. See *TRIBE*, *supra* note 48, § 16-6, at 1451.

156. *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938) ("[P]rejudice against discrete and insular minorities . . . tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and . . . may call for a correspondingly more searching judicial inquiry.").

157. *Id.*

158. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967) (applying strict scrutiny to statute prohibiting marriage between whites and non-whites); see also *Anderson v. Martin*, 375 U.S. 399 (1964) (applying strict scrutiny to law requiring that candidate's race appear on ballot).

159. Generally, the Court has purported to apply strict scrutiny to alienage classifications. *TRIBE*, *supra* note 48, § 16-23. For example, in the early 1970s, the Court gave alienage suspect-class status. See *In re Griffiths*, 413 U.S. 717 (1973) (applying strict scrutiny and holding that states may not prevent resident aliens from practicing law); *Sugarman v. Dougall*, 413 U.S. 634 (1973) (applying strict scrutiny and holding that states may not prevent aliens from holding positions in state civil service); *Graham v. Richardson*, 403 U.S. 365 (1971) (applying strict scrutiny and holding that states cannot deny welfare benefits from discrete and insular minority such as aliens). However, recent decisions create such large exceptions to the strict scrutiny test as applied to alienage cases that the Court probably will apply intermediate level scrutiny to such classifications. See *Plyler v. Doe*, 457 U.S. 202 (1982) (applying intermediate level scrutiny and holding that states may not bar illegal aliens from free state education). Presently, a majority of the Court seemingly applies mere rationality review when states ban aliens from any post involving a "political" rather than an "economic" function and deems any post related to law enforcement or education as political. See, e.g., *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982) (applying mere rationality review and holding that states may bar aliens from becoming deputy probation officers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (applying mere rationality review and holding that states may bar aliens from becoming public school teachers); *Foley v. Connelie*, 435 U.S. 291 (1978) (applying mere rationality review and holding that states may prevent aliens from becoming state troopers).

160. See, e.g., *Hernandez v. Texas*, 347 U.S. 475 (1954) (applying strict scrutiny to discrimination against Mexican Americans with regard to jury service).

161. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (discussing when heightened scrutiny is appropriate).

considerations reflect prejudice and antipathy.¹⁶² Moreover, because legislative means probably will not soon rectify such discrimination against politically powerless groups, the Court subjects such laws to strict scrutiny.¹⁶³ That is, the Court sustains these types of laws only if they are narrowly tailored to serve a compelling state interest.¹⁶⁴ The Court applies a similar standard if state laws impinge upon fundamental rights protected by the Constitution.¹⁶⁵

The Court has also applied a third level of review called "intermediate level" scrutiny.¹⁶⁶ To be upheld, classifications subject to intermediate level scrutiny must serve important governmental objectives and must be substantially related to achieving those objectives.¹⁶⁷ This standard applies to cases in which the classification is close to meeting the requirements of "suspectness."¹⁶⁸ For example, the Court has applied the so-called intermediate level scrutiny to classifications based on gender and illegitimacy.¹⁶⁹ Legal scholars have termed these classifications "quasi-suspect."¹⁷⁰ The Court applies intermediate level scrutiny to legislative classifications based on gender¹⁷¹ because gender generally pro-

162. *Id.*

163. *Id.*

164. *See* *Graham v. Richardson*, 403 U.S. 365, 371-76 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

165. *Shapiro v. Thompson*, 394 U.S. 618, 629-31 (1969) (invalidating law that impinged upon fundamental right to travel interstate by denying welfare benefits to residents who had not resided in state for at least one year); *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating poll tax that impinged upon fundamental right to vote by taxing voters); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541-43 (1942) (invalidating law that impinged upon fundamental right to procreate by allowing involuntary sterilization of institutionalized mental patients).

166. *See, e.g., Mills v. Habluetzel*, 456 U.S. 91, 100-02 (1982) (holding that restrictions on paternity claims by non-marital children must be substantially related to legitimate state interest to survive equal protection scrutiny); *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (holding that gender-based classifications must serve important governmental objectives and must be substantially related to achieving those objectives).

167. *Habluetzel*, 456 U.S. at 99-100, 101; *Craig*, 429 U.S. at 197.

168. *POLYVIU*, *supra* note 146, at 182; *see also Craig*, 429 U.S. 190 (1976) (applying intermediate level scrutiny and invalidating Oklahoma statute that forbade sale of beer containing 3.2% alcohol to males under age of 21 and to females under age of 18 because statute constituted gender-based classification).

169. *Habluetzel*, 456 U.S. at 99-100, 101 (illegitimacy-based discrimination); *Craig*, 429 U.S. at 197 (gender-based discrimination).

170. *POLYVIU*, *supra* note 146, at 239; *see also Habluetzel*, 456 U.S. at 99-100 (1982) (applying intermediate level scrutiny to illegitimacy-based classification); *Trimble v. Gordon*, 430 U.S. 762, 772-73 (1977) (invalidating portion of Illinois intestate succession scheme that prevented illegitimate children from paternal inheritance); *Craig*, 429 U.S. at 197 (applying intermediate level scrutiny to gender-based classification).

171. *See, e.g., Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 721-22 (1982); *Craig*, 429 U.S. at 197 (1976).

vides no sensible ground for differential treatment.¹⁷² That is, "what differentiates gender from such non-suspect statuses as intelligence or physical disability . . . is that the sex characteristic frequently bears no relation to ability to perform or contribute to society."¹⁷³ Moreover, rather than resting on meaningful considerations, statutes that treat people differently based on their gender frequently reflect outdated notions of the relative capabilities of men and women and perpetuate inaccurate stereotypes.¹⁷⁴ Likewise, because illegitimacy is beyond an individual's control and bears "no relation to the individual's ability to participate in and contribute to society,"¹⁷⁵ official discrimination resting on that characteristic is also subject to intermediate level scrutiny.¹⁷⁶

In a limited number of cases, the Court has applied a so-called "active" rational basis review,¹⁷⁷ instead of a mere rational basis review.¹⁷⁸ Under active rational basis review, the Court requires that the government's discriminatory statute "be rationally related to a legitimate governmental purpose."¹⁷⁹ Although the active rational basis test is stated the same as the mere rational basis test, the Court undertakes a more searching determination of whether a rational basis actually exists.¹⁸⁰

172. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion).

The Court may, however, view gender as a sensible basis upon which to base differential treatment. *See, e.g., Kahn v. Shevin* 416 U.S. 351, 352 (1974) (holding gender-based classification valid because governmental objective was to reduce disparity between economic capabilities of men and women).

173. *Frontiero*, 411 U.S. at 686 (plurality opinion).

174. *Hogan*, 458 U.S. at 725.

175. *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

176. *Pickett v. Brown*, 462 U.S. 1 (1983); *Mills v. Habluetzel*, 456 U.S. 91, 99-100 (1982).

177. *See Pruitt v. Cheney*, 963 F.2d 1160, 1165 (9th Cir. 1992) (noting that United States Supreme Court and Ninth Circuit have applied "active" rational basis review); *cf. City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 458 (1985) (Marshall, J., concurring in part, dissenting in part) (characterizing Court's more active rational basis review as "second order" rational basis review).

178. *See, e.g., Cleburne*, 473 U.S. 432 (finding residential zoning permit requirement violative of equal protection rights of mentally-retarded group home residents denied such permit).

In recent years, the Supreme Court has been less inclined to automatically uphold every governmental action under rational basis scrutiny. The Court has even found that statutes regulating economic matters—an area in which the Court typically has shown the highest degree of deference—lack a rational basis. *See, e.g., Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336 (1989); *see also Williams v. Vermont*, 472 U.S. 14 (1985) (invalidating as arbitrary statute that exempted residents, but not non-residents, who purchased cars outside Vermont from Vermont's use tax to extent of any sales tax paid in state of purchase); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) (ruling that Alabama statute taxing out-of-state insurance companies more heavily than insurers based in Alabama did not pass rational basis test).

179. *Cleburne*, 473 U.S. at 446.

180. *See id.* at 458 (Marshall, J., concurring in part, dissenting in part). "[T]he Court does not label its handiwork heightened scrutiny, and perhaps the method employed must hereafter

1. Heightened scrutiny

In a series of cases, the United States Supreme Court has identified several considerations it has used for determining which governmental classifications require heightened scrutiny under the equal protection analysis.¹⁸¹ One factor the Court considers is whether the discrimination is invidious or unjustifiable, that is, whether the discrimination is based on an obvious, immutable or distinguishing trait that frequently bears no relation to ability to contribute to society.¹⁸² A second factor is whether the class historically has suffered from purposeful discrimination.¹⁸³ Third, and finally, the Court considers whether the class lacks the political power necessary to obtain protection from the political branches of government.¹⁸⁴

a. most courts have found lesbians and gays undeserving of heightened scrutiny

i. immutable characteristic

Two circuit courts have concluded that heightened scrutiny is inapplicable in cases involving discrimination against lesbians and gays, because those circuits concluded that homosexuality is not an immutable characteristic.¹⁸⁵ In both cases, the findings were made without the benefit of any supporting authority¹⁸⁶ and were wholly without citation to any scientific or medical authority that would lend support to such con-

be called 'second order' rational basis review rather than 'heightened scrutiny.'" *Id.* (Marshall, J., concurring in part, dissenting in part).

181. *See id.* at 440-41; *Plyler v. Doe*, 457 U.S. 202, 216 n.14, 219-23 (1982); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Frontiero v. Richardson*, 411 U.S. 677, 684-87 (1973) (plurality opinion).

182. *See Cleburne*, 473 U.S. at 440-41; *Plyler*, 457 U.S. at 216 n.14, 219-23; *Murgia*, 427 U.S. at 313; *Frontiero*, 411 U.S. at 684-87 (plurality opinion); *Rodriguez*, 411 U.S. at 28.

183. *See cases cited supra* note 182.

184. *E.g.*, *Frontiero*, 411 U.S. at 684-86 (plurality opinion); *United States v. Carolene Prods.*, 304 U.S. 144, 152 n.4 (1938).

185. In *High Tech Gays v. Defense Industry Security Clearance Office*, 895 F.2d 563 (9th Cir. 1990), the Ninth Circuit, without citation to any evidence in the record or to any medical authority, announced: "Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes." *Id.* at 573. Similarly, in *Woodward v. United States*, 871 F.2d 1068 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990), the Federal Circuit stated: "Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature." *Id.* at 1076. As with the Ninth Circuit in *High Tech Gays*, the court cited no authority for the proposition that homosexuality is a mutable characteristic.

186. *See cases cited supra* note 185.

clusions.¹⁸⁷ The courts simply announced that homosexual orientation was not immutable.¹⁸⁸

According to the growing weight of currently available scientific information, sexual orientation (whether homosexual or heterosexual) is generally not subject to change.¹⁸⁹ "Most experts in the area have concluded that sexual orientation is set by early childhood."¹⁹⁰ Sexual orientation "is not a matter of conscious or controllable choice."¹⁹¹ Recent studies also indicate that sexual orientation is determined, at least in part, by biological factors.¹⁹² Judge Norris phrased the issue of changing one's sexual orientation in heterosexual terms.¹⁹³ If the government began to discriminate against heterosexuals, how many heterosexuals

187. See cases cited *supra* note 185.

188. See cases cited *supra* note 185.

189. See, e.g., ALAN P. BELL ET AL., SEXUAL PREFERENCE—ITS DEVELOPMENT IN MEN AND WOMEN 166-67, 211, 222 (1981); C.A. TRIPP, THE HOMOSEXUAL MATRIX 253-58 (1975); Frank X. Acosta, *Etiology and Treatment of Homosexuality*, 4 ARCHIVES SEXUAL BEHAV. 9, 23-24 (1975); Eli Coleman, *Changing Approaches to the Treatment of Homosexuality*, in HOMOSEXUALITY: SOCIAL, PSYCHOLOGICAL, AND BIOLOGICAL ISSUES 81-88 (William Paul et al. eds., 1982); Douglas C. Haldeman, *Sexual Orientation Conversion Therapy for Gay Men and Lesbians: A Scientific Examination*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY, *supra* note 7, at 149; N. McConaghy, *Is a Homosexual Orientation Irreversible?*, 129 BRIT. J. PSYCHIATRY, 556, 563 (1976); Michael W. Ross & Olli W. Stalstrom, *Exorcism as Psychiatric Treatment: A Homosexual Case Study*, 8 ARCHIVES SEXUAL BEHAV. 379, 382-83 (1979); Charles Silverstein, *Psychological and Medical Treatments of Homosexuality*, in HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY, *supra* note 7, at 101. Additional authorities are cited in Miller, *supra* note 48, at 819-21.

190. See Gonsiorek & Weinrich, *supra* note 7, at 2.

191. High Tech Gays v. Defense Indus. Sec. Clearance Office, 909 F.2d 375, 377 (9th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc).

192. See Simon LeVay, *A Difference in Hypothalamic Structure Between Heterosexual and Homosexual Men*, 253 SCI. 1034, 1035 (1991). The LeVay study found that "INAH 3 [interstitial nuclei of the anterior hypothalamus] is . . . [half as large] in individuals sexually oriented toward men (heterosexual women and homosexual men)" than in individuals sexually oriented toward women. *Id.* at 1035. "These data support the hypothesis that INAH 3 is dimorphic not with sex but with sexual orientation, at least in men." *Id.*; see also J. Michael Bailey, & Richard C. Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCHIVES GEN. PSYCHIATRY, 1089, 1092 (1991) (suggesting that genetic factors help determine sexual orientation). Of the relatives tested whose sexual orientation could be rated, in the Bailey study 52% (29/56) of the identical twins, 22% (12/54) of fraternal twins, and 11% (6/57) of adoptive brothers were homosexual. *Id.* at 1093. This study "suggest[s] that genetic factors are important in determining individual differences in sexual orientation." *Id.*

In a more recent study published in the National Academy of Sciences, "UCLA neuroscientists Roger A. Gorski and Laura S. Allen found that an important structure connecting the left and right sides of the brain—already know to be larger in women than in men—is larger still in homosexual men." Bettina Boxall, *Born Gay?: Many Cheer a Second Study Suggesting that Homosexuality Has Physical Causes*, L.A. TIMES, Aug. 12, 1992, at B1.

193. See *Watkins v. United States Army*, 875 F.2d 699, 726 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990).

would "find it easy not only to abstain from heterosexual activity but also to shift the object of their sexual desires to persons of the same sex?"¹⁹⁴

Even if sexual orientation were mutable, the courts would not be precluded from finding that lesbians and gays constitute a suspect class because the Supreme Court has not stated that absolute immutability is essential for a particular group to be considered a suspect class.¹⁹⁵ Race, gender, alienage and illegitimacy can all be changed or concealed, yet discrimination based on any of these categories compels heightened scrutiny by the courts.¹⁹⁶ Aliens may obtain citizenship, men and women can surgically change their external sexual anatomy, and light-skinned blacks may pass as white.¹⁹⁷ Discrimination based on race would not become permissible merely because a future scientific advance makes changing skin pigmentation possible.¹⁹⁸

The consideration of immutability serves a more general purpose.¹⁹⁹ The presence of an immutable trait suggests the existence of particularly reprehensible forms of discrimination.²⁰⁰ While one might be able to alter or conceal traits such as race, gender or sexual orientation, that change can only occur at a prohibitive cost to the average individual.²⁰¹ The Court only looks to the immutable traits, which are central, defining traits of personhood, which one may alter only at the expense of significant damage to one's identity.²⁰² In this context, sexual orientation fulfills the requirement that the identifying trait be immutable.

194. *Id.* (Norris, J., concurring).

195. In listing the factors relevant to the determination that a governmental classification is suspect, the Supreme Court has on several occasions not mentioned immutability as a requirement. *See e.g.*, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440-41 (1985); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

196. *Watkins*, 875 F.2d at 726 (Norris, J., concurring).

197. *Id.* (Norris, J., concurring).

198. *Id.* (Norris, J., concurring).

199. *Id.* (Norris, J., concurring).

200. *Id.* (Norris, J., concurring).

201. *Id.* (Norris, J., concurring).

202. *See id.* at 726 (Norris, J., concurring) (stating that sexual orientation is central aspect of individual and group identity); *TRIBE*, *supra* note 48, § 16-33, at 1616 (stating that sexual orientation, whether homosexual or heterosexual, is central to personality of individual); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 *HARV. L. REV.* 1285, 1303 (1985) (stating that sexual orientation is central to one's identity).

ii. invidious discrimination

Discrimination based on sexual orientation is also invidious.²⁰³ Beyond the immutable nature of the trait, lesbians and gays have been and still are the subject of incorrect stereotyping.²⁰⁴ Homosexual orientation "implies no impairment in judgment, stability, reliability or general social or vocational capabilities."²⁰⁵ As a class-defining trait, sexual orientation "bears no relation to ability to perform or contribute to society."²⁰⁶

Yet lesbians and gays remain the subject of significant and virulent stereotyping in modern society. Gay men are believed by many to be effeminate and lesbians to be masculine.²⁰⁷ Many assert that lesbians and gays proselytize children to homosexuality and molest children.²⁰⁸ Further, lesbians and gays are considered by large numbers of individuals to be mentally ill.²⁰⁹ These stereotypes are all demonstrably false.²¹⁰ In truth, the sexual orientation of the vast majority of lesbians and gays is not identifiable based on mannerisms alone,²¹¹ and lesbians and gays are no more likely than heterosexuals to molest children²¹² or to be mentally ill.²¹³

The Supreme Court has also focused on the historical background of the discrimination suffered by lesbians and gays in deciding whether to apply strict scrutiny.²¹⁴ Historically, American society has discriminated

203. In the context of a claim that a difference in treatment amounts to "invidious" discrimination in violation of the Fourteenth Amendment, the term invidious means "arbitrary, irrational and not reasonably related to a legitimate purpose." BLACK'S LAW DICTIONARY 826 (6th ed. 1990).

204. Herek, *supra* note 48, at 66-72; *Developments in the Law—Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1528 n.61, 1563-67 (1989) [hereinafter *Sexual Orientation and the Law*]. See generally *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 729-30 (1982) (invalidating discrimination based on stereotype of what constitutes acceptable female work).

205. GAO REPORT, *supra* note 7, at 36 (quoting American Psychiatric Association's 1973 Resolution that formally removed homosexual orientation from list of mental disorders).

206. Cf. *Frontiero v. Richardson*, 411 U.S. 677, 678 (1973) (plurality opinion) (referring to gender as bearing no relation to ability to perform or contribute to society).

207. Herek, *supra* note 48, at 69; Miller, *supra* note 48, at 821-24.

208. Miller, *supra* note 48, at 821-24.

209. *Id.*

210. *Id.*

211. Judd Marmor, *Clinical Aspects of Male Homosexuality*, in *HOMOSEXUAL BEHAVIOR: A MODERN REAPPRAISAL* 267, 267 (Judd Marmor ed., 1980).

212. *Id.* at 271.

213. "[T]he National Association for Mental Health, the American Psychiatric Association, and the Surgeon General now agree that homosexuality, in and of itself, is not a mental illness." Miller, *supra* note 48, at 824.

214. *Bowen v. Gillard*, 483 U.S. 587, 602-03 (1987).

intensely against lesbians and gays.²¹⁵ In finding jobs, securing housing—indeed, in nearly every aspect of social existence—sexual orientation-based discrimination has been a persistent facet of life in the United States.²¹⁶

Unfortunately, the deeply ingrained societal prejudice against lesbians and gays also manifests itself in widespread violence against this group.²¹⁷ Research indicates that lesbians and gays are physically abused and assaulted because of their sexual orientation.²¹⁸ Law enforcement officials report that violence against lesbians and gays is both significant and, perhaps in part due to the AIDS epidemic, increasing.²¹⁹

iii. political power

A final consideration the United States Supreme Court uses to identify governmental classifications that require heightened scrutiny is whether the class traditionally has been unable to protect the rights of its members through the political process.²²⁰ Heightened scrutiny serves to protect politically powerless minorities against majoritarian abuses.²²¹ The Court accords the class special protection by applying heightened scrutiny analysis because the class is unable to secure similar protection through representative government.²²²

In refusing to extend heightened scrutiny to lesbians and gays, one circuit court found that recent legislation in several states shows that

215. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.) (stating that lesbians and gays have been historical object of "pernicious and sustained hostility"); see also Note, *supra* note 202, at 1302 (stating that stigmatization of lesbians and gays has "persisted throughout history, across cultures, and in the United States"); Miller, *supra* note 48, at 824-25 (stating that lesbians and gays "have historically faced pervasive discrimination" in America). Widespread discrimination against lesbians and gays exists in both public and private employment. *Sexual Orientation and the Law*, *supra* note 204, at 1554, 1575. Lesbians and gays must also face discrimination in many other facets of modern life. *Id.* at 1671.

216. Miller, *supra* note 48, at 824-25; see also Herek, *supra* note 48 (discussing implications of stigma, prejudice and violence against lesbians and gays).

217. See Herek, *supra* note 48, at 61.

218. *Id.*

219. See, e.g., Stephanie Chavez, *Hate Crimes Set a Record in L.A. County*, L.A. TIMES, Mar. 20, 1992, at A1, A27; Shari L. Mannery, *Anti-Gay Acts in U.S. Widespread*, CHI. TRIB., June 8, 1990, § 1, at 20; Kara Swisher & Brooke A. Masters, *Police, Gay Activists See Rise in Assaults on Homosexuals: Better Statistics on 'Hate Crimes' Sought*, WASH. POST, Sept. 17, 1989, at A1.

220. See *supra* note 184 and accompanying text.

221. *United States v. Carolene Prods.*, 304 U.S. 144, 152 & n.4 (1938).

222. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985); *Plyler v. Doe*, 457 U.S. 202, 216-17 n.14 (1982); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

lesbians and gays are not politically powerless.²²³ Citing anti-discrimination provisions in three states, an executive order in New York and a series of local ordinances, the Ninth Circuit, in *High Tech Gays v. Defense Industry Security Clearance Office*,²²⁴ announced: "Thus, homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation."²²⁵

This opinion is premised on an inaccurate view of recent state anti-discrimination legislation. The Ninth Circuit's brief catalogue of legislative action was taken directly from two footnotes in a recent Harvard University analysis of the rights of lesbians and gays in America.²²⁶ However, the court ignored the text accompanying this section of the Harvard study: "Unfortunately, very little legislation protects gay men and lesbians from discrimination in the private sector. No federal statute prohibits discrimination by private citizens or organizations based on sexual orientation. Nor do the states provide such protection: Only Wisconsin has a comprehensive statute barring such discrimination in employment."²²⁷ The Harvard study concluded that discrimination against lesbians and gays is pervasive, and that recent changes in the law are inadequate to provide protection.²²⁸ The study found that unless more state and federal governments take greater steps to protect lesbians and gays, "gay men and lesbians will remain unable to conduct their lives free from discrimination."²²⁹

Besides exaggerating the significance of recent anti-discrimination efforts, the Ninth Circuit's position in *High Tech Gays* is fundamentally flawed because it assumes that a few scattered successes in local legislation are proof of political power and therefore invalidate the use of heightened scrutiny in governmental classifications based on sexual ori-

223. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

224. 895 F.2d 563 (9th Cir. 1990).

225. *Id.* at 574.

226. See *Sexual Orientation and the Law*, *supra* note 204, at 1667 n.49, 1668 n.51.

227. *Id.* at 1667. The Harvard study was published in 1989. See *supra* note 204. Currently, five other states have enacted comprehensive sexual orientation anti-discrimination statutes: Connecticut, Hawaii, Massachusetts, New Jersey and Vermont. See, e.g. CONN. GEN. STAT. § 53a-181b (1990); HAW. REV. STAT. §§ 368-1, 378-1, 378-2 (1991); MASS. GEN. LAWS ANN. ch. 6, § 18B, ch. 22, § 16, ch. 22C, § 32, ch. 151B, §§ 1, 3-4, ch. 175I, §§ 2, 7, 12, ch. 176I, § 4, ch. 272, §§ 92A, 98 (West 1992); N.J. STAT. ANN. §§ 2C:33-4, :44-3 (West 1991); VT. STAT. ANN. tit. 8, § 4724, tit. 13, § 1455 (1991).

228. *Sexual Orientation and the Law*, *supra* note 204, at 1671.

229. *Id.*

entation.²³⁰ If applied to other classes, the Ninth Circuit's standard would disqualify many groups from suspect or quasi-suspect status. African Americans, women, aliens or any group that has obtained some form of legislative protection would forfeit the benefits of heightened scrutiny.²³¹

As Judge Canby has observed, the Ninth Circuit's argument in *High Tech Gays* is not consistent with the Supreme Court's treatment of other minorities.²³² Isolated local anti-discrimination successes are insufficient to deprive lesbians and gays of the status of a suspect classification.²³³ Compare the situation with that of African Americans, who constitute the paradigm suspect category for equal protection purposes.²³⁴ African Americans are protected by three federal constitutional amendments,²³⁵ by the federal Civil Rights Acts of 1866, 1870, 1871, 1875, 1957, 1960, 1964, 1965 and 1968, as well as by anti-discrimination laws in 48 states.²³⁶ By that comparison lesbians and gays are politically powerless.²³⁷ In reality, lesbians and gays face severe limitations on their ability to protect their interests by means of the political process. As Justice Brennan observed, "because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena."²³⁸

Several factors limit the effectiveness of political action by lesbians and gays. For example, because of the severe penalties imposed by soci-

230. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 377-78 (9th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc).

231. See *id.* at 378 (Canby, J., dissenting from denial of reh'g en banc).

232. *Id.* (Canby, J., dissenting from denial of reh'g en banc).

233. See *id.* (Canby, J., dissenting from denial of reh'g en banc).

234. See *id.* (Canby, J., dissenting from denial of reh'g en banc).

235. U.S. CONST. amend. XIII (prohibiting slavery and involuntary servitude); *id.* amend. XIV (securing United States and state citizenship, privileges or immunities, due process and equal protection of laws); *id.* amend. XV (securing right to vote).

236. *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting from denial of reh'g en banc).

237. *Id.* (Canby, J., dissenting from denial of reh'g en banc). By absolute standards as well, lesbians and gays are politically powerless because they constitute only about "10 percent of the population." *Id.* (Canby, J., dissenting from denial of reh'g en banc). Moreover, lesbians' and gays' political power is further inhibited because many lesbians and gays keep their sexual orientation secret to avoid discrimination. *Id.* (Canby, J., dissenting from denial of reh'g en banc).

238. *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.); see also *High Tech Gays*, 909 F.2d at 378 (Canby, J., dissenting from denial of reh'g en banc) (stating that lesbians and gays are regarded as "political pariahs" by major political parties); *Watkins v. United States Army*, 875 F.2d 699, 727 (9th Cir. 1989) (Norris, J., concurring) (stating that lesbians and gays face structural barriers rendering "effective political participation unlikely if not impossible"), *cert. denied*, 111 S. Ct. 384 (1990).

ety²³⁹ and the military²⁴⁰ on persons identified as lesbian or gay, many lesbians and gays conceal their sexual orientation.²⁴¹ "Silence, however, has its cost. It may allow a given individual to escape from the discrimination, abuse, and violence which is often directed at homosexuals, but it ensures that homosexuals as a group are politically unheard."²⁴² In addition, by diminishing contact between heterosexual service members and avowed lesbians and gays, the military's exclusionary policy denies heterosexual service members the ability to interact with lesbians and gays and the sensitivity that would result from such interaction.²⁴³

In sum, lesbians and gays, as a class, satisfy all the requirements the Supreme Court has established to determine whether a class is in need of heightened scrutiny. Courts cannot "analyze the present issue under the guidelines set down by the Supreme Court and reach any conclusion other than that discrimination based on sexual orientation is inherently suspect."²⁴⁴ Therefore, only by abandoning the established tests and retreating to another formulation is it possible to achieve a different result.²⁴⁵

b. the effect of the status versus conduct distinction

Determining the appropriate standard of review for governmental discrimination against lesbian and gay military personnel may depend in part on whether the courts distinguish between homosexual *conduct* and homosexual *orientation*. Under the military's policy, homosexual status—as opposed to homosexual conduct—results in immediate dismissal

239. See *supra* notes 48, 139 and accompanying text.

240. See *supra* note 33.

241. This is especially true for lesbians and gays who serve or wish to serve in the military. See GAO REPORT, *supra* note 7, at 10. A number of studies suggest that "there are considerably more homosexuals serving in the military and completing their terms of service than are being caught and discharged." *Id.* at 11 (footnote omitted). "Based on a DOD military population of approximately 2 million, the number of homosexual personnel would range from about 100,000 to 200,000 personnel . . ." *Id.* at 10 n.1.

242. *Jantz v. Muci*, 759 F. Supp. 1543, 1550 (D. Kan. 1991).

243. See *id.* Over the years, public attitudes concerning the presence of lesbians and gays in the military have changed substantially because "more and more people are finding out they know someone who is lesbian or gay and that they are just as competent and qualified as other people." Gerald S. Cohen, *Poll Finds Support for Gays in Military*, S.F. CHRON., Apr. 19, 1991, at A15 (quoting Gregory King, spokesman for Human Rights Campaign Fund); see also GAO REPORT, *supra* note 7, at 37 (stating that experts believe homophobic attitudes can be altered by allowing open communication and sharing of ideas between heterosexual and lesbian and gay service members).

244. *Jantz*, 759 F. Supp. at 1550-51.

245. *Id.* at 1551.

from the military.²⁴⁶ Homosexual conduct, on the other hand, if determined by the officer in charge to be an "aberration," does not automatically result in discharge.²⁴⁷ Most federal courts that have refused to impose a heightened scrutiny analysis have done so by emphasizing that persons engaging in homosexual conduct do not constitute a suspect class.²⁴⁸

Federal circuits diverge on the issue of which standard applies to equal protection challenges against sexual-orientation-based governmental discrimination, when there is no evidence of sexual conduct. The Ninth Circuit Court of Appeals, in its decision in *Pruitt v. Cheney*,²⁴⁹ indicated that it will scrutinize the military's rationales in the same manner²⁵⁰ as the United States Supreme Court scrutinized the City of Cleburne's rationales in *City of Cleburne v. Cleburne Living Center*.²⁵¹ The United States District Court for the District of Columbia, however, has applied a mere rationality review, giving extreme deference to the military's unfounded rationales for its sexual-orientation-based policy.²⁵²

246. *Watkins v. United States Army*, 875 F.2d 699, 714 (9th Cir. 1989) (Norris, J., concurring) ("Under the Army's regulations, 'homosexuality,' not sexual conduct, is clearly the operative trait for disqualification."), *cert. denied*, 111 S. Ct. 384 (1990); see also Gisela Caldwell, Note, *The Seventh Circuit In Ben-Shalom v. Marsh: Equating Speech With Conduct*, 24 LOY. L.A. L. REV. 421, 458 (1991) ("[T]he Army's regulation focuses on the individual's status, and excludes homosexually oriented soldiers merely for 'having a propensity' to engage in forbidden homosexual conduct." (footnote omitted)).

Some courts have found that the military anti-lesbian and anti-gay regulations discriminate based on conduct, not status or speech. See, e.g., *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989), *cert. denied*, 494 U.S. 1003 (1990). For the effect the status/conduct distinction can have, see *infra* notes 248-68 and accompanying text.

247. See *supra* note 33 for the text of the military's exclusionary policy.

248. See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 573 n.9 (9th Cir. 1990); *Padula v. Webster*, 822 F.2d 97, 102 (D.C. Cir. 1987); *National Gay Task Force v. Board of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984), *aff'd by an equally divided court*, 470 U.S. 903 (1985); *Singer v. United States Civil Serv. Comm'n*, 530 F.2d 247 (9th Cir. 1976).

The Seventh Circuit, however, has explicitly abandoned the distinction between orientation and conduct. See *Ben-Shalom*, 881 F.2d at 464. In *Ben-Shalom*, the court held, with no evidence in the case before it and without citation to any authority, that the plaintiff's admitted lesbian orientation compelled the "reasonable inference[]" that she "has in the past and is likely to again engage in such [homosexual] conduct." *Id.*

249. 963 F.2d 1160 (9th Cir. 1992).

250. *Id.* at 995.

251. 473 U.S. 432 (1985).

252. See *Steffan v. Cheney*, 780 F. Supp. 1 (D.D.C. 1991).

Judge Gash attempted to distinguish *Steffan* from *Pruitt*, by emphasizing that in *Steffan* "the defendants have articulated a number of different bases for the regulations that affected plaintiff and his departure from the Naval Academy." *Id.* at 12 (emphasis added). He added that *Steffan* "is procedurally a bit ahead of *Pruitt*" because *Steffan* involved a motion for summary judgment and *Pruitt* involved a motion to dismiss. *Id.* Judge Gash ignored the

The Ninth Circuit originally held in *Watkins v. United States Army*²⁵³ that strict scrutiny applies to equal protection challenges of governmental discrimination based on sexual orientation.²⁵⁴ This opinion was vacated, however, when the full court, sitting en banc, subsequently decided *Watkins's* case on estoppel grounds instead.²⁵⁵ Recently, the Ninth Circuit Court of Appeals applied a *Cleburne*-type active rational basis review to governmental discrimination against lesbians and gays.²⁵⁶ The Ninth Circuit Court of Appeals applied active rational basis review in *High Tech Gays v. Defense Industry Security Clearance Office*,²⁵⁷ "to see whether the government had established on the record a rational basis to the challenged discrimination."²⁵⁸

Similarly, in reversing the lower court's grant of the military's motion to dismiss,²⁵⁹ the Ninth Circuit Court of Appeals in *Pruitt* stated that active rational basis review is the appropriate standard. Thus, the court remanded the case for the lower court to determine "whether the Army's discrimination is rationally related to a permissible governmental purpose."²⁶⁰ The court of appeals in *Pruitt* concluded that, after *Palmore v. Sidoti*,²⁶¹ *Cleburne*, and *High Tech Gays*, it could not say that *Pruitt's* complaint was insufficient on its face.²⁶² This stands in sharp contrast to the lower court's grant of the military's motion to dismiss based upon a completely deferential mere rationality review.²⁶³ After quoting the Army's anti-gay and anti-lesbian policy, the lower court

Ninth Circuit's holding that merely articulating a number of unfounded bases is not enough for the government to establish that its policy had a rational basis. See *Pruitt*, 963 F.2d at 1166 ("[W]e will not spare the Army the task . . . of offering a rational basis for its regulation . . ."). The court in *Pruitt* held that the proper standard of review is a *Cleburne*-type active rational basis review, in which the military must *demonstrate* a rational basis for its policy. *Id.*

253. 847 F.2d 1329 (9th Cir. 1988) (basing holding on equal protection grounds), *aff'd en banc on other grounds*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990).

254. *Id.* at 1349.

255. *Id.*

256. See *Pruitt*, 963 F.2d at 1161 (applying active rational basis review and stating that "[a]lthough the record is clear that *Pruitt* is homosexual, there is no evidence in this case that she engaged in homosexual acts"); *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990) (applying active rational basis review and stating that challenged regulations all relate to conduct rather than orientation).

257. 895 F.2d 563 (9th Cir. 1990).

258. *Pruitt*, 963 F.2d at 1166 (discussing standard of review applied in *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990)) (footnote omitted).

259. *Id.* at 1167 (denying First Amendment claim but allowing equal protection claim), *aff'g in part, rev'g in part*, *Pruitt v. Weinberger*, 659 F. Supp. 625 (C.D. Cal. 1987).

260. *Id.*

261. 466 U.S. 429 (1984).

262. *Id.*

263. *Pruitt v. Weinberger*, 659 F. Supp. 625 (C.D. Cal. 1987), *aff'd in part, rev'd in part sub nom. Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992).

stated: "It is not for this Court to assess the wisdom of the Army's policy here concerned."²⁶⁴ The Ninth Circuit Court of Appeals disagreed with the lower court's holding.²⁶⁵ Because the military's policy is based on prejudice, at least *Cleburne*-type active rational basis review is required.²⁶⁶ The Ninth Circuit Court of Appeals in *Pruitt v. Cheney* was correct in concluding that *Palmore*, *Cleburne*,²⁶⁷ and *High Tech Gays*²⁶⁸ require that the Army present a rational basis for its regulation, and that the plaintiff have an opportunity to contest that basis.²⁶⁹

B. Court's Deference to the Military's Judgment

The Court has given a high level of deference to the political branches with regard to military matters.²⁷⁰ Notwithstanding the Court's deference, service members do not sacrifice their rights by entering the military; rather, the test and the limitations the Court applies "may differ because of the military context."²⁷¹ Although the Court often defers to military judgment,²⁷² this deference is most appropriate in judging whether the reasons set forth on the record for the military's discrimination are rationally related to any of the military's permissible goals.²⁷³ While some internal military matters are exempt from judicial review, claims that the military has deprived service members of their

264. *Id.* at 627.

265. *Pruitt*, 963 F.2d 1160.

266. *Id.* at 1166.

Arguably, *why* the United States Supreme Court applied active rational basis review is unclear. Ellen E. Halfon, Note, *A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Rational Basis Test in City of Cleburne v. Cleburne Living Center*, 20 LOY. L.A. L. REV. 921, 957 & n.252 (1987). The Supreme Court in *Cleburne* never indicated why it applied something tougher than mere rationality. *Id.* One logical assumption, however, is that the Court applied a "heightened" rational basis test because of its concern that deep-seated prejudice, rather than legitimate goals, may have motivated the discriminatory legislation. *Id.* at 958.

267. 473 U.S. 432 (1985).

268. 895 F.2d 563 (9th Cir. 1990).

269. *Pruitt*, 963 F.2d at 1166.

270. *See, e.g.*, *Chappell v. Wallace*, 462 U.S. 296, 304 (1983); *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981); Mary Jo Donahue, Comment, *First Amendment Rights in the Military Context: What Deference is Due?* — *Goldman v. Weinberger*, 20 CREIGHTON L. REV. 85, 100 (1986); Linda Sugin, Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 856-57 (1987).

271. *Rostker*, 453 U.S. at 67.

272. *See, e.g.*, *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986) ("Courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."); *Rostker*, 453 U.S. at 64-68 ("[T]he 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.").

273. *Pruitt*, 963 F.2d 1160.

constitutional rights are reviewable.²⁷⁴ Unfortunately, the theory underlying military deference has never been clearly articulated, and there is nearly a complete lack of standards in the governing precedents as to how much deference is due military judgments in constitutional cases.²⁷⁵ Although the Supreme Court has not provided an analytical framework to determine the reviewability of military decisions,²⁷⁶ the Fifth Circuit Court of Appeals developed a test for this purpose in *Mindes v. Seaman*.²⁷⁷

The Fifth Circuit in *Mindes* established two threshold requirements for review; if these are met, the courts proceed to balance the competing interests of the plaintiff and the military to determine reviewability.²⁷⁸ First, the plaintiff must allege a violation of the Constitution, a federal statute or military regulations.²⁷⁹ Second, the plaintiff must exhaust intraservice remedies.²⁸⁰ If these requirements are met, the courts then determine reviewability by weighing four factors: (1) the nature and strength of the plaintiff's claim; (2) the potential injury to the plaintiff if the court refuses to review the military action; (3) the extent of interference with military functions; and (4) the extent to which military discretion or expertise is involved.²⁸¹

Applying the *Mindes* test to the military's exclusionary policy indicates that judicial deference to the military's judgment is inappropriate.²⁸² Challenges to the military's anti-lesbian and anti-gay policy meet

274. See *Wallace v. Chappell*, 661 F.2d 729, 733 n.4 (9th Cir. 1981), *rev'd on other grounds*, 462 U.S. 296 (1983).

275. Seth Harris, *Permitting Prejudice to Govern: Equal Protection, Military Deference, and the Exclusion of Lesbians and Gay Men from the Military*, 17 N.Y.U. REV. L. & SOC. CHANGE 171, 208 (1990); Gabriel W. Gorenstein, Note, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 390-96 (1984).

276. See Harris, *supra* note 275, at 208 ("The central difficulty with applying the military deference doctrine in constitutional cases is the nearly complete lack of standards in the governing precedents.")

277. 453 F.2d 197 (5th Cir. 1971). The Ninth Circuit has accepted the *Mindes* test and the Supreme Court has neither expressly accepted nor rejected it. See *Wallace*, 661 F.2d at 733 n.4.

One commentator concludes: "The test for determining the appropriateness of applying military deference in cases challenging the military's anti-gay and anti-lesbian regulations is whether a cognizable relationship, at least minimal and perhaps substantial, exists between the classification in the military's regulations and a core military function." Harris, *supra* note 275, at 217.

278. *Mindes*, 453 F.2d at 201.

279. *Id.*

280. *Id.*

281. *Id.* at 201-02.

282. See *id.*

the two threshold requirements of the *Mindes* test.²⁸³ First, the threshold requirement that the plaintiff allege a violation of the Constitution, a federal statute or military regulations is met because the military's exclusionary policy violates equal protection principles.²⁸⁴ Second, the exhaustion of intraservice remedies requirement is met because service members must challenge discharges based on homosexual status before a board of officers.²⁸⁵ Under the military's exclusionary policy the board must recommend discharge of the service member if the board makes a finding of "homosexuality."²⁸⁶ Because these two threshold requirements are met when lesbian and gay service members bring an equal protection challenge against the military's exclusionary policy, the courts must determine reviewability by weighing the four *Mindes* factors.²⁸⁷

First, the courts must examine the nature and strength of the plaintiff's claim.²⁸⁸ Here, the military is excluding lesbians and gays based on the unsubstantiated conclusion that lesbians and gays are unsuitable for military service despite evidence that lesbians and gays *are* suitable for military service.²⁸⁹ Thus, a lesbian or gay service member's claim would be viable because the military's policy violates the Equal Protection Clause.²⁹⁰

Second, the courts must consider the potential injury to the plaintiff if review is refused.²⁹¹ With regard to the military's exclusionary policy, the injury is certain, not just potential. Once discovered, lesbian and gay service members are discharged.²⁹² Thus, if the courts do not grant re-

283. See *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992).

284. See *supra* part III.E.

285. See, e.g., *Watkins v. United States Army*, 875 F.2d 699, 702 (9th Cir. 1989) (en banc) (Army convened board of officers to determine whether Watkins should be discharged because of his homosexual orientation), *cert. denied*, 111 S. Ct. 384 (1990); see also *Pruitt*, 963 F.2d at 1162 (Army Administrative Board convened to determine whether sufficient evidence existed to support conclusion that Pruitt was homosexual); GAO REPORT, *supra* note 7, at 12 ("Current DOD regulations afford the right to appeal homosexual separations through processes within the military adjudication system.").

286. See, e.g., sources cited *supra* note 285; see also 32 C.F.R. pt. 41, app. A, pt. 1.H. (1991) (defining what constitutes finding of homosexuality).

287. *Mindes*, 453 F.2d at 201-02.

288. *Id.* at 201.

289. See *supra* notes 387-484 and accompanying text.

290. See *supra* notes 312-27 and accompanying text.

291. *Mindes*, 453 F.2d at 201.

292. See *infra* notes 63-133 and accompanying text. In addition to being forced out of the military, lesbians and gays who are discharged because of their sexual orientation face denial of unemployment compensation benefits. Paul P. Lamb, Comment, *Time for an About-face: The Problem of Denial of Unemployment Compensation Benefits to Persons Forcibly Separated for Homosexuality*, 1 TEMP. POL. & CIV. RTS. L. REV. (forthcoming Fall 1992) (manuscript *passim*, on file with *Loyola of Los Angeles Law Review*).

view, the military can discharge lesbian and gay service members with impunity.

Third, the courts must evaluate the extent of interference with military functions that would result if the court were to grant review.²⁹³ An examination of history demonstrates that the military can accommodate lesbian and gay service members without undue interference with core military functions.²⁹⁴ Just as the military may have experienced difficulties when it racially integrated the armed forces and when women were added to the ranks (at least the non-combat ranks), the military would probably experience some difficulties if the courts were to invalidate the military's exclusionary policy as unconstitutional.²⁹⁵ However, difficulties arising, for instance, from homophobic service members not wanting to serve with lesbian or gay service members or from housing lesbians or gays under close living conditions with individuals to whom they may be sexually attracted,²⁹⁶ are surmountable.²⁹⁷ The military can make accommodations to ease sexual tensions.²⁹⁸ The military no longer segregates African-American service members from white service members, and no longer limits female service members to traditional female jobs.²⁹⁹ The vital mission of the military has withstood these changes, and the

293. *Mindes*, 453 F.2d at 201.

294. *See, e.g.,* *Watkins v. United States Army*, 875 F.2d 699, 701-02 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990); *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 969 (E.D. Wis. 1980).

295. For example, a service member may not want to sleep in the same barracks with someone who might find them sexually attractive. Moreover, homophobic service members may resist or refuse to take orders from an openly lesbian or gay officer.

296. See the DOD's rationales for its exclusionary policy, quoted in part, *supra* note 33; Rex Wockner, *Military Chief Backs Gay Ban*, BAY AREA REP., Feb. 13, 1991, at 15. Naturally, with women serving in the military, sexual tensions exist between heterosexual service members. In fact, these sexual tensions have recently expressed themselves in the form of sexual harassment. *See* Stephanie Grace, *Navy Secretary Asks New Probe of Tailhook Case*, L.A. TIMES, June 19, 1992, at A14 (Navy Secretary H. Lawrence Garrett III asked DOD Inspector General to investigate sexual assault and harassment charges brought by 26 female officers). Instead of preoccupying itself with its anti-lesbian and anti-gay witch hunts, *The Pentagon's Sexual Politics*, *supra* note 14, the military should concern itself with the "more than 100,000 episodes [in a 10 year period] of sexual assault of women in uniform by heterosexual servicemen." *Id.*

297. *See benShalom*, 489 F. Supp. at 976.

298. For example, during the Persian Gulf War the Army took steps to provide military personnel with at least a minimal privacy. Telephone Interview with Kurt Schlichter, former United States Army First Lieutenant (Aug. 13, 1992) [hereinafter Schlichter Interview]. Although "[m]en often ended up showering in stalls while women were showering in adjacent stalls," the Army provided each individual with an enclosed shower stall. *Id.* In addition, men and women slept in the same tents, but the men were usually in one area of the tent and the women in another. *Id.*

299. *benShalom*, 489 F. Supp. at 976.

military is equally capable of assimilating lesbians and gays in its ranks.³⁰⁰

Fourth, the courts must consider the extent to which military discretion or expertise is involved.³⁰¹ To rationalize the exclusion of lesbians and gays, the military declares them unsuitable.³⁰² Yet the military's own studies show this conclusion to be fallacious.³⁰³ Although the issue involves some degree of military discretion, the courts need not look beyond the military's studies to decide the issue because these studies show that the exclusionary policy is unfounded.

Because the *Mindes* test is satisfied, the courts are able to review the military policy. Two courts in recent cases, however, have diverged in the standard of review to be applied. On the one hand, the Ninth Circuit Court of Appeals has found that the active rational basis standard applies to analyzing the military's rationales.³⁰⁴ Thus, the government must show that its discriminatory policy is rationally based.³⁰⁵ On the other hand, the United States District Court for the District of Columbia, in *Steffan v. Cheney*,³⁰⁶ refused to scrutinize the military's stated rationale.³⁰⁷ Instead, the court in *Steffan* gave extreme deference to the military's stated rationales and even hypothesized the risk of AIDS as a rationale that might support the military's policy.³⁰⁸

At least an active rational basis review is appropriate.³⁰⁹ Therefore, the Ninth Circuit Court of Appeals has taken the better approach, be-

300. *Id.*

301. *Mindes v. Seaman*, 453 F.2d 197, 201-02 (5th Cir. 1971).

302. See 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a. (1991), quoted *infra* in text accompanying note 391.

303. See *McDaniel*, *supra* note 20, at 115 (finding lesbians' and gays' preservice suitability related adjustment to be as good or better than average heterosexual); *Sarbin & Karols*, *supra* note 18, at 7 (finding that homosexuals are not greater security risks than heterosexuals, and concluding "that the time is ripe for engaging in empirical research to test the hypothesis that men and women of atypical sexual orientation can function appropriately in military units"); *Crittenden Report*, *supra* note 13, at 46 (stating that lesbians and gays do not pose greater security problem than heterosexuals).

304. *Pruitt v. Cheney*, 963 F.2d 1160, 1166-67 (9th Cir. 1992).

305. *Id.* The Ninth Circuit Court of Appeals remanded the case for the district court to determine "whether the Army's discrimination is rationally related to a permissible governmental purpose." *Id.* at 1167.

306. 780 F. Supp. 1 (D.D.C. 1991).

307. *Id.* at 10 (applying rational basis review). The court stated that under the deferential standard of rational basis review, the government's "interest in good order and morale, the system of rank and command, and discipline in the Military Services" constitutes a legitimate interest. *Id.* at 12. Without any analysis, the court then stated: "[W]e cannot say that these are not in fact legitimate interests, or that the regulations in question do not promote them." *Id.*

308. *Id.* at 13.

309. See *supra* part III.D.-E.

cause the military should *demonstrate* that its discriminatory policy is at a minimum rationally based.³¹⁰ Instead of absolutely deferring to the military's judgment, courts should apply at least active rational basis review to the military's exclusionary policy.

C. *Future Equal Protection Challenges for Lesbian and Gay Service Members*

The United States Supreme Court has yet to find that lesbians and gays constitute a suspect or even quasi-suspect class. Realistically, given the Court's homophobic opinion³¹¹ in *Bowers v. Hardwick*,³¹² and its aversion to bestowing heightened scrutiny on more groups,³¹³ the current Court is probably unwilling to apply a standard of strict or intermediate level scrutiny to classifications based on sexual orientation.³¹⁴ Lesbians and gays, however, certainly meet all the indicia of suspectness the Court has used to define discrete and insular minorities.³¹⁵ Thus, courts should subject governmental discrimination against lesbians and gays to at least

310. *Pruitt v. Cheney*, 963 F.2d 1160, 1167 (9th Cir. 1992).

311. *Watkins v. United States Army*, 847 F.2d 1329, 1358 (9th Cir. 1988) (Reinhardt, J., dissenting) ("*Hardwick* improperly condones official bias and prejudice against homosexuals . . ."), *aff'd on other grounds en banc*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990); see Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1079-89 (1988); Hayes, *supra* note 139, at 431 n.342.

312. 478 U.S. 186 (1986) (holding that no privacy right to engage in homosexual sodomy exists).

313. See, e.g., *Kadmas v. Dickinson Pub. Sch.*, 487 U.S. 450, 458 (1988). In *Kadmas*, the Court refused to apply "heightened" scrutiny to a statute that discriminated based on wealth because doing so would entail "extend[ing] the requirements of the Equal Protection Clause beyond the limits recognized" previously by the Court. *Id.* The Court expressed a similar rationale in *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 445-46 (1985). The Court in *Cleburne* refused to deem the mentally retarded a quasi-suspect class because doing so would make it

difficult to find a principled way to distinguish a variety of other groups who have perhaps immutable disabilities setting them off from others, who cannot themselves mandate the desired legislative responses, and who can claim some degree of prejudice from at least part of the public at large. . . . We are reluctant to set out on that course, and we decline to do so.

Id.

314. *Harris*, *supra* note 275, at 174.

For an argument that *Cleburne*-type active rational basis analysis is appropriate for classifications based on sexual orientation, see *id.* at 184-206. "[A]ppplied in a manner consistent with the fundamental purposes of equal protection, [active rational basis review] is sufficient to find the involuntary discharge of military personnel on the basis of sexual orientation unconstitutional." *Id.* at 174; see also *Jantz v. Muci*, 759 F. Supp. 1543, 1552 (D. Kan. 1991) (finding no rational basis for discriminating against public school teacher based on his perceived sexual orientation).

315. *Arriola*, *supra* note 47, at 153-54 (stating that lesbians and gays constitute discrete and insular minority).

intermediate level or strict scrutiny. Federal judges,³¹⁶ law professors³¹⁷ and law students³¹⁸ have argued persuasively that the appropriate test should be strict scrutiny for classifications based on sexual orientation. Alternatively, realizing the Court's animosity toward lesbians and gays, at least one commentator has argued that the Court should at a minimum employ active rational basis review.³¹⁹

Probably due to the chilling effect of *Bowers v. Hardwick*,³²⁰ federal courts have been unwilling to apply anything more than mere rationality review to the military's anti-gay and anti-lesbian policy.³²¹ In fact, several judges and commentators have concluded that the Court's extreme focus in *Hardwick* on homosexual sodomy alone—when the challenged sodomy statute applied to heterosexual sodomy as well—coupled with the Court's refusal to consider the equal protection issue, precludes a finding that homosexuals are a suspect class.³²² Therefore, the highest

316. See, e.g., *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 376-80 (9th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc); *Watkins v. United States Army*, 875 F.2d 699, 728 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990); *Jantz*, 759 F. Supp. at 1550-51 (stating that under Supreme Court's guidelines only conclusion possible is that "a governmental classification based on an individual's sexual orientation is inherently suspect"); *Ben-Shalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis.), *rev'd*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990). See generally Hayes, *supra* note 139, at 432-55 (discussing federal decisions considering whether homosexuals constitute class needing heightened judicial protection).

317. See, e.g., JOHN H. ELY, *DEMOCRACY AND DISTRUST* 247 n.52 (1980); *TRIBE*, *supra* note 48, § 16-33, at 1616 & n.47; *Arriola*, *supra* note 47, at 169-74.

318. See, e.g., Denise Dunnigan, Note, *Constitutional Law: A New Suspect Class: A Final Reprieve for Homosexuals in the Military?*, 42 OKLA. L. REV. 273, 289-90 (1989); Hayes, *supra* note 139, at 455-64; Note, *supra* note 202, at 1297-1309; Marion Halliday Lewis, Note, *Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures*, 7 J.L. & POL. 133, 164 (1990); Miller, *supra* note 48, at 816-36.

319. See Harris, *supra* note 275, at 183-84.

While there is a distinction between classifying those who engage in homosexual acts and classifying based on sexual orientation, and an equally sharp distinction between substantive due process jurisprudence and equal protection jurisprudence, the wholly unprincipled *Hardwick* opinion exposed the political reality that lesbians and gays will be given no special status or protection by the Supreme Court. Therefore, reviewing courts must employ an alternative analysis for classifications based on sexual orientation: the modified rational basis test.

Id. (emphasis added) (footnotes omitted).

320. 478 U.S. 186 (1986); see *supra* note 275 and accompanying text.

321. See, e.g., cases cited *supra* note 17.

322. See *Watkins v. United States Army*, 847 F.2d 1329, 1353-56 (9th Cir. 1988) (Reinhardt, J., dissenting), *aff'd en banc on other grounds*, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 384 (1990); see also Rodrick W. Lewis, Note, *Watkins v. U.S. Army and Bowers v. Hardwick: Are Homosexuals a Suspect Class or Second Class Citizens?*, 68 NEB. L. REV. 851, 861 (1989) (stating that *Hardwick* forecloses finding that lesbians and gays form suspect class under equal protection analysis because "if the *Hardwick* Court saw a valid equal protection issue, they would have raised it").

level of review applied to classifications based on sexual orientation has been the active rational basis test.³²³

In light of the United States Supreme Court opinions in *Palmore v. Sidoti*³²⁴ and *City of Cleburne v. Cleburne Living Center*,³²⁵ federal courts, faced with an equal protection challenge to the military's policy of excluding lesbian and gay service members, must require the military to show at least a rational basis for its policy of excluding all lesbian and gay service members.³²⁶ In line with the Supreme Court's analysis in *Palmore* and *Cleburne* the Ninth Circuit Court of Appeals has correctly decided to apply *Cleburne*-type active rational basis review to an equal protection challenge brought against the military's exclusionary policy.³²⁷ Active rational basis review is probably the strictest standard any court will apply to the military's anti-gay and anti-lesbian regulation under an equal protection challenge.³²⁸

D. Active Rational Basis Review

Active rational basis review is probably strict enough to find the military's policy of excluding lesbian and gay service members unconstitutional. Because the military's sexual-orientation-based regulation is not rationally related to a legitimate state objective, the military will fail to demonstrate the requisite rational basis.³²⁹ For the courts to uphold the military's sexual-orientation-based discrimination, the military must show that its policy is rationally based.³³⁰ The Court's holding in *Palmore v. Sidoti*³³¹ undermines the military's anti-gay and anti-lesbian policy because the policy is based on prejudice.³³²

In *Palmore*, the Supreme Court struck down a denial of child custody based on social disapproval of the interracial marriage of the child's

323. See *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992).

324. 466 U.S. 429 (1984).

325. 473 U.S. 432 (1985).

326. See *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992).

The military's policy of excluding lesbian and gay service members is printed at 32 C.F.R. pt. 41, app. A, pt. 1.H. (1991), quoted in part *supra* note 33. For the military's rationales for its sexual-orientation-based policy, see 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a. (1991), quoted *infra* in text accompanying note 391.

327. *Pruitt*, 963 F.2d at 1166.

328. See *supra* notes 312-27 and accompanying text.

329. For a pre-*Pruitt* discussion of why active rational basis review is appropriate, rather than mere rationality or strict or intermediate level scrutiny, see generally Harris, *supra* note 275. Harris agrees that, even under merely active rational basis review, the military's anti-gay and anti-lesbian policy is unconstitutional. *Id.* at 206-07.

330. *Pruitt v. Cheney*, 963 F.2d 1160, 1165-66 (9th Cir. 1992).

331. 466 U.S. 429 (1984).

332. *Id.*

mother. In so ruling the Court stated that private prejudices "may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."³³³ Furthermore, in *City of Cleburne v. Cleburne Living Center*,³³⁴ the Court showed that courts need not confine this principle to instances of racial discrimination reviewed under strict scrutiny.³³⁵

1. *City of Cleburne v. Cleburne Living Center*

The Cleburne Living Center (CLC) planned to use a house to operate a group home for mentally retarded men and women who CLC staff would constantly supervise.³³⁶ CLC also intended to comply with all federal and state regulations applicable to the proposed home.³³⁷ The City of Cleburne (City) informed CLC that it would have to obtain a permit, renewable each year, to operate the home.³³⁸ The City had determined that a zoning ordinance requiring such a permit for construction of "[h]ospitals for the insane and feeble-minded" was applicable to the proposed CLC home.³³⁹ CLC applied for and was denied the permit.³⁴⁰

CLC filed suit against the City and several of its officials alleging that the zoning ordinance was invalid, both on its face and as applied,³⁴¹ because it discriminated against CLC and its mentally retarded residents in violation of their equal protection rights.³⁴² The district court recognized that the City's requirement was based primarily on the residents' mental retardation, but determined, under the rational basis test, that the

333. *Id.* at 433.

334. 473 U.S. 432 (1985). See *infra* text accompanying notes 336-67 for a discussion of the Court's holding in *Cleburne*.

335. See *Cleburne*, 473 U.S. 432, 448 (purporting to apply rational basis standard to statute affecting mentally retarded, but scrutiny applied resembles heightened scrutiny).

336. *Id.* at 435.

337. *Id.* at 435 n.2.

338. *Id.* at 436.

339. *Id.* (quoting City's zoning ordinance). The house was located in an area zoned "R-3," an "Apartment House District." *Id.* at 436 n.3. Under the ordinance, permitted uses included: apartment houses, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes, convalescent homes, homes for the aged and private clubs. *Id.* The ordinance also listed those uses for which a special permit was required, including "[h]ospitals for the insane or feeble-minded, or alcoholic or drug addicts, or penal or correctional institutions." *Id.* (quoting City's zoning ordinance).

340. *Id.* at 437 & n.4.

341. *Id.* at 437. Invalidating the ordinance on its face would result in striking down the ordinance as unconstitutional. However, merely finding the ordinance invalid as applied would only preclude the City from enforcing the ordinance against CLC, but would not invalidate the ordinance as against others.

342. *Id.*

ordinance was rationally related to the City's legitimate interests in regulating this group and thus valid both on its face and as applied.³⁴³

Applying heightened scrutiny, the Fifth Circuit Court of Appeals reversed the district court ruling.³⁴⁴ The court held that heightened scrutiny was warranted because the mentally retarded share many of the characteristics of a traditionally suspect class.³⁴⁵ Under this intermediate level of review, the court decided that the City had failed to show that the ordinance was sufficiently related to its purported purpose.³⁴⁶

The United States Supreme Court affirmed in part and vacated in part the decision of the Fifth Circuit.³⁴⁷ The Court rejected the conclusion of the court of appeals that mental retardation constitutes a quasi-suspect class.³⁴⁸ Instead, the Court held that governmental discrimination against the mentally retarded warranted only a rational basis review.³⁴⁹ After applying that test, the Court concluded there was no rational basis for the City's belief that the proposed group home for the mentally retarded threatened the City's legitimate interest in a way which the permitted uses did not.³⁵⁰ Thus, the Court held that the ordinance, as applied, denied CLC equal protection under the law.³⁵¹

After deciding that the rational basis test was the appropriate standard to be applied to governmental discrimination against the mentally retarded, the Court examined the City's justifications for requiring the permit. The City's reasons included the following concerns: (1) that most of the property owners located within 200 feet of the home had negative attitudes and fears about having a home for the mentally retarded in the neighborhood;³⁵² (2) that students attending the junior high school across from the CLC home might harass the mentally retarded residents;³⁵³ (3) that the home was located on a "flood plain";³⁵⁴ (4) that

343. *Id.*

344. *Cleburne Living Ctr. v. City of Cleburne*, 726 F.2d 191 (5th Cir. 1984), *aff'd in part, vacated in part*, 473 U.S. 432 (1985).

345. *Id.* In determining that the mentally retarded were a quasi-suspect class, the court noted their political powerlessness, the immutability of their condition and the history of discrimination against the mentally retarded fomented by deep-seated historical prejudice. *Id.* at 197-98.

346. *Id.* at 200.

347. *Cleburne*, 473 U.S. at 450.

348. *Id.* at 442, 446.

349. *Id.*

350. *Id.* at 448.

351. *Id.*

352. *Id.*

353. *Id.* at 449.

354. *Id.*

CLC intended the home to be occupied by too many people;³⁵⁵ and (5) that the house would increase congestion of population and of the streets.³⁵⁶

The Court scrutinized these justifications in search of a rational basis for the discrimination, but found none.³⁵⁷ First, concerning the City's "negative attitude" rationale, the Court stated that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently" from other permitted uses.³⁵⁸ The Court explained that the law cannot give effect to private prejudices.³⁵⁹

Second, in rejecting the City's contention that students might harass the mentally retarded residents, the Court deemed this concern unfounded, as the school itself was attended by approximately thirty mentally retarded students.³⁶⁰ The Court went on to state that denying the permit based on such vague, undifferentiated fears was unwarranted because it allowed a portion of the community to validate what would otherwise be an equal protection violation.³⁶¹

Third, the Court determined that no increased hazard of flooding existed for this home than would exist if operated by a group not requiring a special permit.³⁶² Fourth, the Court rejected the argument that density requirements should be different for mentally retarded residents than for other potential residents.³⁶³ Finally, the Court summarily rejected the argument that the asserted interest of "avoiding concentration of population" and of "lessening congestion of the streets" formed a rational basis for the City's ordinance.³⁶⁴

Accordingly, the Court determined that none of the City's concerns justified denial of the permit. Thus, the Court held the ordinance, as applied to the CLC home, was unconstitutional because there was no rational basis for the City's belief that the CLC home threatened its legitimate interests in a way that permitted uses did not.³⁶⁵

355. *Id.* at 449-50.

356. *Id.* at 450.

357. *See id.* at 448.

358. *Id.*

359. *Id.* (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

360. *Id.* at 449.

361. *Id.*

362. *Id.*

363. *Id.* at 449-50.

364. *Id.* at 450.

365. *Id.* at 448, 450. The Court did not affirm the decision of the court of appeals to invalidate the ordinance on its face. The Court's position was that upon a finding that the require-

The rational basis test the majority applied was very different from the traditional test in that it required the City to justify its ordinance. Under the traditional rational basis review, the challenging party bears the burden of proof.³⁶⁶ In *Cleburne*, however, instead of requiring CLC to demonstrate there was no rational basis for the special use permit requirement, the Court required that the City "rationally justify" its decision.³⁶⁷ Thus, under the *Cleburne*-type rational basis review the burden of proof shifts to the government to show a rational basis for its ordinance.³⁶⁸

Similarly, courts should require that the military rationally justify its exclusionary policy. The military's exclusionary policy would fail if the courts were to require the military to demonstrate its policy's rational basis.³⁶⁹ Thus, the issue is whether the courts should apply *Cleburne*'s active rational basis analysis to the military's anti-lesbian and anti-gay policy.

2. When Should Courts Apply Active Rational Basis Review?

It is unclear when courts must apply active rational basis review.³⁷⁰ At least three valid bases exist, however, to support subjecting the military's sexual-orientation-based policy to active rational basis review: (1) the policy is based on prejudice;³⁷¹ (2) lesbians and gays meet all the indicia used to determine "suspectness";³⁷² and (3) the DOD is insulated from the political process.³⁷³

ment of the special use permit denied the proposed CLC residents equal protection of the laws, there was no need to make a broader constitutional determination. *Id.* at 447.

366. *See, e.g.,* *Allied Stores v. Bowers*, 358 U.S. 522 (1959); *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

367. *Halfon, supra* note 266, at 957.

368. *Cleburne*, 473 U.S. at 458 (Marshall, J., concurring in part, dissenting in part) (citing *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Allied Stores v. Bowers*, 358 U.S. 522 (1959)). As evidence that the burden of proof had shifted to the City, Justice Marshall noted that the majority had found it "difficult to believe" the City's purported justifications. *Id.* at 459.

369. *See supra* notes 387-484 and accompanying text.

370. *See supra* note 266.

371. *See Halfon, supra* note 266, at 958.

372. *See supra* notes 189-245 and accompanying text.

373. *See supra* notes 184, 220-21 and accompanying text; *Cleburne*, 473 U.S. at 440; *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). In *Moreno*, the Court invalidated legislation intending to prevent "hippie communes" from participating in a food stamp program, stating "bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." *Moreno*, 413 U.S. at 534. Arguably, the military's desire to harm a politically unpopular group—lesbians and gays—is even more suspect than the legislation in *Moreno*; the DOD is less accountable politically than Congress, an elected governmental body.

First, if the courts are unwilling to confer suspect or quasi-suspect status upon a given group, such as the mentally retarded (and probably lesbians and gays), the Court may be willing to apply active rational basis review when governmental discrimination is based on prejudice.³⁷⁴ Thus, the active rational basis review the Court used in *Cleburne* should apply to the military's exclusionary policy because the policy is based on prejudice, not reason. As Judge Norris pointed out, the "irrelevance of sexual orientation to the quality of a person's contribution to society . . . suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes."³⁷⁵ In short, the military's anti-gay and anti-lesbian policy, like the ordinance in *Cleburne*, "rests on an irrational prejudice against"³⁷⁶ lesbians and gays and would therefore fail active rational basis review.³⁷⁷

Second, the Court may apply the active rational basis test when the government discriminates against an arguably suspect class, particularly because the Court appears unwilling to name any new suspect or quasi-suspect classes.³⁷⁸ Because lesbians and gays meet all the criteria for suspectness, the Court should apply at least active rational basis review.³⁷⁹

Finally, the DOD is insulated from the political process. One reason the Court applies merely rational basis review to social and economic laws is that voters can pressure their representatives to change unwise or unfair laws.³⁸⁰ In the case of the military's policies, however, political pressure is ineffective: Legislators can be voted out of office, but the Secretary of Defense cannot. The Secretary of Defense reports to the Presi-

374. Possibly, the factors that justify suspect or quasi-suspect status also trigger the active rational basis test. Halfon, *supra* note 266, at 958. "The majority [in *Cleburne*] seemed to acknowledge the possibility that deep-seated prejudice against the mentally retarded, rather than legitimate goals, may be the motivation of certain legislation burdening this group. This concern may explain its use of a 'heightened' rational basis test in this case." *Id.*

375. *Watkins v. United States Army*, 875 F.2d 699, 725 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990); *see also* *Rowland v. Mad River Local Sch. Dist.*, 470 U.S. 1009, 1014 (1985) ("[D]iscrimination against homosexuals is 'likely . . . to reflect deep-seated prejudice rather than . . . rationality.'" (Brennan, J., dissenting from denial of cert.) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982)).

376. *Cleburne*, 473 U.S. at 450 (invalidating housing ordinance based on irrational prejudice against mentally retarded).

377. *See id.*

378. *See, e.g., id.* at 442 (holding that class based on mental retardation is not suspect or quasi-suspect); *Plyler v. Doe*, 457 U.S. 202, 219 n.19 (1982) (holding that class based on status as undocumented resident alien is not suspect or quasi-suspect); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (holding that class based on age is not suspect or quasi-suspect); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28-29 (1973) (holding that class based on wealth is not suspect or quasi-suspect).

379. *See supra* notes 189-245 and accompanying text.

380. *Cleburne*, 473 U.S. at 440.

dent, who is Commander in Chief of the armed forces.³⁸¹ Under our winner-take-all electoral process, the Executive Branch can effectively ignore minority issues.³⁸² Moreover, the majority of Americans will not vote for or against a presidential candidate based solely on whether he or she will change the DOD's exclusionary policy.³⁸³ As a result, no meaningful opportunity exists to use political pressure to correct this injustice. Accordingly, courts should subject the military's exclusionary policy to at least active rational basis review because the policy is based on prejudice,³⁸⁴ because lesbians and gays meet all the requirements of a suspect class³⁸⁵ and because lesbian and gays are politically powerless against a politically insulated DOD.³⁸⁶

E. Active Rational Basis Applied to the Military's Policy

Pursuant to DOD directives,³⁸⁷ no admitted homosexual may join the Army, Navy, Air Force, Marines, Coast Guard or Reserve Officers' Training Corps (ROTC).³⁸⁸ For example, the Army's regulations—promulgated pursuant to DOD directives³⁸⁹—require the discharge of military personnel who are “admitted homosexual[s] but as to whom there is no evidence that they have engaged in homosexual acts either before or during military service.”³⁹⁰ The DOD Directive states:

Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a

381. Under his authority as “Commander in Chief” of the Armed Forces, the President determines military policy. See U.S. CONST. art. II, § 2, cl. 1.

382. For example, when the AIDS crisis first surfaced and was seen as an intravenous drug users' and gay men's disease, President Reagan did nothing to combat the disease. See RANDY SHILTS, *AND THE BAND PLAYED ON* 466, 585-601 (1988). Not until researchers declared that AIDS also threatened the heterosexual community did President Reagan take action. *Id.* at 574.

383. The main factors that seem to have influenced voter behavior in the last 19 Presidential elections have been the rate of economic growth during the election year and the rate of inflation over the previous two years. Peter Passell, *Economic Scene: George Bush's Secret Weapon*, N.Y. TIMES, Nov. 28, 1990, at D2; see also Steven Mufson, *Bush Shifts Gears, Blames Others for Sluggish Economy*, WASH. POST, July 31, 1992, at F1 (“According to Yale University economics professor Ray Fair, what matters in the presidential election is the economy's performance in the second and third quarters of th[e] year.”).

384. See *supra* note 139 and accompanying text.

385. See *supra* notes 189-245 and accompanying text.

386. See *supra* note 237-43 and accompanying text.

387. See *supra* note 33.

388. “The service regulations, although they differ somewhat in wording, substantially repeat the DoD regulations on which they are based.” Sarbin & Karols, *supra* note 18, at 67.

389. See *supra* note 33.

390. Army Reg. 140-111, tbl. 4-2, rule E (1989).

propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission. The presence of such members adversely affects the ability of the Military Services

- [1] to maintain discipline, good order, and morale;
- [2] to foster mutual trust and confidence among servicemembers;
- [3] to insure the integrity of the system of rank and command;
- [4] to facilitate assignment and worldwide deployment of servicemembers who frequently must live and work under close conditions affording minimal privacy;
- [5] to recruit and retain members of the Military Services;
- [6] to maintain the public acceptability of military service; and
- [7] to prevent breaches of security.³⁹¹

As of yet, courts have not required that the military show that the presence of lesbian and gay service members *actually* interferes with any of its seven objectives.³⁹² Though these goals may very well be legitimate, no rational nexus exists between the furtherance of these goals and banning lesbians and gays from the military; rather, many of the military's asserted justifications for its anti-gay and anti-lesbian policy "illegitimately cater to private biases."³⁹³

Further, in actively applying rational basis review, the courts should limit their inquiry to the legislature's stated purposes when those purposes are clearly stated.³⁹⁴ With regard to the purpose of the military's

391. 32 C.F.R. pt. 41, app. A, pt. 1.H.1.a. (1991).

392. *Cf. supra* notes 16-17 and accompanying text.

393. *Watkins v. United States Army*, 875 F.2d 699, 728 (9th Cir. 1989) (Norris, J., concurring), *cert. denied*, 111 S. Ct. 384 (1990).

394. *Cf. Johnson v. Robinson*, 415 U.S. 361, 376-82 (1974); *see also McGinnis v. Royster*, 410 U.S. 263, 270 (1973) (upholding statute denying "good-time" credit to some prisoners but not to others, court stated that challenged classification must further legitimate, "*articulated state purpose*" (emphasis added)); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976) (stating that classification will be sustained only if it "*rationaly furthers purpose identified by the State*" (emphasis added)); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973) (stating that challenged classification will pass constitutional muster only if it "*rationaly furthers some legitimate, articulated state purpose*" (emphasis added)).

However, a conflict persists in the Court about the extent to which a challenged law should be tested by "the legislature's actual or articulated purposes rather than by purposes suggested by counsel, or by conceivable purposes hypothesized by the courts." GERALD GUNTHER, *CONSTITUTIONAL LAW* 625 (13th ed. 1991); *accord United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179 (1980) (requiring only "plausible" reason for Congress's classification scheme).

exclusionary policy, the purpose is clearly stated in its text.³⁹⁵ Therefore, if the military's stated rationales fail, courts must strike down the sexual-orientation-based policy as violative of equal protection.

The military bases its anti-gay and anti-lesbian policy on meritless justifications. Analyzing each justification individually reveals that none of the DOD's seven rationales justifies the discriminatory regulation. Although the military's asserted interests in ensuring its effectiveness and preserving discipline and morale are legitimate, no rational nexus connects these interests to barring qualified lesbians and gays from military service. Because the military has neither demonstrated nor articulated a rational basis for its policy, the Court should assume prejudice is the basis, unless and until the military demonstrates otherwise.³⁹⁶

1. Discipline, good order and morale

The military has not shown any evidence to support its claim that the presence of lesbians and gays in the military frustrates the military's ability to maintain discipline, good order and morale. The military merely concludes—without offering any proof—that the presence of lesbian and gay service members will undermine its goal of maintaining *esprit-de-corps*.³⁹⁷ The military undeniably has a legitimate interest in fostering a common spirit of comradery, enthusiasm and devotion to the military mission among service members.

A recent case, however, tends to discredit the military's assumption that the presence of an openly gay person in the military would frustrate this purpose.³⁹⁸ In *Watkins v. United States Army*,³⁹⁹ “[Sergeant] Watkins' homosexuality was well-known but caused no problems and generated no complaints from other soldiers.”⁴⁰⁰ In 1975, the Army convened a board of officers to determine whether Watkins should be discharged because of his homosexual tendencies.⁴⁰¹ The board found Watkins

395. See *supra* text accompanying note 391.

396. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 448-50 (1985) (considering and rejecting as prejudicial City's rationales for ordinance).

397. See *supra* text accompanying note 391.

398. See *Watkins v. United States Army*, 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990).

Although Watkins's presence in the military as an openly gay service member caused no problems, it does not necessarily follow that homophobic tensions would not arise and cause problems if the military were to abandon its exclusionary policy. However, through sensitivity and diversity awareness training programs, the military could mitigate homophobic tensions as some police and fire departments have done. See GAO REPORT, *supra* note 7, at 42.

399. 875 F.2d 699 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990).

400. *Id.* at 702.

401. *Id.*

“suitable for retention in the military service” and recommended that he be retained because “no evidence suggest[ed] that his behavior . . . had either a degrading effect upon unit performance, *morale or discipline*, or upon his own job performance.”⁴⁰² The Secretary of the Army adopted the board’s recommendation as his final decision.⁴⁰³

Although homophobic tensions could potentially frustrate discipline, order and morale, the same is true of tensions caused by racism or sexism. The difficulty that may result from abolishing the military’s anti-gay and anti-lesbian policy does not transform prejudice into a valid policy consideration.⁴⁰⁴ Moreover, the military’s paternalistic worries are premised on outmoded assumptions about the sensibilities of its heterosexual soldiers. The military forgets that before, during and after service, civilian life exposes service members to diversity. Ignorance and isolation breed contempt for “others,” whereas exposure nurtures understanding and acceptance of diversity.⁴⁰⁵ Appreciation of diversity should be a military goal because the ability to understand and interact in civilian society can only enhance a soldier’s value.⁴⁰⁶ The unsubstantiated concern that esprit-de-corps might be undermined because of homophobic tensions does not justify the exclusion of qualified lesbians and gays from military service.

By preventing lesbian and gay soldiers from being forthright about their homosexual orientation, the military fosters the very prejudice it relies on to justify its policy.⁴⁰⁷ If heterosexual soldiers do not learn of the homosexual orientation of their capable and dedicated lesbian and gay peers, prejudicial attitudes will never change.⁴⁰⁸ Thus, in practice, the military’s policy may increase the likelihood that soldiers will react negatively to their lesbian and gay comrades. No evidence exists to support the military’s claim that the presence of lesbians and gays in the military frustrates the military’s ability “to maintain discipline, good or-

402. *Id.* (emphasis added).

403. *Id.*

404. *Cf.* *Palmore v. Sidoti*, 466 U.S. 429 (1984) (holding that racial tensions that could result from leaving child in custody of interracial couple does not transform prejudice into valid policy consideration).

405. *See supra* note 243 and accompanying text.

406. As the Court stated in *United States v. Robel*, 389 U.S. 258, 264 (1967):

[The] concept of “national defense” cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of [freedom of association,] one of th[e] liberties . . . [that] makes the defense of the Nation worthwhile.

Id.

407. *See supra* note 243 and accompanying text.

408. *See supra* note 243 and accompanying text.

der, and morale."⁴⁰⁹ The "ideology of masculinity"⁴¹⁰ is the real basis for the military's anti-gay and anti-lesbian policy,⁴¹¹ and after *City of Cleburne v. Cleburne Living Center*,⁴¹² this prejudicial basis will not suffice as a rational basis for its exclusionary policy.⁴¹³

2. Mutual trust and confidence among members

No evidence suggests that the presence of lesbians and gays in the military will impair the military's ability to foster mutual trust and confidence among members. As Reverend Dusty Pruitt's record illustrates, her superiors and her peers respected her.⁴¹⁴ For example, on a yearly Officer Evaluation Report her superior noted that Pruitt's "cooperative and positive attitude have earned her the respect and admiration of the entire Recruiting Corps."⁴¹⁵ The "entire Recruiting Corps" probably included a few homophobic service members. Further, Watkins's homosexuality was well-known but caused no problems and generated no complaints from other soldiers.⁴¹⁶ In sum, no evidence suggests that the presence of lesbians and gays in the military will impair the military's ability to foster mutual trust and confidence among members.

3. Integrity of rank and command system

No evidence indicates that the presence of lesbians and gays in the military frustrates the military's ability to ensure the integrity of the system of rank and command. Racial segregation in the military was based in part on this same unfounded "danger to the system of rank and command" argument.⁴¹⁷ "Past experience has shown irrefutably that the enlistment of Negroes [sic] (other than mess attendants) leads to disruptive and undermining conditions."⁴¹⁸

409. Dyer, *supra* note 7, at xiv.

410. "The heart of the ideology of masculinity is the belief that power rightfully belongs to the masculine—that is, to those who display the traits traditionally called masculine." Karst, *Pursuit of Manhood*, *supra* note 59, at 505.

411. *See id. passim*; *see also* Karst, "Let Me Fight", *supra* note 139, at A6 ("The central purpose of the exclusion of gay men—and of lesbians, too—is to express the ideology of masculinity.").

412. 473 U.S. 432 (1985).

413. *See id.* at 448.

414. Appellant's Opening Brief at 4, *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (No. 87-5914).

415. *Id.* at 5.

416. *Watkins v. United States Army*, 875 F.2d 699, 702 (9th Cir. 1989) (en banc), *cert. denied*, 111 S. Ct. 384 (1990).

417. Navy Memorandum, *supra* note 52.

418. *Id.*

The military has come a long way since making this statement in 1941. For example, the present Chairman of the Joint Chiefs of Staff, General Colin Powell, is an African American. Arguably, racist service members might be less likely to follow his direction, which would adversely affect the system of rank and command. In today's social and legal environment, however, racism is no longer a valid justification for a policy of segregation.⁴¹⁹ Moreover, the military's fears of integration's adverse effect on the system of rank and command were unfounded. Operation Desert Storm was successfully headed by an African American without any problem in the system of rank and command.⁴²⁰ Homophobia, like racism, is not a valid justification for the military's sexual-orientation-based policy. This policy also has deprived the military of highly qualified officers. Pruitt, for example, was a natural military leader regardless of her homosexual orientation.⁴²¹ While teaching at the Nuclear, Biological and Chemical (NBC) School at Fort Drum, New York, Pruitt's superior officers stated: "Her performance as a leader, supervisor and instructor was of the very highest standards."⁴²² Pruitt's "unlimited potential" caused one of her superiors to recommend that she be advanced ahead of her peers.⁴²³

Similarly, officers like Technical Sergeant Leonard Matlovich and Staff Sergeant Perry Watkins, who were openly gay military supervisors, received outstanding performance ratings.⁴²⁴ This shows that even openly gay service members who are supervisors do not adversely affect the integrity of the system of rank and command.

The military argues that the presence of lesbians and gays could result in sexual harassment or coercion by lesbian or gay superior officers.⁴²⁵ Yet the Uniform Code of Military Justice (UCMJ) prohibits such conduct.⁴²⁶ Moreover, this potential problem is not unique to lesbi-

419. See *Palmore v. Sidoti*, 466 U.S. 429 (1984).

420. See Sam Fulwood III, *To Blacks, Powell Is a Hero and Source of Controversy*, L.A. TIMES, Feb. 17, 1991, at A8; John Ranelagh, *America's Black Eisenhower: Colin Powell*, National Review Information Access, Apr. 1, 1991, available in LEXIS, Nexis Library, Currt file.

421. Appellant's Opening Brief at 4-7, *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (No. 87-5914).

422. *Id.* at 6.

423. *Id.* at 5.

424. *Watkins v. United States Army*, 875 F.2d 699, 703-04 (9th Cir. 1989) (en banc), cert. denied, 111 S. Ct. 384 (1990); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 854 n.4, 856 (D.C. Cir. 1978).

425. Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc at 14 nn.11-12, *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (No. 87-5914).

426. See *Sarbin & Karols*, *supra* note 18, at 56-61 (noting that punitive articles of UCMJ proscribe homosexual and other criminal sexual activity).

ans and gays. The same problem exists between heterosexual service members.⁴²⁷ The sexual-harassment justification for the military's policy is a guise. The real basis for the military's policy is deep-seated prejudice.⁴²⁸

4. Assignment and worldwide deployment of service members under close living and working conditions affording minimal privacy

The presence of lesbians and gays does not adversely affect the military's ability to assign and deploy service members worldwide. Although homosexual conduct is illegal in some states in the United States⁴²⁹ and abroad,⁴³⁰ homosexual status cannot constitutionally be made illegal.⁴³¹ The military seems to fear that deploying lesbian and gay service members in countries that are especially hostile toward homosexuals would potentially interfere with the military mission. Taken to its logical conclusion, this fear of the reaction of other countries would mean that the military must exclude women and Jewish soldiers from the military because they might need to be deployed in Saudi Arabia.⁴³² Similarly, the military would have to exclude African Americans because the military might need to deploy them in countries hostile to people of color. Arab Americans could not be stationed in Israel, et cetera. The Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*,⁴³³ prohibits just this type of selective justification, which does not distinguish the excluded group from others to whom the grounds for exclusion apply equally well.⁴³⁴

427. See Grace, *supra* note 296, at A14.

428. See *supra* note 139 and accompanying text.

429. See *Bowers v. Hardwick*, 478 U.S. 186, 193 (1986) (noting that sodomy is illegal in 24 states and District of Columbia).

430. Rob Tielman & Taco de Jonge, *Country-by-Country Survey*, in 2 ILGA PINK BOOK: A GLOBAL VIEW OF LESBIAN AND GAY LIBERATION AND OPPRESSION 183, 186 (1988).

431. Cf. *Robinson v. California*, 370 U.S. 660, 665-66 (1962) (holding that California statute, which made "status" of narcotic addiction criminal offense punishable with 90 days in jail, constituted "infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments").

432. While Jewish-American soldiers were stationed in Saudi Arabia during the Persian Gulf War, the military took special precautions. See Schlichter Interview, *supra* note 298. For example, Rabbis mainly practiced only offshore, and religious affiliations were removed from soldiers' identification tags. *Id.* While Saudi and Iraqi prejudices had to be considered, this did not necessitate excluding Jewish Americans from combat during the Gulf War. *Id.*

433. 473 U.S. 432 (1985).

434. See *id.*

In regard to "close living and working conditions affording minimal privacy,"⁴³⁵ the military fears that it will encounter problems if openly lesbian and gay service members are allowed to remain in the services. The military's actions during the Persian Gulf War, however, undermine their belief in this rationale. During the Persian Gulf War, the military stated that they would defer administrative discharges of gays and lesbians until after the war due to "operational needs."⁴³⁶ If the difficulties of living and working under close conditions were really one of the military's prominent fears, the military would want to expedite the discharge of lesbians and gays from combat troops. The military would not defer discharge proceedings.⁴³⁷

Just as racial desegregation of the armed forces undoubtedly caused some problems,⁴³⁸ sexual tensions might cause problems if lesbians and gays sleep and shower in the same facilities as members of the same sex.⁴³⁹ As stated above, however, the UCMJ already prohibits service members from making sexual advances toward other service members while on duty.⁴⁴⁰ Moreover, the military can make accommodations to lessen the likelihood of sexual tensions with regard to sleeping and show-

435. See *supra* text accompanying note 391.

436. Wade Lambert, *Gay GIs Told, Serve Now, Face Discharge Later*, WALL ST. J., Jan. 24, 1991, at B1; Randy Shilts, *Military May Defer Discharge of Gays*, S.F. CHRON., Jan. 11, 1991, at A19; see also Memorandum from Military Department for See Distribution at 3 (Feb. 1, 1991) (on file with *Loyola of Los Angeles Law Review*) (calling for suspension of discharges falling under Army Regulation 135-178, which includes discharges based on homosexuality); cf. Memorandum from Military Department for See Distribution at tbl. 2-1, rule 22 (Aug. 24, 1990) (on file with *Loyola of Los Angeles Law Review*) (stating that discharge proceedings based on homosexuality will be suspended and service member will be assigned to active duty if discharge is not requested before unit's receipt of alert notification).

437. See Conrad K. Harper & Jane E. Booth, *End Military Intolerance*, NAT'L L.J., June 10, 1991, at 17. Because of the obvious hypocrisy involved the military subsequently retreated from its statement that it would defer discharge proceedings against lesbians and gay men. See Randy Shilts, *Army Discharges Lesbian Who Challenged Ban*, S.F. CHRON., Jan. 19, 1991, A12.

438. Cf. GAO REPORT, *supra* note 7, at 32 (stating that Executive Order to integrate blacks was met with stout resistance by traditionalists in military establishment because of fears about adverse effect on maintaining discipline, building group morale and achieving military organizational goals).

439. On February 6, 1992, in response to a question from Congressman Barney Frank, before the House Budget Committee, Chairman of the Joint Chiefs of Staff General Colin Powell said with regard to the military's exclusionary policy: "It's difficult in a military setting where there is no privacy . . . to introduce a group of individuals—proud, brave, loyal, good Americans, but who favor a homosexual lifestyle—and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive." *Super Conservative Gingrich Comes Out for Gays in Military*, UPDATE, Feb. 12, 1992, at A4; GAO REPORT, *supra* note 7, at 35-36.

440. See *supra* note 426 and accompanying text.

ering facilities.⁴⁴¹ Recent complaints of sexual harassment indicate that sexual tensions are a problem among heterosexuals.⁴⁴² If the military's "sexual tension" rationale were genuine, the military would have to exclude heterosexuals as well. Thus, the military's exclusionary policy cannot rest on this "sexual tension" rationale. The Supreme Court has prohibited this type of selective justification, which does not distinguish the excluded group (lesbians and gays) from others (heterosexuals) to whom the rationale for exclusion applies equally well.⁴⁴³

Certainly, the "peculiar" nature of military life and the need for discipline gives the military substantial leeway in exercising control over the sexual *conduct* of its service members, at least while on duty and at the barracks.⁴⁴⁴ Courts need not, however, defer to the military's attempt to control a service member's sexual orientation absent a showing of actual deviant conduct and absent proof of a nexus between the sexual orientation and the service member's military capabilities.⁴⁴⁵ Courts must at least require that the military attempt to show that such a nexus exists. Until very recently, "fear of sexual tensions kept the participation of female soldiers to a minimum."⁴⁴⁶ The vital military mission has withstood the participation of female service members,⁴⁴⁷ and the military mission should be able to withstand any changes necessary to eliminate its anti-gay and anti-lesbian policy.⁴⁴⁸

In *Pruitt v. Cheney*,⁴⁴⁹ the Army argued that its "policy is not grounded exclusively on society's moral aversion toward homosexual conduct."⁴⁵⁰ The Army seems to base its exclusionary policy on the assumption that esprit-de-corps and the system of rank and command will fall apart if heterosexual service members know that one of their fellow service members is homosexually oriented because heterosexual service members will think that homosexual service members desire them sexu-

441. See Schlichter Interview, *supra* note 298.

442. See Grace, *supra* note 296, at A14.

443. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985).

444. *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 973 (E.D. Wis. 1980).

445. *Id.*

446. *Id.* at 976.

447. *Id.*

448. *Id.*; see also GAO REPORT, *supra* note 7, at 32 (Thanks to programs for combating racial discrimination, "the military services are leaders in providing equal opportunity for black men and women. It would be wise to consider applying the experience of the past 40 years to the integration of homosexuals.") (quoting Theodore R. Sarbin & Kenneth E. Karols, Defense Personnel Security Research and Education Center, Nonconforming Sexual Orientation and Military Suitability (1988 draft of report released in 1991)).

449. 963 F.2d 1160 (9th Cir. 1992).

450. Appellees' Petition for Rehearing with Suggestion for Rehearing En Banc at 13 n.11, *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (No. 87-5914).

ally. This "sexual desire" justification constitutes the crux of the military's argument. In *Pruitt*, the Army argued:

The Army's policy is not grounded exclusively on society's moral aversion toward homosexual conduct. For example, the Army has reasonably concluded that requiring heterosexual soldiers to share intimate facilities, such as showers and berthing, with admitted homosexuals may be *at least* as objectionable to the privacy and dignity of heterosexuals as would be the sharing of such facilities with persons of the opposite gender. . . . In this regard, it bears emphasizing that soldiers may be stationed at remote locations for prolonged periods in confined facilities affording minimal privacy. Common sense supports the conclusion that, under such circumstances, heterosexual soldiers may be disturbed by the knowledge that the homosexual soldier "desires" and "intends" to obtain sexual gratification from a person of the same gender. Such disturbances may tend to jeopardize morale, as well as undermine the mutual trust and confidence among soldiers that is essential for an effective command structure.⁴⁵¹

However, the "peculiar nature of military life has always required the melding together of disparate personalities. For much of our history, the military's fear of racial tension kept black soldiers segregated from whites. Fear of sexual tensions, until very recently, kept the participation of female soldiers to a minimum."⁴⁵² The military's vital mission has withstood these changes in racially-based and gender-based policies.⁴⁵³ The military should be able to similarly withstand any changes necessary to live without its sexual-orientation-based policy.⁴⁵⁴

In sum, although living under close conditions that afford minimal privacy may potentially pose problems, working under close conditions will replace ignorance and intolerance with awareness and acceptance. *Pruitt's* presence in the Army did not impair the military's ability to deploy troops under close conditions affording minimal privacy. On the contrary, as her superior officer stated, she was an officer of "high moral courage . . . who set[] and maintain[ed] the highest standards of moral conduct both on and off duty."⁴⁵⁵ The United States should follow the

451. *Id.*

452. *benShalom v. Secretary of the Army*, 489 F. Supp. 964, 976 (E.D. Wis. 1980).

453. *Id.*

454. *Id.*; see *supra* note 243 and accompanying text.

455. Appellant's Opening Brief at 6, *Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir. 1992) (No. 87-5914).

lead of other countries that have liberalized their anti-gay and anti-lesbian military policies.⁴⁵⁶

5. Recruiting and retaining members

The presence of lesbians and gays does not impair the military's ability to recruit and retain service members. Reverend Dusty Pruitt's military record illustrates this point. Pruitt was a highly successful recruiter.⁴⁵⁷ She spoke at schools and civic functions throughout Texas, and her superiors consistently praised her for the image she projected on behalf of the Army.⁴⁵⁸

Additionally, if the military admitted lesbians and gays, the military would have a greater pool of qualified people from which to choose. As the military's own study demonstrates, "homosexuals show[] better preservice adjustment than heterosexuals in areas relating to school behavior. Homosexuals also show[] greater levels of cognitive ability than heterosexuals."⁴⁵⁹

6. Maintaining the public acceptability of military service

No evidence exists to support the military's contention that the presence of lesbians and gays impairs the military's ability to maintain public acceptability. Rather, the exclusionary policy adversely affects public acceptability of military service because the "vast majority of Americans—more than 80 percent—believe that the U.S. military services should not discharge soldiers solely because they are homosexual."⁴⁶⁰ Because the majority of Americans disagree with the military's anti-gay and anti-lesbian policy, the military's goal of maintaining public acceptance could be improved by eliminating its sexual-orientation-based policy. Accordingly, there is no rational nexus between the military's goal of maintaining public acceptability and excluding lesbians and gays from military service.

As a case in point, Reverend Pruitt has not only maintained the public acceptability of the military service, she may have improved it.

456. For example, homosexuality has not been a reason for dismissal in Israel since 1988. Tielman, *supra* note 430, at 213. In addition, gays have been allowed in Denmark's military since 1979, *id.* at 228, in the Netherlands's military since 1974, *id.* at 237, and in Sweden's military since 1979, *id.* at 240.

457. Appellant's Opening Brief at 5, *Pruitt* (No. 87-5914).

458. *Id.*

459. McDaniel, *supra* note 20, at 115.

460. Cohen, *supra* note 243; Linda Kanamine, *Poll: Most Americans Say Let Gays Stay in Military*, Gannett News Service, Apr. 18, 1991, available in LEXIS, Nexis Library, Currnt File.

Pruitt's military record contradicts the military's assumptions about public acceptability of lesbians and gays in the military.⁴⁶¹ On a yearly Officer Evaluation Report, for example, her superior noted that Pruitt's "cooperative and positive attitude have earned her the respect and admiration of the entire Recruiting Corps, as well as the educators and other centers of influence with[*in the*] civilian community."⁴⁶² While serving at the U.S. Army Recruiting Main Station in Dallas, Texas, Pruitt made many public appearances at schools and civic functions, for which "she always received laudatory comments."⁴⁶³

Even if the military's fear of the adverse reaction of others to the presence of lesbians and gays in the military were valid, governmental policies based solely on prejudice are unconstitutional. The United States Supreme Court's decision in *Palmore v. Sidoti*⁴⁶⁴ held that general community prejudice against interracial couples was an insufficient justification for removing custody of a child from the parent involved in an interracial relationship.⁴⁶⁵ The Court declared that courts cannot give private prejudices effect.⁴⁶⁶

Applying this reasoning to the military's exclusionary policy extinguishes the argument that societal prejudice against homosexuality constitutes a rational justification for excluding lesbians and gays from the military. Thus, *Palmore* removes the only available reason for treating homosexuality differently than heterosexuality. The argument reduces to this: Social stigma against homosexuals is fundamentally all that separates them from heterosexuals. Public prejudice is not the fault of lesbian or gay service members and, therefore, the court cannot penalize the lesbian or gay service member by equating public prejudice with interference with the military mission.

In sum, the military's anti-gay and anti-lesbian policy is not necessary to avoid public contempt and ridicule. On the contrary, most Americans oppose this policy.⁴⁶⁷ In any event, although homophobia is

461. Appellant's Opening Brief at 5, *Pruitt* (No. 87-5914); see also Boxall, *supra* note 9, at A3 (mentioning public support of discharged lesbian officer Margarethe Cammermeyer).

462. Appellant's Opening Brief at 5, *Pruitt* (No. 87-5914) (emphasis added).

463. *Id.*

464. 466 U.S. 429 (1984).

465. *Id.* at 433.

466. *Id.*

467. See *supra* note 460 and accompanying text.

alive and well in America,⁴⁶⁸ prejudice does not constitute a constitutionally legitimate justification for the military's exclusionary policy.⁴⁶⁹

7. Breaches of security

The issue is whether the DOD can show that its policy of excluding all lesbians and gays from the military is rationally related to the goal of decreasing the likelihood of security breaches. No rational relation exists because lesbians and gay military personnel, as a class, do not constitute a greater security risk than heterosexual service members; moreover, all evidence indicates that lesbians and gays are not a security risk.⁴⁷⁰ The fact that the military has attempted to keep such reports secret shows the baseless nature of this justification.⁴⁷¹ Moreover, the current defense secretary, Dick Cheney, has distanced himself from the national security rationale.⁴⁷² The "security risk" rationale serves only to mask the military's actual impetus for its policy—prejudice and maintenance of the macho military culture.⁴⁷³

The military's contention that lesbians and gays are likely targets for blackmail by enemy agents who might threaten to expose their sexual orientation does not support its anti-gay and anti-lesbian policy; it undermines that policy. The military's security risk contention premises discrimination on circular reasoning. If the military did not threaten to discharge lesbian and gay service members for openly acknowledging their homosexual orientation, they could not be blackmailed by the

468. For example, the Los Angeles County Commission on Human Relations reported that in "1991 Gays were the most frequent victims of crimes, followed by blacks and Jews." Stephanie Chavez, *Hate Crimes Set a Record in L.A. County*, L.A. TIMES, Mar. 20, 1992, at A1, A27; see also Herek, *supra* note 48, at 60-61 (discussing statistics on hate crimes against lesbians and gays and public opinion polls regarding positive and negative attitudes towards lesbians and gays).

469. See *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985) (holding that catering to prejudice does not constitute rational basis upon which government may base its policy); see also *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 725 (1982) (stating that societal presumption of inherent handicap or innately inferior status does not provide legally cognizable rationale).

470. McDaniel, *supra* note 20, at 111-35; Sarbin & Karols, *supra* note 18, at 29; Crittenden Report, *supra* note 13, at 46.

471. DYER, *supra* note 7, at xvi-xvii.

472. Responding to questions from Representative Barney Frank (D-Mass.), Secretary of Defense Dick Cheney "called the notion that enlistment of gays and lesbians poses a risk to national security—one of the main rationales for the ban—'a bit of an old chestnut' that he 'inherited.'" Cheney made similar comments August 2, 1991 on the ABC television program *Good Morning America*. Chris Bull, *Lukewarm Defense of Military Policy Heartens Activists*, ADVOC., Sept. 10, 1991, at 21.

473. Karst, *"Let Me Fight"*, *supra* note 55, at A6 ("The central purpose of the exclusion of gay men—and of lesbians, too—is to express the ideology of masculinity.").

threat of exposure.⁴⁷⁴ Only with the military's policy is the threat of exposure viable blackmail ammunition.⁴⁷⁵ Therefore, the military's present policy does not decrease the likelihood of security breaches; instead, it increases the likelihood of blackmail by making homosexual orientation something to hide. Hence, the military has unwittingly made an argument for abandoning its anti-gay and anti-lesbian policy.

More importantly, the military's own studies have revealed the unsupported nature of their "security breach" rationale. In 1957 the Secretary of the Navy created a board that examined the "security risk" justification—once one of the military's principal justifications—for its anti-gay and anti-lesbian ban.⁴⁷⁶ The board's report concluded that lesbians and gays do not pose a greater security risk than heterosexuals.⁴⁷⁷ A more recent report, again conducted under the auspices of the military, also found that lesbians and gays pose no special security risk.⁴⁷⁸ The report concluded:

In summary, this report has provided limited but cogent evidence regarding the preservice suitability of homosexuals who may apply for positions of trust. Although this study has several limitations, the preponderance of the evidence presented indicates that homosexuals show preservice suitability-related adjustment that is as good or better than the average heterosexual.⁴⁷⁹

474. If no sanction followed such exposure, no blackmail could occur, assuming the service member was not keeping his or her homosexual orientation a secret from anyone other than the military.

475. One court, however, has stretched the blackmail rationale to include even lesbians and gays who are "out of the closet." In *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987), the court found it rational for the FBI to conclude that the criminalization of homosexual conduct in certain states coupled with "public opprobrium toward homosexuality exposes homosexuals, even 'open' homosexuals, to the risk of possible blackmail to protect their partners, if not themselves." *Id.* at 104. This reasoning conflicts with the Supreme Court's requirement in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), that the rationale not be overinclusive. *See id.* at 432. Here the rationale would fail because it is equally applicable to active heterosexuals who are subject to blackmail about their sexual partners' identities—particularly if the service members or their sexual partners were married to someone else.

476. *See Crittenden Report, supra* note 13, at 47.

477. *See GAO REPORT, supra* note 7, at 29-30 (summarizing Crittenden Report's findings).

478. *McDaniel, supra* note 20, at 134.

479. *Id.*

The military's argument that lesbians and gays pose a security risk is a hypocritical guise.⁴⁸⁰ The military's own studies indicate that lesbians and gays do *not* pose a greater security risk than heterosexuals.⁴⁸¹

Although the military was able to demonstrate a rational basis for subjecting lesbians and gays to expanded security investigations in *High Tech Gays v. Defense Industry Security Clearance Office*,⁴⁸² this rational basis was based on the KGB's irrational targeting of this group.⁴⁸³ Even this meager evidence of a rational basis can no longer be considered valid with the break-up of the KGB.⁴⁸⁴

In short, none of the military's stated justifications actually motivated the exclusion of lesbians and gays from the military. The military can point to no rational interest that is not based on prejudice and a desire to maintain the oppressive status quo to justify its exclusion of lesbians and gays. Accordingly, the military regulations of the various branches of the armed forces promulgated pursuant to DOD directives violate equal protection principles.

IV. PROPOSAL

It took an Executive Order in 1945 by President Truman, issued against the advice of almost every admiral and general, to racially integrate our armed forces.⁴⁸⁵ Similarly, an Executive Order would be the most efficient way to end the military's blanket exclusion of lesbians and gays. Ending the military ban of lesbians and gays via an executive order would also avoid problems regarding separation of powers and deference to the military because the President is Commander in Chief of the

480. The media has focused on the Pentagon's hypocrisy—specifically, the hypocrisy of stating that having a gay Assistant Secretary of Defense is a permissible security risk, yet allowing lesbians and gays in the armed services is not a permissible risk. Michelangelo Signorile, *The Outing of Assistant Secretary of Defense Pete Williams*, *ADVOC.*, Aug. 27, 1991, at 34, 42. As Signorile wrote, "the fact that a top Pentagon official is gay and is accepted as such by his superiors presents an enormous double standard—especially in light of the fact that over 2,000 gay and lesbian servicepeople have been discharged since his appointment in 1989." *Id.* at 34. It defies logic that an Assistant Secretary of Defense's sexual orientation does not constitute a security risk, while a service person who has no access to sensitive information is considered a security risk. "Blackmail, it would seem, is not the Pentagon's real fear." *Id.* at 43; Bull, *supra* note 472, at 21.

481. See *supra* notes 470, 476-79 and accompanying text.

482. 895 F.2d 563 (9th Cir. 1990).

483. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 909 F.2d 375, 376 (9th Cir. 1990) (Canby, J., dissenting from denial of reh'g en banc).

484. See John-Thor Dahlburg, *Legislators Join in Scrapping Kremlin Power*, *L.A. TIMES*, Dec. 27, 1991, at A1.

485. MILLER, *supra* note 40, at 79.

Armed Forces.⁴⁸⁶ Nor is this solution wholly unrealistic considering that Governor Bill Clinton, the Democratic presidential candidate for the 1992 election, has vowed to end the military's ban of lesbians and gays if elected President.⁴⁸⁷ Furthermore, Representative Barbara Boxer introduced a resolution⁴⁸⁸ that calls on the President to eliminate the military's exclusionary policy,⁴⁸⁹ and Representative Patricia Schroeder recently introduced a bill⁴⁹⁰ that would "prohibit discrimination by the Armed Forces on the basis of sexual orientation."⁴⁹¹

Assuming conservatives maintain control of the White House, lesbian and gay service members will have to seek protection in the courts because a conservative president would probably veto any bill requiring the military to dismantle its sexual-orientation-based policy. Although active rational basis review is probably the highest standard of review the Supreme Court will uphold concerning an equal protection challenge to discrimination based on sexual orientation, this standard should be sufficient to find that the military's anti-gay and anti-lesbian policy is irrational.

Lesbian and gay service members and heterosexual service members are similarly situated individuals. Equal protection principles require that those similarly situated be treated similarly unless there is *at least* a rational reason to justify disparate treatment. Here, there is none. Military regulations discriminate against lesbians and gays in violation of the Equal Protection Clause, and there is no rational reason to exclude les-

486. See *supra* note 381. In fact, "[t]he Human Rights Campaign Fund . . . is asking President Bush to sign an executive order overturning the military homosexual ban." Kanamine, *supra* note 460.

487. Ronald Brownstein, *Clinton Addresses 600 at Rally of Gays, Lesbians*, L.A. TIMES, May 19, 1992, at A24 (Clinton "repeated his promise to end the ban on homosexuals serving in the military"); Gwen Ifill, *Clinton's Platform Gets Tryouts Before Friends*, N.Y. TIMES, May 20, 1992, at A21 (Clinton "pledged to . . . lift the ban on homosexuals in the military").

488. H.R. Res. 271, 102d Cong., 1st Sess. (1991).

489. Ted Weiss, *Gays in the Military YES: Performance is what really matters*, CHI. TRIB., Dec. 23, 1991, at C21.

490. H.R. 5208, 102d Cong., 2d Sess. (1992). The bill provides:

SECTION 1. PROHIBITION ON DISCRIMINATION IN THE MILITARY ON THE BASIS OF SEXUAL ORIENTATION.

(a) **IN GENERAL.**—No member of the Armed Forces, or person seeking to become a member of the Armed Forces, may be discriminated against by the Armed Forces on the basis of sexual orientation.

(b) **PRESERVATION OF RULES AND POLICIES REGARDING SEXUAL MISCONDUCT.**—Nothing in subsection (a) may be construed as requiring the Armed Forces to modify any rule or policy regarding sexual misconduct or otherwise to sanction or condone sexual misconduct, but such rules and policies may not be applied in a manner that discriminates on the basis of sexual orientation.

491. Chris Bull, *Double Front Strategy: Pentagon Policy Catches Flak in Congress and the Media*, ADVOC., June 30, 1992, at 21.

bian and gay service members. The irrelevance of sexual orientation to the quality of a person's contribution to society suggests that classifications based on sexual orientation reflect prejudice and inaccurate stereotypes. Moreover, discrimination against homosexuals is likely to reflect deep-seated prejudice rather than rationality. In short, the military's exclusionary policy rests on an irrational prejudice. Because the policy is based on prejudice, courts should subject it to at least active rational basis review.

V. CONCLUSION

The ban of lesbians and gays from military service should end because it is irrationally based and perpetuates prejudice against lesbian and gay service members. Unless the anti-gay policy is extinguished, 1993 will mark the fiftieth anniversary of the policy's existence. For almost fifty years the exclusionary policy has perpetuated homophobia, because only by ending the ban will homophobic service members learn that lesbians and gays as a class are just as qualified to serve in the military as heterosexuals. Without the ban, interaction between heterosexual and openly lesbian or gay service members will dispel stereotypes and foster knowledge and familiarity, which in turn will teach the important American trait of tolerance and acceptance of diversity.

Discharging talented patriots like Margarethe Cammermeyer, Leonard Matlovich, Perry Watkins, Miriam Ben-Shalom, Dusty Pruitt, Joseph Steffan and others from military service solely because of their sexual orientation does not serve the best interests of the nation. The anti-gay policy merely wastes taxpayers' money and irrationally perpetuates discrimination against this group. "If the Pentagon redirected the time and taxpayer money it spends rooting out gays and lesbians into sensitivity training and other measures aimed at combating sexism and prejudice against homosexuals, the military and the entire country would be better off."⁴⁹² The United States military's ban of lesbians and gays must end.

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492. *The Pentagon's Sexual Politics*, *supra* note 14, at 16.

* This Comment is dedicated to Jon Davidson and Steven Wyllie for their thoughtful and provocative reads of earlier versions; to my mother, Joan, for believing in me; to Ron Shaheen for his patience and support; and to the memory of Leonard Matlovich, whose courageous challenge to the military's exclusionary policy inspired this Comment.

