

NOTE

PERMITTING PREJUDICE TO GOVERN: EQUAL PROTECTION, MILITARY DEFERENCE, AND THE EXCLUSION OF LESBIANS AND GAY MEN FROM THE MILITARY

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INTRODUCTION

Military regulations mandating the discharge of all lesbians and gay men¹ solely on the basis of their sexual orientation present a conflict between two fundamental values. One value is the nation's unique interest, perhaps its greatest interest, in self-preservation through military preparedness. The other is the right to the sovereignty of an individual's identity unfettered and unthreatened by government interference. The constitutionality of the military's regulations raises a question more troubling than the difficult choice between these vital interests. Instead, it asks whether the nation's military interests are so compelling that their mere incantation is sufficient to abrogate an individual's sovereignty.

The Ninth Circuit Court of Appeals, sitting en banc, left this constitutional question open in its recent decision in *Watkins v. United States Army*.² The Seventh Circuit Court of Appeals, in *BenShalom v. Marsh*,³ addressed the constitutional problem, but in a manner so confusing and shocking that careful study and response is required. Constitutional equal protection guarantees mandate that no individual be left unprotected in the face of majoritarian irrationality and prejudice.⁴ Yet the judiciary gives its greatest deference in cases involving military matters. This Note provides a framework for analyzing the clash of these two lines of constitutional jurisprudence, and finds that the regulations excluding lesbians and gay men from the military are unconstitu-

1. Some courts and the military use the term "homosexuals" to describe lesbians and gay men. The term is unfortunate because of the pejorative cast of its common usage, and its frequent identification with only gay men and not with lesbians. Further, "homosexuals" focuses on sex, rather than personal identity, and thereby skews reasoned discussion of issues involving gay men and lesbians. Therefore, this Note will use the term "homosexuals" only in quoting or directly referencing judicial opinions and military regulations which use the term. In all other instances, the phrase "lesbians and gay men" will be used.

2. 875 F.2d 699 (9th Cir. 1989) (en banc) [hereinafter *Watkins II*]. The court held that Sgt. Perry Watkins must be reenlisted, despite the military's regulations, because he had been permitted to enlist and reenlist several times. On those grounds, the court held that the Army was equitably estopped from blocking Watkins' reenlistment. This Ninth Circuit opinion replaced an initial panel decision which had addressed the constitutional issues. *Watkins v. United States Army*, 847 F.2d 1329 (1988) [hereinafter *Watkins I*], *withdrawn on reh'g*, *Watkins II*, 875 F.2d 699 (9th Cir. 1989) (en banc).

3. 881 F.2d 454 (7th Cir. 1989) [hereinafter *BenShalom IV*].

4. Since "prejudice" will be used repeatedly throughout this text, it warrants early definition. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, UNABRIDGED 1788 (1981) defines "prejudice" as:

2a(1): preconceived judgment or opinion; leaning toward one side of a question from other considerations than those belonging to it; unreasonable predilection for or objection against something. (2) an opinion or leaning adverse to anything without just grounds or before sufficient knowledge; b: . . . an unreasonable predilection, inclination, or objection; c: an irrational attitude of hostility directed against an individual, a group, a race, or their supposed characteristics.

tional. Stripped to their core, the military's regulations do nothing more than allow societal prejudice against lesbians and gay men to dictate the exclusion of talented people from military service to their country.⁵

This Note is divided into three sections. Section I presents the legal framework surrounding discrimination against lesbians and gay men by the military. Once the legal framework is presented, the constitutionality of the military's regulations is assessed in light of both equal protection guarantees and the judiciary's policy of deference in military matters.

Section II focuses on the equal protection issues. The central equal protection question involved in challenges to the military's regulations mandating the discharge of all lesbians and gay men is, what level of judicial scrutiny should be applied to governmental classifications based on sexual orientation. The Ninth Circuit Court of Appeals panel which originally decided *Watkins I* held that sexual orientation is a suspect classification and applied strict scrutiny to the military's regulations.⁶ That analysis is correct given the standards established by Supreme Court precedent which demonstrate that strict or heightened scrutiny of classifications based on sexual orientation should be available to reviewing courts. *Watkins I*, nevertheless, defied the unfortunate political realities of the current United States Supreme Court. The Court's opinion in *Bowers v. Hardwick*⁷ exposed the unprincipled political reality that the current Court is unwilling to apply a standard of strict or heightened scrutiny to classifications based on sexual orientation. In this context, an alternative course must be found to guarantee the equal protection rights of lesbians and gay men.

This Note argues that an alternative course is available to reviewing courts: a modified rational basis analysis based on the Supreme Court's opinion in *City of Cleburne v. Cleburne Living Center, Inc.*⁸ The purpose of constitutional equal protection is to guarantee that similarly situated people are treated equally⁹ — to ferret out prejudice in governmental classifications. The

5. The cases scrutinizing the military's exclusion of lesbians and gay men routinely involve high-quality servicepeople being discharged under the regulations. See *Watkins I*, 847 F.2d at 1346; accord *Dronenburg v. Zech*, 741 F.2d 1388, 1389 (D.C. Cir. 1984); *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 853, 856 (D.C. Cir. 1978); *Schwartz v. Covington*, 341 F.2d 537, 537 (9th Cir. 1965); *BenShalom v. Secretary of the Army*, 489 F. Supp. 964, 969 (E.D. Wis. 1980) [hereinafter *BenShalom I*]; and *Doe v. Chafee*, 355 F. Supp. 112, 113 (N.D. Cal. 1973).

During fiscal years 1985, 1986, and 1987, the Army discharged 829 enlisted men, 11 male officers, 354 enlisted women, and 3 female officers for "homosexuality;" the Navy discharged 1,825 enlisted men, 30 male officers, 382 enlisted women, and 4 female officers; the Marine Corps discharged 213 enlisted men, 6 male officers, and 90 enlisted women; and the Air Force discharged 644 enlisted men, 41 male officers, 220 enlisted women, and 7 female officers. T. SARBIN & K. KAROLS, *NONCONFORMING SEXUAL ORIENTATIONS AND MILITARY SUITABILITY* 21-22 (Dec. 1988) (Defense Personnel Security Research and Education Center).

6. *Watkins I*, 847 F.2d at 1352.

7. 478 U.S. 186 (1986).

8. 473 U.S. 432 (1985).

9. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

emerging modified rational basis analysis, applied in a manner consistent with the fundamental purposes of equal protection, is sufficient to find the involuntary discharge of military personnel on the basis of sexual orientation unconstitutional.

Section III of this Note considers the special deference accorded by the judiciary to military decisions, an issue that courts have not fully addressed in reviewing the exclusion of lesbians and gay men. After reviewing the history of military deference and the Supreme Court's recent decision in *Goldman v. Weinberger*,¹⁰ this Note concludes that military deference does not require that courts permit discrimination which violates the rights of lesbians and gay men to constitutional equal protection.

I.

THE LEGAL FRAMEWORK

A. *Military Policy Toward Lesbians and Gay Men*

Congress' only statement affecting homosexual conduct or orientation in the military is Article 125 of the Uniform Code of Military Justice [hereinafter UCMJ].¹¹ Article 125 outlaws both homosexual and heterosexual sodomy.¹² All other military policy on sexual conduct or orientation has been promulgated either by the Department of Defense [hereinafter DoD] or the service branches.¹³

Toward the end of World War II, the military's policy governing discharges of lesbians and gay men was limited to action against servicepeople engaging in homosexual acts.¹⁴ In 1945, the definition of sanctionable sexual behavior in military regulations was reformulated to include only "psychopathic personality manifested by antisocial or amoral trends, criminalism, chronic alcoholism, drug addiction, pathological lying or sexual misconduct."¹⁵

The DoD shifted away from the liberalized rules in 1947, at least partly inspired by the Senate's investigations of lesbians and gay men serving in the government.¹⁶ In 1949, the DoD established its policy that known lesbians and gay men were military liabilities and security risks whose discharge from the service branches was mandatory.¹⁷ In 1955, the policy was modified to

10. 475 U.S. 503 (1986).

11. 10 U.S.C. § 925 (1988). The UCMJ is the military's criminal code.

12. 10 U.S.C. § 925 (1988) reads in full:

(a) Any person subject to this chapter who engages in unnatural carnal copulation with another person of the same or opposite sex or with an animal is guilty of sodomy. Penetration, however slight, is sufficient to complete the offense.

(b) Any person found guilty of sodomy shall be punished as a court-martial may direct.

13. The service branches are the Army, Navy, Air Force, Marines, and Coast Guard.

14. Note, *Homosexuals in the Military*, 37 *FORDHAM L. REV.* 465, 466-67 (1969).

15. AR 615-368, 7 Mar. 1945, Para. 1(a)(2), cited in Note, *supra* note 14, at 467.

16. Note, *supra* note 14, at 468 & n.31.

17. Comment, *Employment Discrimination in the Armed Services—An Analysis of Recent*

permit retention of lesbians and gay men adjudged specially valuable to the military.¹⁸ The DoD reaffirmed the overall policy in 1975.¹⁹

The decision in *Matlovich v. Secretary of the Air Force*²⁰ compelled further changes in the DoD's regulations. Airman Leonard Matlovich was discharged from the Air Force after admitting to having engaged in private, off-duty, off-base consensual sodomy.²¹ Matlovich claimed that the Air Force regulations requiring his discharge violated his constitutional rights to privacy and equal protection. The District of Columbia Circuit Court of Appeals, however, determined that the Air Force's regulations permitted commanding officers to make exceptions to the policy of discharging lesbians and gay men without offering specific grounds for making such exceptions.²² The court found it impossible to review the constitutionality of Matlovich's claim in the absence of clearly defined standards for excepting certain lesbians and gay men.²³ On remand, the district court found the Air Force incapable of articulating the bases for its discharge and retention decisions. Matlovich's discharge was overturned.²⁴

The DoD reacted to *Matlovich* in 1981 by promulgating new, narrower, more precise regulations. A "homosexual" was defined as "a person . . . who engages in, desires to engage in, or intends to engage in homosexual acts."²⁵ A serviceperson may be discharged for engaging in, attempting to engage in, or soliciting another to engage in homosexual acts. She may also be discharged for stating that she is a homosexual, unless exculpatory evidence is offered. For an accused serviceperson to avoid discharge, she must show that all of the following conditions exist: (1) her conduct is a departure from her usual and customary behavior; (2) the conduct is unlikely to recur; (3) the conduct was not accomplished through force, coercion, or intimidation; (4) her continued presence in the service is consistent with proper discipline, good order, and morale; and (5) she does not desire or intend to engage in homosexual acts.²⁶

Decisions Affecting Sexual Preference Discrimination in the Military, 27 VILL. L. REV. 351, 354 (1981-1982).

18. Note, *supra* note 14, at 469.

19. Comment, *supra* note 17, at 354 & n.20. The 1975 policy directive from the DoD described "[t]he homosexual person" as "unsuitable for military service" and as someone whose "presence in a military unit would seriously impair discipline, good order, morale, and security." "The unique character of the military environment, both ashore and at sea, precludes any possibility of their assimilation within a military organization, under any conditions." *Id.* at 354 n.20. The policy required administrative discharge, depending upon the quality of the person's military service, but left open the possibility of criminal prosecution for homosexual acts. *Id.*

20. 591 F.2d 852 (D.C. Cir. 1978).

21. *Id.* at 854.

22. *Id.* at 855.

23. *Id.*

24. *Matlovich v. Secretary of the Air Force*, 23 Fair Empl. Prac. Cas. (BNA) 1251 (D.D.C. 1980).

25. 32 C.F.R. § 41, App. A(H)(1) (1988); accord *BenShalom IV*, 881 F.2d at 457 (citing AR 140-111, Table 4-2, Rule E).

26. 32 C.F.R. § 41, App. A(H)(1) (1988). The service branches' regulations implement,

B. Constitutional Challenges to Military Policy

1. Substantive Due Process

The military's new regulations mandating the discharge of lesbians and gay men have been challenged on a number of constitutional theories. One such theory is substantive due process. Substantive due process, inferred from the fifth and fourteenth amendments, protects those unenumerated rights necessary to the exercise and protection of the enumerated rights in the Constitution and the Bill of Rights.²⁷

In *Beller v. Middendorf*,²⁸ the Navy's discharge of the plaintiffs for engaging in homosexual conduct was challenged on substantive due process grounds. The plaintiffs argued that the Navy's regulations requiring involuntary separation violated their rights to privacy. The Ninth Circuit Court of Appeals, in an opinion by the current United States Supreme Court Justice Anthony Kennedy, upheld the regulations. Kennedy rejected the plaintiffs' substantive due process argument, relying on the Supreme Court's summary affirmance of *Doe v. Commonwealth's Attorney*,²⁹ which upheld the constitutionality of a statute criminalizing homosexual sodomy. The district court in *Doe* had found that the right to privacy did not extend to homosexual sodomy.³⁰

In *Beller*, the court found that because the Navy's regulations did not affect a protected privacy right, and, because of the Navy's special role as employer, the government's military interests outweighed the plaintiff's individual interests.³¹

The District of Columbia Circuit Court of Appeals, in *Dronenburg v. Zech*,³² also rejected a substantive due process argument in its decision upholding the same Navy regulations. Judge Bork, applying a strict textual interpretation of substantive individual rights contained in the Constitution and the Bill of Rights, harshly criticized the inference of any privacy right. Bork established the presumptive validity of substantive law produced by "the democratic process," and found that the plaintiff failed to overcome that

and in most cases mimic, these DoD regulations. See T. SARBIN & K. KAROLS, *supra* note 5, at A-13 (listing each of the service branches' relevant regulations).

27. Perhaps the most important of these is the right to privacy. See *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Roe v. Wade*, 410 U.S. 113 (1973). Apart from establishing zones of personal or associational autonomy into which government may not reach, substantive due process is premised on the principle that citizens must be protected in their personal development and creativity so they may contribute to and participate in a democracy. See also Richards, *Constitutional Legitimacy and Constitutional Privacy*, 61 N.Y.U. L. REV. 800, 843-45 (1986) [hereinafter *Constitutional Legitimacy*]; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1302-14 (1988); D. RICHARDS, *TOLERATION AND THE CONSTITUTION* (1986) [hereinafter *TOLERATION*].

28. 632 F.2d 788 (9th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981).

29. 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).

30. *Doe v. Commonwealth's Attorney*, 403 F. Supp. 1199, 1200 (E.D. Va. 1975).

31. *Beller*, 632 F.2d at 809-10.

32. 741 F.2d 1388 (D.C. Cir. 1984). Included on the *Dronenburg* panel, and joining in Judge Bork's opinion, was the current United States Supreme Court Justice Antonin Scalia.

presumption.³³

Beller and *Dronenburg* apparently foreclose substantive due process challenges to the military's regulations excluding lesbians and gay men.

2. Fundamental Rights

The military's regulations have also been challenged under the fundamental rights branch of constitutional equal protection. The equal protection clause requires that governmental classifications infringing on fundamental individual rights undergo strict scrutiny. Unless a compelling governmental interest for the infringing classification is presented, and no less restrictive alternative exists, the classification is unconstitutional.³⁴ A concrete answer to the question of what constitutes a fundamental right remains elusive, as evidenced by the Supreme Court's question-begging definition of fundamental rights as those which are "explicitly or implicitly guaranteed by the Constitution."³⁵

The Supreme Court, in *Plyler v. Doe*, indicated that a sub-fundamental category of rights exists for individual activities which deserve a lesser degree of protection from governmental interference.³⁶ These rights, while less than "fundamental," are "substantial," and deserve some special protection. Heightened scrutiny is applied to classifications impinging on these sub-fundamental, substantial rights.³⁷

In *Hatheway v. Secretary of the Army*,³⁸ Lieutenant Hatheway claimed that UCMJ Article 125 was being applied only in cases of homosexual sodomy while cases of heterosexual sodomy remained unprosecuted.³⁹ Hatheway had been discharged for homosexual conduct. The Ninth Circuit Court of Appeals viewed the challenge as implicating the fundamental rights branch of the equal protection clause.⁴⁰

33. *Id.* at 1395-97.

34. See L. TRIBE, *supra* note 27, at 1454-65.

35. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 33-34 (1973). In addition to privacy, examples of fundamental rights are analyzed in *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to travel), and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (right to vote).

One commentator argued that successful fundamental rights challenges are inevitably brought by members of classes exhibiting some "indicia of suspectness." The suggestion is that fundamental rights analyses are merely shrouded suspect or quasi-suspect class analyses. Note, *Shedding Tiers for the Mentally Retarded: City of Cleburne v. Cleburne Living Center*, 35 DEPAUL L. REV. 485, 496 (1985).

36. 457 U.S. 202, 219-26 (1982) (special protection is given classifications involving education); *cf.* *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (education is not a fundamental right).

37. 457 U.S. at 219-26.

38. 671 F.2d 1376 (9th Cir. 1981), *cert. denied*, 457 U.S. 864 (1981).

39. *Id.* at 1378.

40. The court said:

We understand Hatheway's claim (that the commission of a homosexual act is an impermissible basis for prosecution) to be an equal protection argument . . . Classifications which are based solely on sexual preference implicate the "right to be free, ex-

The *Hatheway* court sub silentio recognized a substantial, but not fundamental, right in the individual interest in homosexual conduct and balanced that interest against the government's interest in maintaining a strong military force. Analogizing to the heightened scrutiny applied in *Beller's* substantive due process analysis, the *Hatheway* court held that "[i]n light of *Beller* . . . selection of cases involving homosexual acts for Article 125 prosecutions bears a substantial relationship to an important governmental interest."⁴¹

While foreclosing fundamental rights challenges to Article 125, *Hatheway* did not address the military's regulations mandating the exclusion of lesbians and gay men. The decision's relevance to equal protection challenges, as in the case of *Bowers v. Hardwick* (which is discussed below), depends on whether a distinction between sodomy and sexual orientation can be drawn. Because that distinction can be drawn, *Hatheway's* reasoning does not foreclose equal protection challenges to the military's regulations.

3. *Bowers v. Hardwick and Equal Protection Analysis*

The Supreme Court's decision in *Bowers v. Hardwick*⁴² ratified the decisions in *Beller* and *Dronenburg*. The *Hardwick* Court rejected a substantive due process privacy challenge to a sexual orientation-neutral Georgia statute outlawing sodomy.⁴³ The Court's decision focused narrowly on the constitutionality of the statute as applied to homosexual sodomy, and found no right to privacy for homosexual sodomy.⁴⁴ While foreclosing substantive due process privacy challenges to sodomy statutes, the Court left open the question of whether the *Hardwick* decision implicitly foreclosed "heightened scrutiny" equal protection analysis for classifications based on sexual orientation.

There is a sharp distinction between the substantive component of the due process clause and the equal protection clause.⁴⁵ According to Professor Cass Sunstein, the Constitution should be read not "as an undifferentiated unit" but "as a set of entitlements and prohibitions that are targeted at quite discrete problems."⁴⁶ Substantive due process protects a range of basic rights defined by Anglo-American tradition and the judiciary's normative inquiry into "evolving standards of decency."⁴⁷ The inquiry is necessarily an investi-

cept in very limited circumstances, from unwarranted government intrusion into one's privacy."

Id. at 1382 (citing *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)).

41. *Hatheway*, 671 F.2d at 1382.

42. 478 U.S. 186 (1986).

43. GA. CODE ANN. § 16-6-2 (1984), which reads in pertinent part:

"(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Section (b) of the statute establishes that conviction for sodomy carries with it a penalty of not less than one nor more than twenty years in prison.

44. 478 U.S. at 190-91.

45. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988).

46. *Id.* at 1167.

47. *Id.* at 1170-73.

gation and interpretation of history.⁴⁸

The *Hardwick* decision was styled in just this manner: “[T]he court looked to whether homosexual sodomy was ‘implicit in the concept of ordered liberty’ or ‘deeply rooted in this Nation’s history and tradition’.”⁴⁹ The Court’s decision was nothing more than a historical review concluding with the determination that the substantive rights protected by the due process clause have not historically included, and therefore do not now include, a right to homosexual sodomy.

The equal protection clause serves the wholly independent purpose of eradicating discriminatory classifications, without regard to traditions or normative inquiries into rights other than equality. The equal protection clause, fulfilling its mandate to protect the constitutional principle of equality against historical practices which result in violations of that principle, frequently opposes tradition.⁵⁰ In some cases it may operate to proscribe traditions which the due process clause permits.⁵¹ *Hardwick*’s substantive due process analysis is irrelevant to an equal protection analysis of classifications based on sexual orientation.

Hardwick’s lack of precedential value in equal protection cases is further established by considering the substantive distinction between criminalized homosexual sodomy and sexual orientation. Several courts have addressed that distinction and produced conflicting results. The District of Columbia Circuit Court of Appeals declined to accept the status-conduct distinction in *Padula v. Webster*.⁵² Margaret Padula had applied to become an FBI special agent, but was rejected on the grounds that she engaged in lesbian sexual activity.⁵³ The court of appeals, relying on *Hardwick* and *Dronenburg*, upheld the FBI’s action:

[i]t would be quite anomalous, on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause . . . If the [Supreme] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state sponsored discrimination against the class is invidious.⁵⁴

The *Padula* court’s reasoning was adopted by the Seventh Circuit in *Ben-*

48. *Id.* at 1168.

49. *Id.* (citing *Hardwick*, 478 U.S. at 191-92). Justice White’s opinion failed to consider modern conceptions of decency, and for this reason *Hardwick* is wrongly decided. Also, the Georgia statute, according to its plain terms, is orientation-neutral. White should have treated it as such.

50. Sunstein, *supra* note 45, at 1174.

51. *Id.* at 1176. Professor Sunstein offers *Watkins I*, 847 F.2d, as an example of this principle.

52. 822 F.2d 97 (D.C. Cir. 1987).

53. *Id.* at 99.

54. *Id.* at 103.

Shalom IV.⁵⁵

A separate panel from the District of Columbia Circuit Court of Appeals,⁵⁶ the Fifth Circuit,⁵⁷ the Ninth Circuit's *Watkins I* panel,⁵⁸ and several lower courts⁵⁹ have disagreed with the *Padula* court's interpretation. *Hardwick* is properly read quite narrowly to permit only the criminalization of sodomy:

Hardwick does not hold, for example, that two gay people have no right to touch each other in a way that expresses their affection and love for each other. Nor does *Hardwick* address such issues as whether lesbians and gay men have a fundamental right to engage in homosexual activity such as kissing, holding hands, caressing, or any number of other sexual acts that do not constitute sodomy under the Georgia statute. *Hardwick* simply did not address the issue of discrimination based on sexual orientation or sexual preference itself.⁶⁰

A pre-*Hardwick* decision, *BenShalom I*,⁶¹ cited Justice Brandeis' famous dissent in *Olmstead v. United States*⁶² to find that "constitutional privacy principles clearly protect one's sexual preferences in and of themselves from

55. 881 F.2d at 464.

56. See *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), *cert. denied*, — U.S. —, 108 S. Ct. 2883 (1988).

57. See *Baker v. Wade*, 774 F.2d 1285, 1287 (5th Cir. 1985) (denial of petition for reh'g en banc).

58. See *Watkins I*, 847 F.2d at 1339-42.

59. See, e.g., *BenShalom v. Marsh*, 703 F. Supp. 1372 (E.D. Wis.) [hereinafter *BenShalom III*], *rev'd*, 881 F.2d 454 (7th Cir. 1989); *BenShalom v. Marsh*, 690 F. Supp. 774 (E.D. Wis. 1988) [hereinafter *BenShalom II*]; *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1368-69 (N.D. Cal. 1987); *Swift v. United States*, 649 F. Supp. 596, 601 (D.D.C. 1986).

60. *High Tech Gays*, 668 F. Supp. at 1370-71; accord Sunstein, *supra* note 45, at 1166-67 (*Hardwick* does not purport to answer the question of whether "discrimination against a subgroup of people, some or many of whom may engage in conduct that can constitutionally be criminalized, is a violation of the Equal Protection Clause.") (citing *Watkins II*, 847 F.2d at 1340 (suggesting an analogy to African-Americans who engage in constitutionally prohibited acts)).

It is interesting to note that a state classification of criminal defendants, where criminal acts did define the class, was struck down by the Supreme Court under a heightened rational basis test. See *James v. Strange*, 407 U.S. 128 (1972). See also *infra* text accompanying notes 120-23.

61. *BenShalom I*, 489 F. Supp. 964 (E.D. Wis. 1980). Sgt. Miriam BenShalom was discharged from the Army because she admitted that she was a lesbian, but succeeded in overturning the Army discharge. Sgt. BenShalom was reinstated, after a protracted battle, in 1987. She attempted to reenlist in 1988 but was denied. Subsequently, Sgt. BenShalom obtained a preliminary injunction requiring the Army to consider her request for reenlistment without respect to her sexual orientation. *BenShalom II*, 690 F. Supp. 774 (E.D. Wis. 1988). Thereafter, the district court held, on facts very similar to those in *Watkins I*, that the Army's regulations violated BenShalom's first amendment right of expression and the fifth amendment's equal protection guarantees. *BenShalom III*, 703 F. Supp. 1372 (E.D. Wis. 1989). The Seventh Circuit Court of Appeals, in an opinion discussed in various parts of this Note, reversed. *BenShalom IV*, 881 F.2d 454 (7th Cir. 1989).

62. 277 U.S. 438, 477 (1927) (Brandeis, J., dissenting).

government regulation."⁶³ While the right to privacy may not extend to certain conduct, the court argued, it does extend to the "personal privacy" of one's personality.⁶⁴ The *BenShalom I* court overturned the Army's discharge of a lesbian servicewoman as violative of her first amendment rights of expression, speech, and association⁶⁵ and of her right to privacy.⁶⁶

As applied to the *Hardwick* Court's reasoning, *BenShalom I* makes clear that there are elements of sexual orientation irrelevant to criminalized sodomy which may be protected by substantive due process privacy guarantees.⁶⁷ Such a conclusion is further reinforced by empirical data which show that some lesbians and gay men adopt their sexual identity without ever having had homosexual sex.⁶⁸ The military's regulations themselves contemplate the possibility, if not the likelihood, that socially defined "heterosexuals" will engage in homosexual sodomy.⁶⁹ Simply put, there is no equation of criminalized homosexual sodomy and lesbian or gay orientation.⁷⁰

A comparison of the Georgia statute upheld in *Hardwick*⁷¹ with the military's regulations mandating the discharge of lesbians and gay men⁷² makes even clearer the difference between the targets of those two laws. Take the hypothetical case of Jane Doe, an Army private stationed in Georgia. Jane Doe is a heterosexual, but one night she got drunk with Jill Roe and the two women engaged in lesbian sex. Under military regulations, temporarily putting aside UCMJ Article 125, Private Doe can avoid discharge by proclaiming her heterosexuality and her lack of a continuing desire or intent to engage in homosexual acts.⁷³ The Army will not discharge Doe. Nonetheless, Doe and Roe are both criminally liable under the Georgia sodomy statute upheld in

63. *BenShalom I*, 489 F. Supp. at 976 (emphasis in original). In *BenShalom III*, a post-*Hardwick* decision, the district court cited the language used by the *Watkins I* panel, 847 F.2d at 1340, 1341, for the same proposition.

64. *BenShalom I*, 489 F. Supp. at 975; cf. *Robinson v. California*, 370 U.S. 660 (1962) (state law making the status of narcotics addiction a crime is "cruel and unusual punishment" in violation of the fourteenth amendment, incorporating the eighth amendment against the states).

65. *BenShalom I*, 489 F. Supp. at 974.

66. *Id.* at 976.

67. *BenShalom III*, 703 F. Supp. at 1377; accord *Doe v. Casey*, 796 F.2d 1508, 1522 (D.C. Cir. 1986), cert. denied, — U.S. —, 108 S. Ct. 2883 (1988).

68. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 943-44 (1989) (citing Golden, *Diversity and Variability in Women's Sexual Identities*, in LESBIAN PSYCHOLOGIES: EXPLORATIONS AND CHALLENGES 19, 25 (Boston Lesbian Psychologies Collective ed. 1987); McDonald, *Individual Differences in the Coming Out Process for Gay Men: Implications for Theoretical Models*, 8 J. HOMOSEXUALITY 47, 47 (Fall 1982)).

69. See *supra* text accompanying notes 25-26.

70. See Halley, *supra* note 68, at 949 (describing the paradox of the *Padula* court's definition of "homosexuals" excluding all celibate and refraining, but self-identifying, lesbians and gay men, possibly including the plaintiff in *Padula*).

71. See *supra* note 43.

72. See *supra* text accompanying notes 25-26.

73. 32 C.F.R. § 41, App. A(H)(1) (1988).

Hardwick. Both women face twenty years in prison.⁷⁴

On the other hand, Joan Noe is a lesbian and, like Jane Doe, an Army private stationed in Georgia. Noe is absolutely celibate, and although desirous of lesbian sex, she is frightened by the prospect of twenty years in Georgia state prisons. Noe confesses her fears and her lesbianism to her commanding officer. Under the Georgia sodomy statute, Doe cannot be prosecuted. Nevertheless, the military's regulations will mandate Noe's involuntary separation.⁷⁵

The only differences between Jane Doe and Joan Noe are their conduct and orientation. The trigger to the Georgia statute is Doe's conduct, independent of her sexual orientation.⁷⁶ The trigger to the military regulations is Noe's sexual orientation, independent of her conduct. Under the military's regulations a lesbian or gay serviceperson can be discharged without ever engaging in homosexual conduct.

Moreover, accepting for the moment an equation of status and conduct, why should broad regulations requiring discharge on the basis of sexual orientation be necessary when a criminal prohibition of sodomy covers precisely the same cases? If no distinction can be drawn between those engaging in homosexual sodomy and lesbians and gay men, then the existing prohibition of sodomy in UCMJ Article 125 already addresses the military's concerns.⁷⁷

Having established that *Bowers v. Hardwick* does not foreclose heightened scrutiny in an equal protection analysis,⁷⁸ several courts⁷⁹ and commentators⁸⁰ have judged sexual orientation to be a suspect classification under equal protection analysis. Evaluation of the factors which define suspect classifications⁸¹ proves these courts and commentators right.⁸² Application and analysis of suspect classification status must occur, however, in the context of sharp and stubborn resistance from the federal appellate bench to heightened scrutiny of sexual orientation classifications.

The District of Columbia Circuit Court of Appeals, rejecting suspect or quasi-suspect class status for lesbians and gay men in *Padula v. Webster*,⁸³

74. See *supra* note 43.

75. 32 C.F.R. § 41, App. A(H)(1) (1988).

76. By the plain meaning of the Georgia statute, any person engaging in heterosexual or homosexual sodomy is liable under the Georgia sodomy statute regardless of her orientation. See *supra* note 43. But see Note, *Chipping Away at Bowers v. Hardwick: Making the Best of an Unfortunate Decision*, 63 N.Y.U. L. REV. 154 (1988) (arguing that *Bowers* does not hold state laws prohibiting sodomy constitutional as to heterosexual sodomy).

77. See *supra* notes 11-12 and accompanying text.

78. See *infra* notes 98-110 and accompanying text for a full discussion of heightened scrutiny under equal protection.

79. See *BenShalom III*, 703 F. Supp. at 1377-80; *Watkins I*, 847 F.2d at 1345-48; *Watkins II*, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring).

80. Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285 (1985) [hereinafter *Constitutional Status*]; Comment, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984) [hereinafter *Heightened Scrutiny*].

81. See *infra* text accompanying note 99.

82. See *infra* note 93.

83. 822 F.2d 97, 102 (D.C. Cir. 1987).

accurately pointed out that the Supreme Court has acknowledged only three classifications to be suspect: race,⁸⁴ alienage,⁸⁵ and national origin.⁸⁶ A plurality of the Supreme Court in *Frontiero v. Richardson*⁸⁷ attempted to define gender as a suspect classification,⁸⁸ but was forced in a later majority decision to manufacture a "quasi-suspect class" status for gender.⁸⁹ Only illegitimacy joins gender in the category of quasi-suspect classes.⁹⁰ All other classifications, including age, are reviewed under the rational basis test.⁹¹

The present Supreme Court has made clear its unwillingness to assign even quasi-suspect status to any classification not already so recognized.⁹² In particular, the *Hardwick* decision, although completely without precedential value in equal protection cases, indicated that the current Supreme Court does not intend to grant any special status to classifications based on sexual orientation.⁹³ The *Hardwick* Court reviewed a sodomy statute which applied to both heterosexual and homosexual sodomy; yet, the Court upheld the statute only as applied to homosexual sodomy. If the Supreme Court considered sexual orientation a suspect classification, it is unlikely that it would have qualified, *sua sponte*, an orientation-neutral statute with orientation-based adjectives as it did in *Hardwick*. While there is a distinction between classifying those who engage in homosexual acts and classifying based on sexual orientation,⁹⁴ and an equally sharp distinction between substantive due process jurisprudence and equal protection jurisprudence,⁹⁵ the wholly unprincipled *Hardwick* opinion exposed the political reality that lesbians and gay men will be given no

84. *Loving v. Virginia*, 388 U.S. 1 (1967).

85. *Graham v. Richardson*, 403 U.S. 365 (1971).

86. *Korematsu v. United States*, 323 U.S. 214 (1944).

87. 411 U.S. 677 (1973).

88. *Id.* at 682.

89. *Craig v. Boren*, 429 U.S. 190 (1976); *accord* *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718 (1978).

90. *See, e.g., Lalli v. Lalli*, 439 U.S. 259 (1978); *Mills v. Habluetzel*, 456 U.S. 91 (1982).

91. *See* *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312 (1975); *see also* *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985).

92. *See, e.g., Kadrmas v. Dickinson Pub. Schools*, — U.S. —, 108 S. Ct. 2481, 2487-88 (1988):

[Heightened scrutiny], which is less demanding than 'strict scrutiny' but more demanding than the standard rational relation test, has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy. In *Plyler [v. Doe]*, 457 U.S. 202 (1982)], which did not fit this pattern, the State of Texas had denied to the children of illegal aliens the free public education that it made available to other residents *We have not extended this holding beyond the 'unique circumstances' that provoked its 'unique confluence of theories and rationales.'* (emphasis added).

93. *Accord* L. TRIBE, *supra* note 27, at 1616 n.47 (1988). *But see id.* at 1616 (finding that classification based on sexual orientation "merits a searching judicial approach"). *See generally* *Heightened Scrutiny*, *supra* note 80 (arguing that sexual orientation is a suspect classification); *Constitutional Status*, *supra* note 80 (same).

94. Sunstein, *supra* note 45, at 1166 n.26.

95. The *Hardwick* Court expressly refused to consider equal protection issues. 478 U.S. 186, 196 n.8 (1986); *see supra* text accompanying notes 45-51.

special status or protection by this Supreme Court.⁹⁶ Therefore, reviewing courts must employ an alternative analysis for classifications based on sexual orientation: the modified rational basis test.

II.

EQUAL PROTECTION ANALYSIS⁹⁷

A. *Strict Scrutiny of Suspect Classifications*

Equal protection analyses of race-based classifications always involve "strict scrutiny" because of a presumption that such governmental decisions are a majoritarian translation of an illegitimate purpose — prejudice — into law. To dispel this nearly irrebuttable presumption, the state must show a "compelling governmental interest" for which the race-based classification is the least restrictive alternative.⁹⁸

The Supreme Court has derived five factors from the race paradigm to justify strict scrutiny of suspect classifications: (1) a history of discrimination against the class; (2) gross and inaccurate stereotypes of the class; (3) a defining class characteristic which is irrelevant to an individual class member's ability to perform; (4) a defining class characteristic which is immutable; and (5) a class which is a "discrete and insular minority" unable to gain redress from discrimination from the political branches of government.⁹⁹ That generalization of the factors justifying strict scrutiny has allowed the Court to consider nationality,¹⁰⁰ alienage,¹⁰¹ and gender¹⁰² suspect classifications.

96. Justice Blackmun, in his dissent in *Hardwick*, accused the majority of an obsession with homosexuality. 478 U.S. at 200. Several commentators have suggested that the Court's narrow focus on homosexual sodomy, when the case did not require such a narrow focus, is evidence of judicial anti-homosexual bias. See, e.g., Stoddard, *Bowers v. Hardwick: Precedent by Personal Predilection*, 54 U. CHI. L. REV. 648, 655-56 (1987); Comment, *History, Homosexuals, and Homophobia: The Judicial Intolerance of Bowers v. Hardwick*, 19 CONN. L. REV. 129, 137-42 (1986).

97. While the fifth amendment, applicable to the federal government and, therefore, the relevant constitutional provision for military cases, does not include an equal protection clause, the Supreme Court has interpreted the guarantee of equal protection to be included in the fifth amendment's guarantee of due process. *Bolling v. Sharpe*, 347 U.S. 497 (1954). "This Court's approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the 14th Amendment." *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); *accord* *Rostker v. Goldberg*, 453 U.S. 57, 62 n.3 (1981); *Schlesinger v. Ballard*, 419 U.S. 498, 500 n.3 (1975); and *Frontiero v. Richardson*, 411 U.S. 677, 680 n.5 (1973) (plurality opinion).

98. See Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1030-34 (1979); see also L. TRIBE, *supra* note 27, at 1438.

99. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-47 (1985); *accord* *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982); *Massachusetts Retirement Bd. v. Murgia*, 427 U.S. 307, 313-14 (1976); *Frontiero*, 411 U.S. at 684-87; and *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973).

100. See *supra* note 86.

101. See *supra* note 85.

102. Gender is now considered a "quasi-suspect" classification. See *supra* notes 87-89 and accompanying text. *But see* Perry, *supra* note 98, at 1055 (claiming that intermediate scrutiny as opposed to strict scrutiny in gender cases in "adoption is more rhetorical than real").

These five factors expose and effectuate a compromise struck by the Supreme Court between two theories of constitutional equal protection. One theory defines constitutional equality as the elimination and remedy of the historical moral degradation and subjugation of certain classes in American society.¹⁰³ This theory explains the Court's concern for past discrimination, stereotyping, and irrelevant classifications.

The second theory offers a process-based definition of constitutional equality. Process-based theorists argue that because "discrete and insular minorities" are unable to defend themselves in the political process from majoritarian oppression, an independent judiciary must intervene to correct the flawed democratic process. Equal protection is the guarantor of full and fair representation. This theory produced the Court's assessment of which classes are "discrete and insular minorities."¹⁰⁴

Immutability serves both theories, though immutability may describe suspect classifications more than it determines them.¹⁰⁵ Janet Halley argued that:

immutability is neither a necessary nor a sufficient precondition for the recognition of a suspect classification, and, where it has appeared as a factor in the Court's analysis, it has always been shorthand for inquiry into the fairness of the political process burdening the group.¹⁰⁶

Nonetheless, a class member's inability to easily change her personal behavior or characteristics to avoid a discriminatory governmental distinction¹⁰⁷ indicates the basic unfairness of discriminating against that class.¹⁰⁸ Society should not punish or disadvantage an individual on the basis of something for which the individual is not personally responsible.¹⁰⁹ Further, to coerce an individual to change something which she cannot change is fundamentally irrational.¹¹⁰ Therefore, special judicial attention is owed under equal protection when the government discriminates against those unable to escape that discrimination on their own.

103. See TOLERATION, *supra* note 27, at 296-303; R. DWORKIN, TAKING RIGHTS SERIOUSLY 223-39 (1977); and L. TRIBE, *supra* note 27, at 1465.

104. See generally J. ELY, DEMOCRACY AND DISTRUST (1980) (the leading argument in support of process-based equal protection theory). Process-based theory was born in *United States v. Carolene Products*, 304 U.S. 144, 152-53 n.4 (1938).

105. See *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-44 (1985); *Massachusetts Retirement Bd. v. Murgia*, 427 U.S. 307, 313-14 (1976); see also *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (listing factors determining suspectness but excluding immutability).

106. Halley, *supra* note 68, at 926-28 (citing, e.g., *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973); *Parham v. Hughes*, 441 U.S. 347, 351 (1979) (dictum)).

107. Immutability need not mean strict immutability. Many definitions of immutability discuss the centrality of the defining trait to the class member's personality. See, e.g., *Constitutional Status*, *supra* note 80, at 1303.

108. *Watkins I*, 847 F.2d at 1347.

109. See L. TRIBE, *supra* note 27, at 1615; cf. *Robinson v. California*, 370 U.S. 660 (1962).

110. Halley, *supra* note 68, at 928 (quoting *Parham v. Hughes*, 441 U.S. 347, 352-53 (1979)).

Equal protection analysis is designed to root out prejudice as an unconstitutional basis for governmental classification. Higher levels of scrutiny are immediately applied to classifications which are very likely motivated by prejudice. The factors established by the Supreme Court test each classification to determine whether a heightened presumption of the presence of prejudice as sole or primary motivator for the government's classification is appropriate.

B. Rational Basis Analysis

Every non-suspect governmental classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike."¹¹¹ This rational basis requirement serves the same purposes as the suspect classification analysis. Illegitimate state purposes, such as prejudice, are prohibited.¹¹² To guarantee the effectiveness of that prohibition, governmental classifications must reasonably relate to a legitimate state purpose.¹¹³ Arbitrary and capricious classifications suggest that an illegitimate purpose is motivating the governmental action.¹¹⁴ In all other classifications with no indication that the majority is discriminating against a historically disadvantaged, despised, and powerless minority, as in suspect classifications, the rational basis test presumes that governmental actions are valid.

1. Rational Basis Analysis and Judicial Speculation

Traditional judicial deference to the political branches¹¹⁵ purposes and methods for achieving those purposes meant that application of a rational basis analysis was tantamount to a determination of constitutionality.¹¹⁶ Rational basis analyses long followed an early Supreme Court dictate that "[a] statutory classification will not be set aside if any state of facts reasonably may be conceived to justify it."¹¹⁷ The modern paradigm of the deferential strand

111. *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

112. *See, e.g., City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439-42 (1985).

113. *See McLaughlin v. Florida*, 379 U.S. 184, 191 (1964); *accord Parham v. Hughes*, 441 U.S. 347, 351 (1979); *Massachusetts Retirement Bd. v. Murgia*, 427 U.S. 307, 314 (1976); *Reed v. Reed*, 404 U.S. 71, 75-76 (1971).

114. *See, e.g., Cleburne*, 473 U.S. at 440-41.

115. "Political branches" will hereinafter be used as a generic description for governmental bodies either consisting of popularly elected officials or controlled by popularly elected officials, as distinct from independent judicial officers (i.e. legislative and executive branches). "Political body" will be used to refer to any individual institution within those branches.

116. L. TRIBE, *supra* note 27, at 1442-43.

117. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961); *accord Parham*, 441 U.S. at 351 ("[l]egislatures have wide discretion in passing laws that have the inevitable effect of treating some people differently from others"); *Murgia*, 427 U.S. at 314 ("This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one."); and *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 530 (1959) (stating that the court should uphold any classification

of rational basis analysis is *Williamson v. Lee Optical of Oklahoma*.¹¹⁸ In *Williamson*, the Court openly speculated as to a possible rational relationship to a legitimate purpose in order to support a governmental classification. Strict deference remains even in recent decisions.¹¹⁹

2. *The Burger Court Cases: Modifying the Rational Basis Test*

A second strand of rational basis analysis emerged, however, in the early years of the Burger Court. This modified rational basis analysis presented an alternative to the mandate of strict judicial deference in cases not involving suspect classifications. The Court struck down state and federal actions using a non-deferential rational basis analysis.

In *James v. Strange*,¹²⁰ the Court reviewed a Kansas statute permitting the state to recover in civil proceedings the legal defense fees it expended on behalf of indigent criminal defendants.¹²¹ The statute created two classes: civil judgment debtors who were indigent criminal defendants and all other civil judgment debtors. Under the statute, indigent defendants did not receive the protections provided for other civil judgment debtors.¹²² The Court carefully reviewed the statute and its operation and found no rational relationship between the classification and the legitimate purposes for civil recoupment actions.¹²³

Justice Brennan, writing for the Court in *United States Department of Agriculture v. Moreno*,¹²⁴ struck down an amendment to the Food Stamp Act which excluded from the program any household containing an individual who was unrelated to other household members.¹²⁵ The Court found that the amendment classified households based on whether every adult living in the household was related to every other adult in the household.¹²⁶ Brennan determined that the classifications drawn in the amendment were not rationally related to the legitimate governmental purposes described in the Act.¹²⁷ Brennan, responding to a government defense of the classifications, also found that the amendment failed to serve the purpose of minimizing fraud because it was both underinclusive and overinclusive and because the statute already contained effective anti-fraud provisions.¹²⁸ Finally, Brennan reviewed the legis-

based "upon a state of facts that reasonably can be conceived to constitute a distinction, or difference in state policy").

118. 348 U.S. 483 (1955).

119. See, e.g., *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166 (1980). See also the continuing vitality of *Dandridge v. Williams*, 397 U.S. 471, 485-87 (1970).

120. 407 U.S. 128 (1972).

121. *Id.* at 128-29.

122. *Id.* at 135-36.

123. *Id.* at 139-40.

124. 413 U.S. 528 (1973).

125. *Id.* at 529.

126. *Id.*

127. *Id.*

128. *Id.* at 538.

lative history and uncovered an illegitimate governmental purpose motivating the amendment: "to prevent so-called 'hippies' and 'hippie communes' from participating in the food stamp program."¹²⁹ Using both strands of the rational basis test and casting aside traditional deference to Congress, the Court held the amendment unconstitutional.

In *Logan v. Zimmerman Brush Co.*,¹³⁰ the Illinois Supreme Court had upheld strict time limits prescribed in the Illinois Fair Employment Practices Act which blocked plaintiff Logan from pursuing an employment discrimination claim.¹³¹ Logan breached the time limits due to inadvertent mis-scheduling by the state Fair Employment Commission.¹³² The U.S. Supreme Court's majority opinion reversed the Illinois court's decision exclusively on due process grounds; however, a separate opinion by Justice Blackmun, joined by three other justices, addressed the equal protection claim. In reviewing the statute and the state court's rationale, Blackmun gleaned three governmental purposes for the time limits. Blackmun found that randomly terminating meritorious claims did not serve any of the articulated purposes.¹³³ Although the purposes were legitimate, the classification was unrelated to those purposes and therefore failed the rational basis test.

The Supreme Court also applied a non-deferential rational basis test in four tax cases during the Burger era. These cases are especially important because, as in military cases, great judicial deference is given the political branches where a tax classification is involved.¹³⁴ In *Zobel v. Williams*,¹³⁵ the Court struck down a state legislative scheme to distribute earnings generated by an oil revenues fund based on the number of years each resident had lived in Alaska since statehood.¹³⁶ The Court held that the classification of residents was wholly unrelated to the legitimate purposes of encouraging prudent management of the fund and creating financial incentives for individuals to establish and maintain Alaskan residency.¹³⁷ Finally, the Court held that the legislative scheme's third purpose, rewarding residents' past contributions to the state, was not a legitimate state purpose.¹³⁸

In *Hooper v. Bernalillo County Assessor*,¹³⁹ the Court struck down a New Mexico statute giving tax exemptions only to Vietnam War veterans who established residency in the state before May 8, 1976; all veterans who estab-

129. *Id.* at 534.

130. 455 U.S. 422 (1982).

131. *Id.* at 426-27.

132. *Id.* at 426.

133. *Id.* at 439-41.

134. *Madden v. Kentucky*, 309 U.S. 83, 87-88 (1940); *accord* *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959); *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 509 (1937).

135. 457 U.S. 55 (1982).

136. *Id.* at 56. Alaska gained statehood in 1959.

137. *Id.* at 61.

138. *Id.* at 63 (citing *Shapiro v. Thompson*, 394 U.S. 618, 632-33 (1969)).

139. 472 U.S. 612 (1985).

lished residency after that date were ineligible for the exemption. The line drawn between veterans was not rationally related to the articulated legitimate governmental purposes, serving instead the illegitimate purpose of rewarding the veterans' past efforts.¹⁴⁰

The Court overturned a Vermont use tax in *Williams v. Vermont*¹⁴¹ because it arbitrarily distinguished between residents and non-residents.¹⁴² The classification was found to be unrelated to the purported purposes of protecting the state's revenues from lower out-of-state taxes, requiring those who use roads to pay for them, and encouraging Vermont residents to shop in the state.¹⁴³

In *Metropolitan Life Insurance Co. v. Ward*,¹⁴⁴ the Court struck down an Alabama statute imposing higher taxes on out-of-state insurance companies than on domestic insurance companies.¹⁴⁵ Because the appellants acknowledged that the tax scheme was rationally related to the state's objectives of promoting domestic business,¹⁴⁶ the Court focused on determining whether that asserted purpose was legitimate. Calling the tax barriers "purely and completely discriminatory," the Court overturned the statute.¹⁴⁷ The Court concluded that the legitimate purpose of promoting domestic business was made illegitimate when it was furthered by discrimination.¹⁴⁸

The Burger Court cases are more than a narrow line of dissent from the mainstream of rational basis analysis. Even where the Court upheld statutes, a non-deferential standard of review was adopted.¹⁴⁹ The Supreme Court reviewed legislative histories and lower court opinions in these cases to establish whether the governmental purpose asserted was legitimate and whether the challenged classification was actually related to that purpose. Thus, the two basic questions of rational basis analysis were no longer left to judicial speculation. The Court began to require that the government prove the existence of a legitimate purpose and its relationship to the challenged classification.

3. *Interpreting the Burger Court Cases*

Remarkably inconsistent voting by the justices in the seven Burger Court modified rational basis cases suggests that the revised test had not yet completed its trip through judicial peristalsis.¹⁵⁰ Nonetheless, it may be possible

140. *Id.* at 620-23.

141. 472 U.S. 14 (1985).

142. *Id.* at 22.

143. *Id.* at 23-26.

144. 470 U.S. 869 (1985).

145. *Id.* at 871.

146. *Id.* at 876.

147. *Id.* at 878.

148. *Id.* at 882.

149. See, e.g., *Schweiker v. Wilson*, 450 U.S. 221 (1981); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 597 (1979) (White, J., dissenting); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Lindsey v. Normet*, 405 U.S. 56 (1972).

150. *James v. Strange* was unanimous, although decided very soon after Justice Rehnquist

to glean a set of principles from these cases which produced this new line of analysis.¹⁵¹

First, the victimized class in each case was attenuated from the political process of the offending jurisdiction. The classes discriminated against in *Moreno*, *James*, and *Logan*¹⁵² might qualify as "discrete and insular minorities." Each of the classifications in the other four Burger Court cases benefited residents of the jurisdiction and/or penalized non-residents or more recent residents. While no evidence was presented proving that an entrenched majority within the jurisdictions used the legislature for their own enrichment, there is cause to be suspicious. The rational basis test is a bulwark against just such a concern.

Modification of the rational basis test reflects a realistic and unsympathetic view of the legislative and political process characteristic of the political climate after the Vietnam War-Watergate era of the early 1970s. Legislatures and executives are the focus of intense pressure from competing interests and constituencies. While political officers seek to serve the general good of their state or nation, their collective decisions necessarily reflect a balancing of interests requiring broad accommodation of diverse constituencies. Governmental classifications which confer special benefits on one group or inflict some detriment on another are produced by competition among pressure groups. There must be an independent check against favoritism and illicit discrimination.

joined the Court. Only Justice Rehnquist dissented in all the remaining six cases; his *Logan* opinion joined the result but rejected the majority's reasoning and held very narrowly on unrelated grounds. Justice O'Connor dissented in *Williams*, *Metropolitan Life*, and *Hooper* but concurred in *Zobel* and joined the separate opinion in *Logan*. Justice Stevens dissented only in *Hooper*. Justice Blackmun dissented in *Williams*, concurred in *Zobel*, and authored the separate opinion in *Logan*. Chief Justice Burger dissented only in *Moreno*. Justice Powell joined Rehnquist in a very narrow separate opinion in *Logan*, concurred in *Zobel*, and took no part in *Hooper*.

Most fascinating and difficult to explain is the O'Connor dissent in *Metropolitan Life* joined by Justices Brennan, Marshall, and Rehnquist. Brennan and Marshall, who had concurred or joined the majority in every other case, signed on to a dissent in *Metropolitan Life* arguing for a very narrow rational basis test, along with extraordinary deference to the states in tax classifications.

The Brennan concurrences in *Hooper*, *Williams*, and *Zobel* agreed with the majority reasoning but argued for an additional holding that the challenged tax statutes infringed on the fundamental right to travel.

151. Citing the long line of irreconcilable rational basis cases, Justice Rehnquist has properly warned that "[t]he most arrogant legal scholar would not claim that all of these cases applied a uniform or consistent test under equal protection principles." *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 176 n.10 (1980) (Rehnquist, J., dissenting). This Note certainly does not attempt to reconcile the two strands of rational basis analysis. Rather, this Note attempts to define them.

152. In order to have a meritorious employment discrimination claim under the Illinois Fair Employment Practices Act, the claimant must have suffered a physical disability or be a member of a protected class such as an African-American or a woman. ILL. REV. STAT. ch. 48, paras. 851-67 (1979). These protected classes are generally accepted as discrete and insular minorities. However, only a very small component of each class, a small sub-group randomly selected from among those with meritorious claims, would have been victimized by the state regulations in *Logan*.

Only the judiciary, by imposing a requirement of rationality on all discriminatory classifications and assignments of governmental benefits, can protect minorities from the legislatively enforced will of the majority.¹⁵³ This general cynicism toward the political branches is the first factor inspiring a closer scrutiny in rational basis analyses.

Second, each of the statutory classifications in the seven cases involved a permanent distinguishing factor from which a classified citizen could not escape or could escape only through drastic change. It would have been literally impossible for the Alaskan taxpayers of *Zobel*, the newly resident Vietnam veterans of *Hooper*, the employee/claimants of *Logan*, and the non-residents of *Williams* to change their statuses under the challenged statutes. Each would have been forced to turn back the clock to escape state discrimination. The foreign insurance companies of *Metropolitan Life* could have never achieved taxation rate parity with Alabamian insurance companies without themselves becoming domestic companies. The indigent defendants of *James v. Strange*, once indicted, could not alter their need for counsel or their civil debtor status under the law. The unrelated cohabitating food stamp recipients of *Moreno* could change their status under the congressional amendment, but only by going to the expense of establishing separate households or by marrying or adopting their cohabitants. Thus, the permanence of the classification under the challenged statute was a second factor running through the modified rational basis cases.

Finally, a third common factor was the irrelevance of the classification to the legitimate governmental purpose the statute allegedly served. The Court in each case reviewed the classification and the government's asserted purpose for the classification. In *Moreno*, *Metropolitan Life*, *Hooper*, and *Zobel*, the Court held that the asserted justifications were illegitimate and, therefore, just cause for suspicion.

But, even when legitimate purposes were articulated by the government, the classifications were considered suspicious by the Court because they were not facially reasonably related to the articulated purposes. In *Moreno*, *Williams*, and *Metropolitan Life*, the classifications were facially underinclusive. In *Moreno*, the classification was also overinclusive. The classifications in *Logan* and *James v. Strange* were completely arbitrary on their face. Each classification, on its face, was an inappropriate proxy for a legitimate governmental objective. The Court was, for that reason, more suspicious of the classification than it otherwise would have been under rational basis analysis.

The relevance requirement is best explained by a simple syllogism. Every government classification must be motivated by some purpose. Governmental

153. See Gunther, *Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); accord Barrett, *The Rational Basis Standard for Equal Protection Review of Ordinary Legislative Classifications*, 68 KY. L.J. 845, 847-56, 867-69, 876-78 (1979-1980); see also Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); L. TRIBE, *supra* note 27, at 582-83.

purposes are of two types: legitimate and illegitimate. Therefore, the absence of a legitimate purpose supporting a government classification suggests the presence of an illegitimate purpose. The suggestion of an illegitimate purpose explains and justifies closer judicial scrutiny of the governmental classification. The judiciary's role in the protection of individual rights requires it.

There are three factors, therefore, which contribute to the application of a modified rational basis test: the relationship of the burdened class to the political process of the classifying jurisdiction ("political powerlessness"); the permanence of the classification established in the challenged statute or governmental action ("permanence"); and the underinclusiveness, overinclusiveness, or arbitrariness of the classification or the presence of an illegitimate governmental purpose, thereby putting the relevance of the classification in doubt ("relevance").

The Supreme Court has not yet explicitly reviewed these factors before applying a modified rational basis test in a particular case, as it has with the five factors used in strict scrutiny of suspect classifications. However, the presence of these three factors in a case gives the Court special reason to be suspicious of a challenged classification. This heightened suspicion replaces the traditional presumption in rational basis analysis that governmental classifications are valid. With this new presumption in place, the Court can be expected to reject traditional deference for a closer review of a governmental classification. The required response to the Court's closer review is a rational, supportable justification for the classification articulated by the government. While the three elements of modified rational basis analysis may not be prerequisites to such closer scrutiny, they are indicators that closer scrutiny is appropriate.

This interpretation of the modified rational basis test is consistent with the two background theories of constitutional equal protection.¹⁵⁴ Process-based concerns are prominent in modified rational basis test jurisprudence, beginning with the general cynicism of the Court toward decisionmaking in the political process. Adding to this general concern is the relative separation of the victimized classes from the political mainstream in the classifying jurisdiction. Although these classes are not discrete and insular in the way that race or gender are, they are sufficiently removed from political decisionmaking in legislatures to arouse judicial notice.

Of course, every classification benefits one group to the detriment of others. But some classifications discriminate against a "permanent" class unable to voluntarily change its own status or effectively defend itself in the political process. Perhaps even more significantly, the classifications deprive these minority classes of a state-provided benefit and confer that benefit on a self-serving majority. Such a result raises the hackles of, and spurs closer judicial scrutiny by, process-based equal protection theorists.

154. See *supra* text accompanying notes 103-04.

The anti-degradation, anti-subjugation principle of modified rational basis analysis is more subtle. The classes in the Burger Court cases did not suffer historical discrimination akin to slavery, segregation, or sexism. Further, the classifications neither expressly nor impliedly perpetuated a scheme of systemic invidious discrimination, nor threatened the sovereign personhood of their victims.

Yet, as judicial investigation and implementation of constitutional equal protection evolved, the perpetuation of invidious discrimination became more subtle and covert.¹⁵⁵ Since current Supreme Court analysis justifies strict scrutiny only when classifications are overtly related to race, nationality, or alienage, judicial scrutiny must reach beyond suspect classifications analysis to effectively address more subtle discrimination and, thus, serve the objectives of the anti-degradation, anti-subjugation principle of equal protection.

One method for extending this principle of equal protection is the modified rational basis test. As noted earlier, an illicit goal probably lurks where a legitimate purpose is absent. And since equal protection commands that no class suffer discrimination without a legitimate purpose, the principle is served by the heightened scrutiny of the modified rational basis test.

4. *City of Cleburne v. Cleburne Living Center: The Modified Rational Basis Test Paradigm*

City of Cleburne v. Cleburne Living Center, Inc.,¹⁵⁶ marked the maturity of the Court's evolution away from the policy of extreme deference to the political branches.¹⁵⁷ The City of Cleburne had denied a special use permit under the city's zoning laws for the operation of a group home for people with mental retardation.¹⁵⁸ The Supreme Court rejected the quasi-suspect class

155. Compare *Strauder v. West Virginia*, 100 U.S. 303 (1880) (involving a state law expressly excluding all but "white male persons" from serving on juries) with *Batson v. Kentucky*, 476 U.S. 79 (1986) (involving prosecutorial peremptory challenges to individual African-Americans in jury selection); compare *Sweatt v. Painter*, 339 U.S. 629 (1950) (involving an express prohibition on the attendance of African-Americans at a state university's law school) with *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (involving a race-conscious affirmative action selection policy in a state university's medical school); and compare *Brown v. Board of Educ.*, 347 U.S. 483 (1954) (rejecting "separate-but-equal" schools as a remedy) with *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971) (providing specific guidelines for remedying disparate impact racial discrimination in the public schools).

156. 473 U.S. 432 (1985).

157. *Cleburne* did not establish a consensus for the modified rational basis test. Justice Stevens' concurrence, joined by Chief Justice Burger, argued for the application in every equal protection case of a rational basis standard which differs little in its degree of deference from the modified rational basis test. *Id.* at 452 (Stevens, J., concurring). Justice Marshall's concurrence and dissent, joined by Justices Blackmun and Brennan, argued that the majority opinion, in fact, applied heightened scrutiny. Marshall argued for a sliding scale approach to equal protection analysis with "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn" determining the level of scrutiny to be applied in each case. *Id.* at 460 (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 99 (1973) (Marshall, J., dissenting)).

158. *Id.* at 437.

status assigned to people with mental retardation by the Court of Appeals for the Fifth Circuit¹⁵⁹ and adopted a rational basis standard for review of the city's zoning law.¹⁶⁰

Following traditionally deferential rational basis review, the Supreme Court should have attempted to hypothesize *any* legitimate purpose for the city's zoning law, whether or not such a purpose had been articulated by the city council in its legislative history or litigation.¹⁶¹ In *Cleburne*, however, the Court required the City to "rationally justify" its classification.¹⁶² Then, the Court carefully reviewed the city council's stated justifications: (1) the negative attitudes of neighboring property owners toward people with mental retardation; (2) fear that students at a nearby junior high school might harass the residents with mental retardation; (3) fear of a flood endangering the residents of the home; (4) fear about the legal responsibility for the actions of the residents; and (5) concerns about the number of residents and the size of the home.¹⁶³

The latter three justifications, while legitimate concerns in the Court's view, were rejected because they were fatally underinclusive and thereby wholly unrelated to the discriminatory classification of people with mental retardation. The same fear of a flood existed for other uses permitted in the zone without special use permits, such as hospitals, convalescent homes, and nursing homes. The same concern about legal responsibility for groups' actions applied to boarding and fraternity houses, also allowed without restriction in the zone. The same concerns about the size of the house and number of residents applied to any group of individuals, regardless of their state of mental development, living together in the same home.¹⁶⁴ While the city council could have established valid zoning regulations, it could not establish a discriminatory classification *unless that classification was rationally related to the city's legitimate interests*.¹⁶⁵ In *Cleburne*, the Burger Court showed its willingness to review asserted justifications closely to determine whether the requisite relationship existed, just as it had done in earlier cases.

The Court rejected the city's other justifications — the neighbors' negative attitudes and fear of harassment by nearby students — as rooted in the

159. *Id.* at 442.

160. *Id.* at 446. *But see id.* at 459 (Marshall, J., concurring in part, dissenting in part) ("The refusal to acknowledge that something more than minimum rationality is at work here is, in my view, unfortunate . . .").

161. *See supra* text accompanying notes 115-19. This Note puts aside the important debate over which articulation — the legislative or litigation — should be considered by the Court.

162. *Cleburne*, 473 U.S. at 447. For a general analysis of the Court's reasoning, see Comment, *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 (1987).

163. *Cleburne*, 473 U.S. at 448-49.

164. *Id.* at 449.

165. *Id.* at 448 (emphasis added).

illegitimate purpose of giving effect to private prejudices.¹⁶⁶ Thus, the Court reaffirmed the well-established illegitimacy of prejudice as a basis for governmental classification.¹⁶⁷ While there may be a legitimate governmental interest in avoiding harassment by community members, a governmental body may not legitimately address that interest by excluding the victims of prejudice.

Prejudice has always been considered by the Court to be an illegitimate, irrational basis for governmental decisionmaking. In *United States Department of Agriculture v. Moreno*,¹⁶⁸ for example, the Supreme Court announced that "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."¹⁶⁹ *Moreno*, as noted above,¹⁷⁰ applied a modified rational basis analysis to a statutory provision prohibiting the distribution of food stamps to unrelated adults living in the same household. The Court found that the statutory exception was created as a bare political punishment of "hippies."¹⁷¹

In *Palmore v. Sidoti*,¹⁷² the Court, applying strict scrutiny to a race-based child custody decision, declared with regard to racial bias that "[t]he 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."¹⁷³ In *Plyler v. Doe*,¹⁷⁴ the Court applied an intermediate level of scrutiny to a state law restricting undocumented children's access to public education. The Court announced that "[l]egislation predicated on . . . prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law."¹⁷⁵

The *Cleburne* decision cited and echoed these earlier Supreme Court precedents:

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 apartment houses, multiple dwellings, and the like. It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, and the

166. *Id.* at 448-49 (citing *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

167. The *Cleburne* majority presented three opinions: the Court's opinion by Justice White, 473 U.S. at 432, a concurrence by Justice Stevens, *id.* at 451, and a partial concurrence, partial dissent by Justice Marshall, *id.* at 455. However, there was no disagreement on the fundamental illegitimacy of prejudice as a basis for governmental classification.

168. 413 U.S. 528 (1973).

169. *Id.* at 534-35 (emphasis in original).

170. *See supra* text accompanying notes 124-29.

171. *Moreno*, 413 U.S. at 534, 543.

172. 466 U.S. 429 (1984).

173. *Id.* at 433.

174. 457 U.S. 202 (1982).

175. *Id.* at 216 n.14.

City may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic.¹⁷⁶

Cleburne conclusively established that prejudice of any kind, not merely racial prejudice, is an irrational, illegitimate ground for governmental classification.

As noted earlier, there are three factors which help identify appropriate circumstances for the application of a modified rational basis test: permanence, relevance, and the political process of the classifying jurisdiction. Each of these three factors was present in *Cleburne*.¹⁷⁷

The City of *Cleburne* established a class in its zoning regulation of all people with mental retardation. Mental retardation is a condition not easily changed or avoided. It is, therefore, a permanent condition within the definition of the modified rational basis test.

The *Cleburne* Court was faced with a governmental classification which was, on its face, irrelevant to any legitimate governmental purpose. The classification was motivated, in part, by private prejudices in the community. Prejudice is always illegitimate. In addition to prejudice, the *Cleburne* Court heard three justifications for the government's classification which were underinclusive and, therefore, unrelated to the government's legitimate purposes for zoning laws. The Court held, appropriately under modified rational basis analysis, that facial underinclusiveness exposed a lack of relationship between the classification and the governmental objective.

The *Cleburne* modified rational basis analysis can be summarized as follows. Governmental classifications by the political branches are assumed to be valid, rational, and related to the legitimate governmental objectives asserted. The government need only support the presumption of validity by articulating some legitimate purpose reasonably related to the classification. Such presentation satisfies the relevance requirement.

Even with the Court's continuing skepticism about the legislative process, a presumption of validity remains intact unless the challenged classification is based on a permanent characteristic and, when it is necessary to support that classification with a legitimate governmental purpose: (1) the government remains silent; (2) the government asserts an illicit purpose, such as prejudice, to justify the classification; or (3) the government asserts a purpose which is on its face irrelevant to the classification. To overcome the presumption of invalidity created by any of these situations, the government must present to the

176. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 448 (1985) (citations omitted).

177. A comment on *Cleburne* suggested that three similar factors explain the application of "second order rational basis" by the Supreme Court: irrational prejudice, the absence of an articulated purpose, and a politically disadvantaged class. See Comment, *supra* note 162, at 958-61. This Note attempts to generalize the analysis in *Cleburne* to help understand the full line of modified rational basis cases. *Cleburne* clearly does not stand alone in its modified rational basis review. Developing a model which encompasses the full development of modified rational basis analysis permits the application of *Cleburne* beyond the specific facts of that case.

court a supportable, legitimate purpose for the classification.¹⁷⁸

The difference between suspect or quasi-suspect class status and modified rational basis analysis is the positioning of the presumption of invalidity. Strict scrutiny *begins* with the premise that the government is acting prejudicially and, therefore, illegitimately.¹⁷⁹ Modified rational basis analysis begins with the premise that classifications by the political branches are valid; however, if the government cannot reinforce the premise with some evidence of a rationally related legitimate governmental purpose, closer scrutiny and a presumption of invalidity arise.

The most significant difference between the early, highly deferential rational basis analysis and the *Cleburne* rational basis analysis is the source of the justification for the governmental classification. The *Cleburne* decision and the other Burger Court modified rational basis analyses required the challenged political bodies to justify their classifications after permanence and irrelevance raised the Court's suspicions.¹⁸⁰ Earlier decisions using the deferential rational basis test left the justification up to the imagination of the judges.¹⁸¹

C. *Modified Rational Basis Analysis and the Military's Exclusion of Lesbians and Gay Men*

The modified rational basis test requires the government to meet the burden of establishing: (1) a reasonable relationship between the classification imposed and the objective sought; and (2) a legitimate governmental objective. The military's regulations requiring the involuntary discharge of servicepeople on the basis of sexual orientation fail this test and are, therefore, unconstitutional.

First, sexual orientation is a "permanent" characteristic as defined under the modified rational basis test. Permanence need not be synonymous with the literal impossibility of change characterizing the classifications in *Zobel*, *Hooper*, *Logan*, and *Williams*. It is better understood as consistent with, and perhaps broader than, the "immutability" factor considered in suspect classification analyses.

178. *But see* Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977), wherein the Supreme Court held that mixed motive government actions can be unconstitutional. Once the plaintiff establishes that her constitutionally protected activity is a substantial factor motivating the government's action, the burden of persuasion shifts to the government to establish that the same decision would be reached in the absence of the protected activity.

179. *See supra* text accompanying note 98.

180. *Cf.* Gunther, *supra* note 153.

181. *See supra* text accompanying notes 115-18. Also, it is important to note that this section purports to do nothing more than analyze the Supreme Court's behavior in modified rational basis test cases and glean a coherent set of principles from that behavior. For a normative study of closer judicial scrutiny in equal protection cases, see Sunstein, *Interest Groups in American Public Law*, 28 STAN. L. REV. 29, 69 (1985). *See generally* Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); Note, *State Economic Substantive Due Process: A Proposed Approach*, 88 YALE L.J. 1487 (1979).

Theorists advancing the anti-subjugation, anti-degradation principle of constitutional equal protection define the purpose of strict scrutiny as the preservation of the "substantive values of equality and autonomy."¹⁸² Personal autonomy must encompass the unfettered right to self-determination of an individual's identity. Immutability, therefore, describes "those traits that are so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change them"¹⁸³

Moreno suggests that "permanence" under the modified rational basis test may be somewhat broader than "immutability" under strict scrutiny. The class discriminated against by the challenged congressional act in *Moreno* consisted of unrelated, cohabitating adult food stamp recipients.¹⁸⁴ The classification left its victims with a choice between losing their food stamp allotments and either establishing a familial relationship with the other adults in their household or drastically altering their living arrangements. The permanent classification, therefore, touches not only family relationships but also non-marital, non-intimate living arrangements.

While constitutional privacy protection does not extend to the living arrangements of unrelated adults,¹⁸⁵ such relationships can be significant in the definition and maintenance of an individual's identity. The choice of a communal living arrangement or a non-marital intimate living relationship may express an individual's view of traditional values or allegiance to a set of new values. A decision to join a cloistered monastery or convent may be the very definition of religious conscience. The welcoming of unrelated immigrant visitors from a common homeland may be the reinforcement of ethnic or national identity. For the state to mandate a living arrangement, or prohibit a type of living arrangement as it did in *Moreno*, does invade personal autonomy. Therefore, the characteristic defining the classification is permanent.

Sexual orientation easily fits within the broadly defined contours of permanence. Sexual orientation can be viewed as "the confluence of individual, group, and social identity."¹⁸⁶ For some, it is considered a dissent from traditional gender roles and societal definitions. Furthermore, there is great doubt that sexual orientation can be changed without wrenching personal trauma.¹⁸⁷ Even if such change could occur, requiring an individual to alter a central

182. L. TRIBE, *supra* note 27, at 1465; *accord* TOLERATION, *supra* note 27, at 297.

183. *Watkins I*, 847 F.2d at 1347; *accord* *Constitutional Status*, *supra* note 80, at 1303-04. *But see* Halley, *supra* note 68, at 932-34 (arguing that the "immutability" of an individual's sexual orientation or identity is the product of social interpretation, rather than self-identification, when considered for equal protection).

184. *See supra* text accompanying notes 124-26.

185. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). *But see* *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 543 (1973) (Douglas, J., concurring) (arguing that the cohabitation of unrelated food stamp recipients is protected by the freedom of association). Justice Douglas authored his *Moreno* concurrence and the majority opinion in *Boraas* within one year, which is surprising given that the two opinions directly contradict one another on this important point of constitutional privacy.

186. *Constitutional Status*, *supra* note 80, at 1304.

187. *Heightened Scrutiny*, *supra* note 80, at 819-20; *accord* Halley, *supra* note 68, at 937-38

component of her personal identity strikes at the heart of the anti-degradation, anti-subjugation principle.

Janet Halley's criticism of the traditional immutability debate makes clear the importance of focusing the permanence debate on the individual's self-definition rather than society's definition of the individual.¹⁸⁸ Societal attempts to define sexual orientation as a strict dichotomy between heterosexual women and men, on the one hand, and lesbians and gay men, on the other (as do the military's regulations), ignore well-respected, longstanding empirical research documenting adult human sexual behavior.¹⁸⁹ The results are absurd, grossly inaccurate, and therefore very dangerous governmental definitions.¹⁹⁰ Such distorted classifications, bearing no real relation to the true orientations of the classifications' victims, inevitably impinge upon individual self-identification. The judiciary's role is to protect that individual autonomy; therefore, careful judicial review of such classifications is necessary. For that reason, sexual orientation must be permanent for the purposes of modified rational basis analysis.

Second, it is likely that the democratic process has not worked appropriately in creating the military's sexual orientation classification. To supplement the judiciary's increasing suspicion about the political branches' decisionmaking processes,¹⁹¹ special concerns are raised by the method of decisionmaking attending military rules. Military decisionmaking is attenuated from the political process. No elected representatives participate directly in the drafting of military regulations.¹⁹² The lesbian and gay community and its representatives had no opportunity through a direct or representative democratic process to protect themselves from the discrimination in the regulations. The only methods for gaining redress through the political branches are legislative reversal through the passage of legislation overturning the regulation,¹⁹³ or the

(citing studies which "clearly demonstrate that, for many individuals, sexual orientation is indeed fixed immutably before puberty").

188. Halley argues that lesbians and gay men immutably oriented toward their own sex who are coerced to conform to heterosexuality are "changing" their sexual orientation, even though the essence of their orientation remains unchanged. This change is significant in Halley's view because "social agents work with social meaning . . . not the ideal, epistemology of their decisionmaking." Halley, *supra* note 68, at 934.

189. Halley, *supra* note 68, at 939-41 (discussing the Kinsey scale which established that many study subjects reported some mixture of heterosexual and same-sex experiences); accord T. SARBIN & K. KAROLS, *supra* note 5, at 11.

190. See, e.g., *supra* note 70 (citing Halley, *supra* note 68, at 949, for the possibility that the *Padula* court had defined its plaintiff out of the class it was attempting to establish); see also Halley, *supra* note 68, at 947-56.

191. See *supra* text accompanying notes 152-53.

192. Subject to the President's authority, the Secretary of Defense has "authority, direction, and control over the Department of Defense." 10 U.S.C. § 113(b) (1988). Each executive department head and military department head "may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. § 301 (1988).

193. Administrative regulations can be overturned by Congress only through the adoption

direct command of the DoD under orders from the President.¹⁹⁴ Every minority faces an insurmountable task in passing legislative veto statutes. Influencing an incumbent President through the political process is even less likely. Therefore, the courts have special cause for concern and suspicion when the military classifies on its own. The judiciary is the only realistic remedy for the military's insular rulemaking. Under these circumstances, the closer scrutiny of the modified rational basis test is justified.

As for the third factor in determining whether modified rational basis analysis is appropriate, the facial relevance of the classification to the purposes for which it was enacted, the government asserts five justifications for the military's sexual orientation-based classification. They are:

(1) Morale and discipline will suffer because of tensions between lesbians and gay men in the service and others in the service who despise homosexuality;

(2) Lesbian and gay officers may not be able to gain and hold the respect and trust of those under their command because many lower-ranked heterosexual soldiers despise homosexuality;

(3) The presence of lesbians and gay men in the military is a source of ridicule and notoriety harmful to the military's recruitment efforts and its public image;

(4) Discipline might be undermined by emotional relationships between lesbians or gay men of different ranks; and

(5) Breaches of security are possible because of the susceptibility of lesbians and gay men to blackmail.¹⁹⁵

Two of these justifications — avoiding breaches of security and preventing inter-rank emotional relationships — serve the legitimate purpose of maintaining military discipline.¹⁹⁶ They fail to support the classification, however, because neither justification on its face bears any relation to sexual orientation. The regulations are grossly underinclusive just as was the *Cleburne* zoning ordinance. As the *Watkins I* panel pointed out, heterosexuals are just as likely to engage in emotional relationships across ranks as are lesbians and gay men.¹⁹⁷ Thus, the regulations are underinclusive to serve such a purpose. If the problem of inter-rank emotional relationships is a threat to discipline, as the military could reasonably perceive it to be, then there is no basis for distinguishing between heterosexual relationships and lesbian or gay

of legislation consistent with the constitutionally-required procedures of bicameralism and presentment for veto as required in article I of the Constitution. See *INS v. Chadha*, 462 U.S. 917, 921 (1983).

194. U.S. CONST. art. II, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

195. *Watkins I*, 847 F.2d at 1350 (quoting the Army's Opening Brief and the Army's Second Supplemental Brief); accord *BenShalom III*, 703 F. Supp. at 1376 (citing AR 135-178, Para. 10-2).

196. See *infra* text accompanying notes 257-68.

197. 847 F.2d at 1352.

relationships.¹⁹⁸

The fear of security breaches caused by the blackmail of lesbian and gay servicepeople is a substantial and legitimate concern. The military's regulations, however, *create* rather than resolve this problem.¹⁹⁹ Blackmail is made possible only by consequences resulting from the exposure of a blackmail victim's concealed behavior or condition. For a lesbian or gay man to be effectively blackmailed, she must be subject to punishment for her sexuality. Such punishment is made possible primarily by the regulations the military is attempting to justify. Without the certainty of involuntary discharge created by the military's regulations, the danger of blackmail-induced security breaches would greatly diminish.

Societal prejudice against lesbians and gay men may make exposure of concealed sexual orientation undesirable for some. However, many of the servicepeople discharged under the military's regulations openly proclaim their sexual orientation.²⁰⁰ In fact, the regulations punish voluntary disclosure by lesbians and gay men.²⁰¹ Those who do not publicly proclaim or act upon their sexual orientation, thereby increasing their vulnerability to blackmail, will not likely be reached under the military's regulations.

Of the forty significant espionage cases in the United States, only two involved lesbians or gay men, and neither of those involved blackmail.²⁰² Further, forty percent of the lesbians and gay men discharged from the Army between 1981 and 1987, and fifty percent of those discharged from the Air Force during that same period, held "Secret" or "Top Secret" security clearances. Background investigations of these servicepeople must have failed to expose any indication that these lesbians and gay men were security risks.²⁰³ The 1957 Crittenden Report, prepared to assist the Secretary of the Navy with revision of policies discriminating against lesbians and gay men, found that there was no factual data supporting the assertion that lesbians and gay men are security risks. No new data has been generated since that report to prove

198. See *infra* text accompanying notes 230-32 for a discussion of the UCMJ sections dealing with this subject.

199. See *Watkins I*, 847 F.2d at 1352.

200. See, e.g., *Watkins I*, 847 F.2d at 1330; *Matlovich v. Secretary of the Air Force*, 591 F.2d 852, 853 (D.C. Cir. 1978); *BenShalom I*, 489 F. Supp. at 969; *Doe v. Chafee*, 355 F. Supp. 112, 113 (N.D. Cal. 1973).

201. See *supra* text accompanying notes 25-26 (a serviceperson may be discharged for stating that she is a homosexual).

202. *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 668 F. Supp. 1361, 1375 (N.D. Cal. 1987) (citing *Federal Government Security Clearance Programs: Hearings Before the Permanent Subcomm. on Investigations of the Committee on Governmental Affairs United States Senate*, 99th Cong., 1st Sess. 171-87, 913-26 (1985)). In *High Tech Gays*, one of the plaintiffs was the target of an attempted blackmail. He unequivocally rejected the attempt.

203. T. SARBIN & K. KAROLS, *supra* note 5, at 22. This report was commissioned by the Pentagon to assess whether lesbians and gay men serving in the military are security risks. The report concluded that they are not, and suggested that the military investigate changing its policies towards gay men and lesbians. The Pentagon rejected the report in its entirety as biased, flawed, offensive, wasteful of government resources, and beyond the mandate of the commission. *N.Y. Times*, Oct. 22, 1989, at 1, col. 6. A new report was ordered. *Id.* at 24.

otherwise.²⁰⁴

The only rational relationship between the government's asserted justification and the classification based on sexual orientation is the regulation itself.²⁰⁵ It would be perverse to hold that constitutional equal protection guarantees permit the government to establish its own unreasonable classifications and, in turn, use those classifications to justify future discrimination.

The military's three remaining justifications are based on alleged pervasive prejudice against lesbians and gay men among lower-ranked servicepeople and the public at large. The military's perception that lesbians and gay men are despised by some heterosexuals is certainly true,²⁰⁶ just as the neighbors of the home in the *Cleburne* case feared and hated people with mental retardation.²⁰⁷ Nonetheless, prejudice, by definition, is never rational²⁰⁸ and, therefore, cannot be a rational basis for governmental classification.²⁰⁹ The similarity is striking between the arguments against lesbians and gay men in the military and the arguments made against the racial integration of the military during World War II.²¹⁰

It might be argued, probably not without some empirical support, that the public reaction to lesbians and gay men is substantially more virulent and emotional than the public reaction to mental retardation.²¹¹ But, as noted earlier, the political branches may not use either the acts, threats, or opinions of even the most zealous bigots as a justification for excluding the victims of prejudice.²¹² The equal protection clause is a mere empty shell if it does not

204. T. SARBIN & K. KAROLS, *supra* note 5, at 29.

205. The extremes to which the blackmail argument can be taken were shown in *Padula v. Webster*, 822 F.2d 97, 104 (D.C. Cir. 1987), wherein the court found that "open" lesbians and gay men are exposed "to the risk of possible blackmail to protect their partners, if not themselves." (emphasis added).

206. See *Constitutional Status*, *supra* note 80, at 1285 & n.3; see also *Heightened Scrutiny*, *supra* note 80, at 799-807.

207. See *supra* text accompanying note 163.

208. See *supra* note 4.

209. See *supra* text accompanying notes 166-76. See also *BenShalom III*, 703 F. Supp. at 1377, wherein the Army asked the court to rely on the "obvious connection" between sexual orientation and detrimental effect on legitimate military purposes. The court should, the Army argued, use "common sense." The court answered that "[i]n this context, the word 'common sense' amounts to little more than a euphemism for prejudice." *Id.*

210. "[T]he Army's duty is to fight battles and win wars. Therefore the Army must maintain morale in the ranks and use its manpower with maximum efficiency. Integration would lower morale and impair efficiency. Whites just will not serve with blacks . . ." Kenworthy, *The Case Against Army Segregation*, 275 ANNALS 27 (1951); see also T. SARBIN & K. KAROLS, *supra* note 5, at 25 ("The order to integrate blacks was first met with stout resistance by traditionalists in the military establishment. Dire consequences were predicted for maintaining discipline, building group morale, and achieving military organizational goals. None of these predictions of doom has come true.").

211. For example, there is some legislation designed to protect the rights of people with physical and mental disabilities. See, e.g., Section 504 of the Federal Rehabilitation Act of 1973, 29 U.S.C. § 794 (1982 & Supp. IV 1986), and the Bill of Rights section of the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. § 6010(1), (2) (1982). No comparable federal legislation exists for the protection of lesbians and gay men.

212. See *supra* text accompanying notes 166-76.

expel from governmental decisionmaking all motivations based on the most severe of prejudices as well as more moderate distastes.

Furthermore, any reasonable interpretation of the guarantees of constitutional equal protection must include protection against virulent, emotional prejudices. At the time of the adoption of the Reconstruction Amendments, prejudice against African-Americans was harsh and violent.²¹³ The greater the tendency in the prejudice-motivated majority to discriminate against a vulnerable minority, the more important are the protections provided by constitutional equal protection. To uphold the military's regulations on the basis of prejudice or prejudice-inspired acts alone would eliminate the requirement that government classifications have a rational basis.

The Seventh Circuit's opinion in *BenShalom IV* suggested a new argument for establishing a rational relationship between the sexual orientation classification in the military's regulations and the admittedly important governmental interest in military discipline. Judge Wood constructed his argument as follows: (1) "Homosexuals," as defined by the regulations, either admit a "desire" to engage in homosexual acts or have engaged in such acts; (2) "homosexuals," because they desire to engage in homosexual acts, have a propensity to engage in homosexual acts; (3) because homosexual acts are prohibited by regulation, and the military is not obligated to assume the risk that its regulations will be violated, "homosexuals" — who are likely to violate those regulations — may be discharged.²¹⁴

On first reading, Judge Wood's logic is majestic in its simplicity and clarity. Closer review, however, exposes a confused and factually inaccurate line of argument which misreads precedent and the relevant governing statutes. Each step of the argument is flawed.

First, while it is true that the regulations define "homosexuals" in the manner described by Judge Wood,²¹⁵ it was Miriam BenShalom who declared herself a lesbian, not the authors of the regulations.²¹⁶ Words do not have universal referents. While the regulations' authors defined a "homosexual" in one way, Sgt. BenShalom may have had an entirely different definition in mind when she self-identified as a lesbian.

Sgt. BenShalom may have, like some other lesbians and gay men, established her sexual identity without ever having engaged in homosexual acts.²¹⁷ She may define lesbianism as an identity unrelated to homosexual conduct. Her declaration may have offered a political and social statement dissenting

213. See *Constitutional Legitimacy*, *supra* note 27, at 854 ("Much of the traditional condemnation of homosexuality interprets the sexual preference in the same distorted way nineteenth century theories of racial differences interpreted race, stereotypically associating homosexuality with images of incompetence, immaturity, licentiousness and animalistic immorality."); accord *Perry*, *supra* note 98, at 1026.

214. *BenShalom IV*, 881 F.2d at 460-61.

215. See *supra* text accompanying note 25.

216. See *supra* note 61.

217. See *supra* note 68 and accompanying text.

from what she perceives to be societal subjugation of differing sexual orientations. In any event, it is wrong to suggest, as Judge Wood did, that the only reasonable understanding of BenShalom's acknowledgement that she is a lesbian, "if not an admission of its practice, at least can reasonably and rationally be viewed as reliable evidence of a desire and propensity to engage in homosexual conduct."²¹⁸

Second, Judge Wood's propensity argument, that lesbians and gay men are likely to engage in homosexual acts, casts a much wider net than even the military's regulations contemplate. Considering Alfred Kinsey's findings that a sizable plurality of men and women are neither exclusively heterosexual nor exclusively lesbian or gay,²¹⁹ Judge Wood would find many self-identifying heterosexuals who desire to engage in homosexual acts. Using the propensity argument, these self-identifying heterosexuals should be discharged according to the regulations. The military's regulations, as Judge Wood interpreted them, are grossly underinclusive if the goal is to discharge servicepeople with a propensity to engage in homosexual acts, and grossly overinclusive if the goal is to discharge self-identifying lesbian and gay servicepeople.

The conflict between the false dichotomy of sexual orientations assumed by Judge Wood and the empirical data showing a scale of varied sexual identities leaves courts reviewing the military's regulations to answer an absurd and unanswerable question: how many homosexual acts must a serviceperson desire before she is a "homosexual?" The extremes, of course, are easy. A serviceperson desiring no homosexual acts is not a "homosexual" under the regulations, while a serviceperson desiring to engage exclusively in homosexual acts would be a "homosexual" under the regulations.

But how should a court treat a serviceperson who regularly engages in nine acts of heterosexual sex but desires one homosexual act? Or desires two homosexual acts during the course of time she engages in eight heterosexual acts? Or four homosexual acts and six heterosexual? Or five and five? Strictly construing the regulations could require discharging all of these servicepeople given Judge Wood's propensity argument.²²⁰ Yet, it is unlikely that all of these servicepeople would proclaim themselves lesbians or gay men as did Miriam BenShalom.

Third, and most importantly, Judge Wood failed miserably in the simple task of reading Article 125 of the UCMJ.²²¹ Judge Wood cited Article 125 for the proposition that the Army has a regulation prohibiting homosexual acts.²²² In fact, Article 125 by the plain meaning of its clear terms rejects the association of sodomy with a particular sexual orientation: "(a) Any person

218. *BenShalom IV*, 881 F.2d at 464.

219. Halley, *supra* note 68, at 939-41 (citing A. KINSEY, W. POMEROY, & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* 650-51 (1948); and A. KINSEY, W. POMEROY, C. MARTIN, & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 488 (1953)).

220. *See supra* text accompanying note 214.

221. 10 U.S.C. § 925 (1988).

222. *BenShalom IV*, 881 F.2d at 461. While much of this discussion occurs during the

. . . who engages in unnatural carnal copulation with another person of *the same or opposite sex or with an animal* is guilty of sodomy. . . ."²²³ Congress obviously did not consider "sodomy" to be synonymous with "homosexual acts." Further, the plain meaning of Article 125's language excludes from coverage acts other than sodomy through which lesbians and gay men may express their affection or sexuality.²²⁴ Congress, therefore, obviously did not intend to reach all acts which might or might not be associated with lesbian or gay orientation. Article 125 simply does not express a military policy outlawing homosexual acts. Without such a policy, the military's exclusionary regulations cannot claim the justification of the arguably legitimate purpose contained in Article 125.

Closer scrutiny of the military's regulations exposes yet another breach in the asserted rational relationship to the legitimate governmental purpose of military discipline. Each concern expressed by the government is already covered by the UCMJ.²²⁵ Violations of UCMJ provisions result in courts-martial, and convictions can result in penalties far more harsh than mere discharge. Enacting a regulation with a weak penalty serves no legitimate purpose if the mischief sought to be prohibited by that regulation is punishable under existing regulation by stiffer penalties.

The government's arguments imply that lower-ranked personnel will disobey the orders of lesbian or gay superior officers, that tension will result in some disruption of military operations, and that enlisted personnel or officers will react in some negative, tangible manner to the lesbians and gay men in the military, thereby undercutting discipline.

Eight articles of the UCMJ could be applied to punish harshly any serviceperson disrupting military discipline. Article 89 punishes any person subject to military law for disrespect toward a superior commissioned officer.²²⁶ Article 91 does the same for insubordinate conduct toward warrant officers, noncommissioned officers, or petty officers.²²⁷ Articles 90 and 92 punish for assaulting or willfully disobeying a superior commissioned officer or disobeying any regulation or order.²²⁸ Article 117 punishes anyone using "provoking or reproachful words or gestures towards any other person" in the military.²²⁹ These five articles, taken together, make any visible manifestation of disrespect for superior officers or peers the basis for criminal liability. Through threats of prison sentences and dishonorable discharges, the UCMJ deters all military personnel from reacting in any negative way to lesbians and

court's consideration of the first amendment claim in the case, all of the reasoning discussed herein is incorporated into the court's analysis of the equal protection claim. *Id.* at 464.

223. 10 U.S.C. § 925(a) (1988) (emphasis added).

224. *Cf. supra* text accompanying note 60.

225. Articles 77 to 134 of the UCMJ establish the substantive offenses for which military personnel may be court-martialed. 10 U.S.C. §§ 877-934 (1988).

226. 10 U.S.C. § 889 (1988).

227. 10 U.S.C. § 891 (1988).

228. 10 U.S.C. §§ 890, 892 (1988).

229. 10 U.S.C. § 917 (1988).

gay men in their midst. And any serviceperson who is not deterred can be criminally prosecuted and punished.

The government also expressed fears that lesbian or gay servicepeople would develop emotional relationships across ranks, thus creating discipline problems. Article 93 of the UCMJ punishes any person guilty of "cruelty toward, or oppression or maltreatment of," any military person under her command.²³⁰ Article 133 makes punishable any and all "conduct unbecoming an officer."²³¹ Any action not in line with military protocol by a superior officer toward an enlisted person could be criminally prosecuted, just as any action out of line with military protocol by an enlisted person could be prosecuted as described above.

Filling the gaps between these UCMJ articles is Article 134, the General Article:

Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial²³²

There is no action from the government's litany of horrors which is not already subject to criminal penalty under the UCMJ. There is no conduct in which military personnel could legally engage to manifest their prejudice against lesbian and gay military personnel. All conduct-related discipline problems associated with the presence of lesbian and gay men in the military are already addressed without the challenged regulations.

The government asserts that a need exists, but closer scrutiny has shown that the need is already filled by the UCMJ.²³³ A resolved problem needs no redress: "If there is a big hole in the fence for the big cat, need there be a small hole for the small one?"²³⁴ The military's regulations are nothing more than a surrender to the prejudices of the public and military personnel. They punish the victims of prejudice and enact that prejudice into law.

In all, the military's regulations do not on their face present either the rational relationship or legitimate governmental purpose required by the mod-

230. 10 U.S.C. § 893 (1988).

231. 10 U.S.C. § 933 (1988).

232. 10 U.S.C. § 934 (1988).

233. See *O'Brien v. United States*, 376 F.2d 538, 540-41 (1st Cir. 1967), *rev'd on other grounds*, 391 U.S. 367 (1968). The First Circuit Court of Appeals held unconstitutional a statute making the burning of draft cards a criminal offense. The court held that the statute violated first amendment free expression rights and *served no "proper purpose" because it was duplicative of an existing statute.*

The Supreme Court reversed, but did so by finding that the later statute *did not duplicate the existing statute.* 391 U.S. at 380-81; *accord United States Dep't of Agric. v. Moreno*, 413 U.S. 523 (1973).

234. *Polaroid Corp. v. C.I.R.*, 278 F.2d 148, 153 (1st Cir. 1960); *accord Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

ified rational basis test. The permanence of the condition in the classification and the process which produced the regulations justify closer scrutiny of the regulations and the motivations behind them. The failure to articulate a legitimate, related purpose and the manifest prejudice produce a presumption of invalidity. A brief survey of the UCMJ shows that every fear of breaches of military discipline advanced by the government is already answered by criminal statutes. This scrutiny shows that prejudice, and prejudice alone, is at work in the classification based on sexual orientation. The regulations are unconstitutional.

III.

THE DOCTRINE OF MILITARY DEFERENCE

A. *A General Definition: The Court's "Thumb on the Scale"*

After determining that the military's regulations excluding lesbians and gay men are unconstitutional under the modified rational basis test, reviewing courts must give serious consideration to the importance of the military context in which the regulations operate. The courts must assess whether the military needs of the nation, as they relate to the regulations excluding lesbians and gay men from service, are so important that they require putting aside or altering equal protection scrutiny of those regulations.

The Supreme Court gives the greatest level of deference to the political branches in military matters.²³⁵ The Court offers three justifications for its deferential stance. First, the Constitution expressly vests the Congress²³⁶ and the Executive²³⁷ with power over the military affairs of the United States. Second, the Court acknowledges its own lack of expertise in military affairs.²³⁸ Third, special recognition is given to the military's status as a "specialized community governed by a separate discipline from that of the civilian,"²³⁹ requiring "the subordination of the desires and interests of the individual to the needs of the service."²⁴⁰ For these reasons, the Court has vested the Congress, the Executive, and the military²⁴¹ with broad, largely unchecked discretion in

235. See, e.g., *Rostker v. Goldberg*, 453 U.S. 57, 64-65 (1981); *Orloff v. Willoughby*, 345 U.S. 57, 94 (1953); see also Comment, *First Amendment Rights in the Military Context: What Deference is Due?* - Goldman v. Weinberger, 20 CREIGHTON L. REV. 85, 100 (1986) [hereinafter *What Deference is Due?*]; Note, *First Amendment Rights of Military Personnel: Denying Rights To Those Who Defend Them*, 62 N.Y.U. L. REV. 855, 856-57 (1987) [hereinafter *First Amendment Rights*].

236. See U.S. CONST. art. I, § 8, cls. 12-14.

237. See U.S. CONST. art. II, § 2, cl. 1.

238. See, e.g., *Rostker*, 453 U.S. at 64-65; see also Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962).

239. *Orloff*, 345 U.S. at 94.

240. *Id.* at 92; accord *Parker v. Levy*, 417 U.S. 733, 751 (1974); *Schlesinger v. Councilman*, 420 U.S. 738, 747-48 (1975); *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

241. See *infra* note 253 (suggesting that the treatment of congressional action in military affairs should be different from that of the Executive and military officials).

military decision making.²⁴²

Members of the military services do not, however, sacrifice their rights upon entering the military, even though "the tests and limitations to be applied may differ because of the military context."²⁴³ In non-constitutional cases, this special deference is reflected in a doctrine of limited judicial review of military cases.²⁴⁴ The balancing test adopted to determine the reviewability of non-constitutional claims is, however, inapplicable for constitutional claims against the military.²⁴⁵ The unique need for discipline in the military "may render permissible within the military that which would be constitutionally impermissible outside it."²⁴⁶ However, courts may not "abdicate" their "ultimate responsibility to decide the constitutional question, but simply [must] recognize that the Constitution itself requires . . . deference to congressional choice."²⁴⁷

The central difficulty with applying the military deference doctrine in constitutional cases is the nearly complete lack of standards in the governing precedents. One commentator complained that "the majority opinions on point [have] repeated the standard phrases by rote."²⁴⁸ Critics of the military deference doctrine have argued that it is "seductively broad," is "pregnant with danger,"²⁴⁹ and "must be approached with a healthy skepticism" when it is used to support a violation of the Bill of Rights.²⁵⁰

One method for understanding the operation of the military deference doctrine is to consider a scale balancing an individual's interest against a necessary military action which infringes on the individual's interest. Military deference serves as the Court's thumb on the government's side of the scale, representing the Court's recognition that military affairs are an important gov-

242. The military deference doctrine, as it is currently constituted, is inconsistent with the fundamental constitutional value of judicial supremacy in the protection of individual rights and the role judicial supremacy plays in the separation of powers. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); see also *THE FEDERALIST* NO. 10 (J. Madison). A rights-protective doctrine more consistent with those values would recognize military deference as a variant on judicial review of administrative agency decisions. Cf. Haggerty, *Judicial Review of Military Administrative Decisions*, 3 *HASTINGS CONST. L. Q.* 171 (1976). Unfortunately, the theory underlying military deference has never been clearly articulated and is rarely investigated.

243. *Rostker v. Goldberg*, 453 U.S. 57, 67 (1981); see Warren, *supra* note 238, at 188.

244. See *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971). See generally Note, *Judicial Review of Constitutional Claims Against the Military*, 84 *COLUM. L. REV.* 387 (1984).

245. Note, *supra* note 244, at 389.

246. *Parker v. Levy*, 417 U.S. 733, 758 (1974); see also *Brown v. Glines*, 444 U.S. 348, 354 (1980); *Greer v. Spock*, 424 U.S. 828, 837-38 (1976).

247. *Rostker*, 453 U.S. at 67; see also *First Amendment Rights*, *supra* note 235, at 859-60 (arguing that judicial review of military affairs implicating constitutionally protected individual rights is a clash between the express grants of military authority to the Executive and Congress in articles I and II and the express article III obligations of the federal judiciary).

248. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 *N.C.L. REV.* 177, 178 (1984).

249. *Glines*, 444 U.S. at 369 (Brennan, J., dissenting).

250. Warren, *supra* note 238, at 197.

ernmental interest.²⁵¹ To hold a governmental action in the military context unconstitutional, a court must find that the individual's interest outweighs that thumb on the scale.

The government need only establish that the governmental decision at issue is sufficiently related to military necessity.²⁵² Without a sufficient relationship between the challenged governmental action and the government's military necessity, the Court lifts its thumb from the scale and the bare governmental classification is balanced against the individual's interest.

B. *The Requirement of a Cognizable Relation to Military Necessity*

The crucial, yet unanswered, question in the military deference doctrine is what aspects of military policy can be fairly included under a valid definition of military necessity.²⁵³ One commentator has suggested that the Court establish a two-tiered standard of review: regular, non-deferential judicial review during peacetime, and no judicial review during times of war.²⁵⁴ A second commentator has suggested a near complete segregation of military service personnel from the protection of the Constitution.²⁵⁵ Neither of these two suggestions, however, reflect the current state of the military deference doctrine.

Before the Supreme Court's 1986 decision in *Goldman v. Weinberger*,²⁵⁶ military deference precedents indicated that invocation of military necessity as the justification for a governmental action required some cognizable relation to the military's core function of preparing and fighting wars.²⁵⁷ In *U.S. ex*

251. *Rostker*, 453 U.S. at 70 ("the Government's interest in raising and supporting armies is an 'important governmental interest'").

252. *See, e.g., Rostker*, 453 U.S. at 79 ("Congress' decision to authorize the registration of only men . . . does not violate the Due Process Clause. The exemption of women from registration is not only sufficiently but also closely related to Congress' purpose in authorizing registration.").

253. *See First Amendment Rights, supra* note 235, at 876 (arguing that the Supreme Court has established no standard for review of military cases involving the First Amendment). It is also unclear whether military decisions by military officials or the Executive Branch should receive the same deference as those decisions made by Congress. *Compare Rostker*, 453 U.S. at 80 n.15 ("The grant of constitutional authority is, after all, to Congress and not to the Executive or military officials.") and *Chappell v. Wallace*, 462 U.S. 296, 301 (1983) ("[i]t is clear that the Constitution contemplated that the legislative branch have plenary control over rights, duties, and responsibilities in the framework of the Military Establishment. . . ."), with *Orloff v. Willoughby*, 345 U.S. 57, 93-94 ("The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates.") (emphasis added).

254. *First Amendment Rights, supra* note 235, at 876-89.

255. Hirschhorn, *supra* note 248, at 252-53.

256. 475 U.S. 503 (1986).

257. This reading of the pre-*Goldman* cases shares the premise of the proposal in *First Amendment Rights, supra* note 235. Individual rights should be overridden by the military necessity of the nation only when a clear case can be made for the existence of that necessity. Not every function of the military rises to the level of necessity. *Compare Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion) with *Schlesinger v. Ballard*, 419 U.S. 498 (1975), discussed *infra* notes 260-68. The difficult question is how to distinguish between non-essential

rel. *Toth v. Quarles*,²⁵⁸ the Court blocked the Army from reinstating a veteran to active duty solely for the purpose of court-martialing him. The Court, in refusing to defer to the military and overturning the court-martial, reasoned that it "is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-servicemen the benefit of a civilian court trial when they are actually civilians"²⁵⁹

In *Frontiero v. Richardson*,²⁶⁰ the Supreme Court invalidated a congressional scheme permitting male members of the armed services to claim their wives as dependents without producing any evidence of actual dependence, while requiring female members to prove their husbands' dependence before dependent's benefits would be granted.²⁶¹ *Frontiero* is noteworthy because of the complete lack of discussion of the military deference doctrine in the plurality and concurring opinions.²⁶² The clear implication is that administrative personnel matters do not have the cognizable relationship to core military functions necessary to find a place behind the military necessity aegis.²⁶³

Comparing *Frontiero* with *Schlesinger v. Ballard*,²⁶⁴ another gender-based military classification case, gives greater clarity to the core/non-core distinction. In *Ballard*, the Supreme Court upheld a congressional plan for military promotions which included a less stringent mandatory discharge provision for women than for men.²⁶⁵ Because women were restricted from serving in com-

military functions and core, necessary functions. The Supreme Court has provided no answer to this question.

The danger of the *Goldman* decision, discussed *infra* notes 276-93 and accompanying text, is the tremendously broad sweep given by the Court to the government's claims of military necessity. A much narrower definition is necessary if servicepeople's rights are to be given the appropriate level of protection. One method of narrowing the definition is to require the government to establish a *substantial relationship* between the challenged governmental action (e.g., the discharge of Goldman for wearing a yarmulke) and the claimed military necessity (e.g., the maintenance of discipline). The Court should carefully review the asserted relationship (e.g., the government's claim in *Goldman* that any variation in military regulations undercuts discipline). If military necessity is "substantially" implicated, the governmental interest must be upheld.

This type of review will likely require the courts to investigate, and become somewhat more knowledgeable in, military affairs. See *infra* note 268.

258. 350 U.S. 11 (1955).

259. *Id.* at 22.

260. 411 U.S. 677 (1973).

261. *Id.* at 679-80.

262. Justice Rehnquist's lone dissent adopted the reasons given by the district court for upholding the military's scheme. *Id.* at 691. Judge Rives' district court decision also did not discuss the military deference doctrine. *Frontiero v. Laird*, 341 F. Supp. 201 (M.D. Ala.), *prob. juris. noted* 409 U.S. 840 (1972), *rev'd sub. nom.* *Frontiero v. Richardson*, 411 U.S. 677 (1973).

263. *Accord* *Schlesinger v. Ballard*, 419 U.S. 498, 502 (1975) (Brennan, J., dissenting).

264. 419 U.S. 498 (1975).

265. Under 10 U.S.C. § 6382(a) (repealed 1980), male officers were subject to mandatory discharge after nine years of active service if they failed twice to be promoted. Female officers, under 10 U.S.C. § 6401(a) (repealed 1980), were entitled to 13 years of commissioned service before facing mandatory discharge for failure to be promoted.

bat,²⁶⁶ the Court held that the gender-based promotion scheme served the special personnel needs of the military. The *Ballard* Court distinguished *Frontiero* by pointing to the nature of the policy challenged:

In . . . *Frontiero* the reason asserted to justify the challenged gender-based classifications was administrative convenience, and that alone. Here, on the contrary, the operation of the statutes in question results in a flow of promotions commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command. *This Court has recognized that 'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.'*²⁶⁷

It is the direct relationship to combat needs that brings *Ballard* within the definition of military necessity. The government's actions in *Frontiero* and *Quarles*, on the other hand, bore no relation to preparing for or fighting wars and thus could not be defined within military necessity.²⁶⁸

A brief survey of several leading pre-*Goldman* military cases gives further evidence that the Court requires that some relationship between the challenged rule and core military functions be shown. In *Parker v. Levy*,²⁶⁹ a first amendment challenge was launched against the Army's court-martial of a captain under several sections of the UCMJ. The captain had made statements opposing the Vietnam War to enlisted personnel, urged resistance to the war, and refused to administer a medical training program because of his opposition to the war. The Supreme Court upheld the court-martial. The necessity of maintaining strict military discipline, the Court reasoned, established the requisite relationship between the court-martial and core military functions:

Disrespectful and contemptuous speech, even advocacy of violent change, is tolerable in the civilian community In military life, however, other considerations must be weighed. The armed forces depend upon a command structure that at times must commit men to combat, not only hazarding their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.²⁷⁰

In *Chappell v. Wallace*,²⁷¹ the need for strict discipline was again the basis for

266. See 10 U.S.C. § 6015 (1988).

267. *Ballard*, 419 U.S. at 510 (quoting *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955)) (emphasis added).

268. See generally Hirschhorn, *supra* note 248, at 198-200 (arguing that the judiciary cannot determine what is and is not a core function of the military without greater knowledge of the operations of the military services).

269. 417 U.S. 733 (1974).

270. *Id.* at 759 (quoting *United States v. Gray*, 20 C.M.A. 63 (1970)).

271. 462 U.S. 296 (1983).

the Court's deference to the military. In this case, the plaintiffs sought damages for race discrimination from their superior officers. The Court refused to grant damages, arguing that exposing officers to personal liability would undermine "the need for unhesitating and decisive action by military officers and equally disciplined responses by enlisted personnel."²⁷²

In *Rostker v. Goldberg*,²⁷³ the Supreme Court upheld males-only draft registration. Justice Rehnquist, after reviewing the legislative history of the congressional act which reintroduced the Selective Service System, found that Congress had considered and decided the question of the role of women in the military before passing the registration law. Since women were restricted from participating in combat, and the purpose of the registration and prospective draft was to provide personnel for combat, Congress found that a gender-based classification was reasonably related to preparing for war.²⁷⁴ *Rostker* is most important because of the close attention paid by Justice Rehnquist to the legislative history and Congress' explanation of the connection between combat readiness and the registration law's gender classification.²⁷⁵ A strictly deferential Court would not have investigated the relationship between Congress' actions and its purposes.

In summary, before *Goldman v. Weinberger*, the Supreme Court had adopted a standard of great deference to the Congress and the Executive, and perhaps to military officials, on military affairs. The pre-*Goldman* cases show that establishing a relationship between a challenged military action and the core functions of the military is the condition precedent to military deference. Once that cognizable relationship is proven, military deference is a thumb on the scale establishing the important governmental interest balanced against an individual serviceperson's interests. If that cognizable relation does not exist, as in *Frontiero* and *Quarles*, the Court lifts its thumb off the scale and the individual's interests, in most cases, prevail.

C. *The Effect of Goldman v. Weinberger*

Captain Goldman, an Air Force psychologist and an ordained Orthodox Jewish rabbi, was discharged for wearing his yarmulke²⁷⁶ indoors and thereby violating the service's regulations concerning uniform dress.²⁷⁷ Goldman claimed that the regulations violated the free exercise clause of the first amendment.²⁷⁸ Justice Rehnquist, writing for a close majority, upheld the Air Force's regulations, holding that the "desirability of dress regulations in the

272. *Id.* at 304.

273. 453 U.S. 57 (1980).

274. *Id.* at 76-79. See *infra* note 308.

275. See *Rostker*, 453 U.S. at 72-82.

276. A "yarmulke" is a skull cap worn by observant Jews as a religious requirement.

277. *Goldman v. Weinberger*, 475 U.S. 503, 505 (1986). The regulations at issue required, in pertinent part, that headgear not be worn indoors except by armed security police in the performance of their duties. AFR 35-10.

278. *Goldman*, 475 U.S. at 504.

military is decided by the appropriate military officials, and they are under no constitutional mandate to abandon their considered professional judgment."²⁷⁹ Rehnquist's opinion relied heavily on the doctrine of military deference. With extensive citations to past precedent, he renewed the view of the military as a specialized and separate society which "to accomplish its mission . . . must foster instinctive obedience, unity, commitment, and esprit de corps."²⁸⁰ Rehnquist returned to his own language in *Rostker* to declare that judicial deference "is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations is challenged."²⁸¹

Justice Brennan, in a harsh dissent, described the Court's review of Goldman's discharge as "a subrational-basis standard — absolute, uncritical 'deference to the professional judgement of military authorities.'"²⁸² Justice O'Connor, in a separate dissent, scored the Court's complete lack of attention to the validity of Captain Goldman's constitutional claim, along with its failure to adopt any standard for reviewing such claims in the military context.²⁸³ Brennan's severe interpretation of the majority's opinion²⁸⁴ has been adopted by several commentators who see the *Goldman* decision as conferring "absolute deference" on the military.²⁸⁵

The majority opinion in *Goldman* established a deferential standard far beyond that ever before recognized by the Supreme Court. The touchstone of military deference prior to *Goldman* was a link between the challenged governmental action and a core military function. It is difficult to perceive, as dissenting Justice Brennan argued, how Captain Goldman's unobtrusive, minor variation from the regulations could subvert discipline.²⁸⁶ In order to establish the link, Rehnquist accepted the government's argument that any variation from regulations is a threat to military discipline.²⁸⁷ This drastic expansion of the definition of core military functions which permitted Rehnquist to defer to the military is, without question, a serious threat to the proposition that servicepeople are protected by the Constitution.

The *Goldman* decision did not, however, establish a standard of absolute military deference. Absolute deference suggests that all military decisions will be unquestioningly honored.²⁸⁸ *Goldman* stops short of complete abrogation

279. *Id.* at 509.

280. *Id.* at 507.

281. *Id.* (citing *Rostker v. Goldberg*, 453 U.S. 57, 70 (1980)).

282. *Goldman*, 475 U.S. at 515 (Brennan, J., dissenting).

283. *Id.* at 528 (O'Connor, J., dissenting).

284. Justice Blackmun, joined by Justice Marshall, also dissented. *Id.* at 524.

285. See, e.g., *What Deference is Due?*, *supra* note 235, at 104; *First Amendment Rights*, *supra* note 235, at 873; Note, *Goldman v. Weinberger: Deference or Abdication*, 7 PACE L. REV. 531, 557-58 (1987); Note, *The Supreme Court and The Free Exercise Clause in the 1986 Term: The Narrowing of the Right of Civilians and Military Personnel to Engage in Religious Practices*, 23 WILLAMETTE L. REV. 134, 152, 155 (1987).

286. *Goldman*, 475 U.S. at 517 (Brennan, J., dissenting).

287. *Id.* at 516.

288. Even the most pessimistic commentators would be forced to admit that the Supreme

of all judicial review of military decisions. Rehnquist's opinion was careful to establish the relationship between mandatory uniform dress regulations and the military necessity of discipline:

Uniforms encourage a sense of hierarchical unity by tending to eliminate outward individual distinctions except for those of rank. The Air Force considers them as vital during peacetime as during war because its personnel must be ready to provide an effective defense on a moment's notice; the necessary habits of discipline and unity must be developed in advance of trouble.²⁸⁹

The action against Captain Goldman, in Rehnquist's view, maintained the integrity of a regulation necessary to preserve strict discipline, a recognized core function of the military.²⁹⁰ Rehnquist asserted that the "courts must give great deference to the professional judgement of military authorities concerning the *relative importance of a particular military interest*."²⁹¹ Even a seemingly unimportant element of the military's disciplinary regulations is, in Rehnquist's calculation, an important governmental interest. In brief, Rehnquist has removed the Court's thumb from the scale and replaced it with a hand. Nonetheless, even after *Goldman*, some connection between the classification and core military functions is necessary to keep that hand on the scale.

The Rehnquist military deference doctrine puts in doubt the *level* of relationship necessary between the challenged governmental action and the core military functions of waging and preparing for war. While the relationship to core military functions of the government's actions in *Parker*, *Chappell*, and *Rostker* could fairly be described as "substantial" or "reasonable,"²⁹² the relationship of Captain Goldman's yarmulke to military discipline certainly cannot be described as anything more than "minimal." The majority opinion in *Goldman*, while extremely deferential to the military for determinations of what is necessary to carry out core military functions, required that at least a minimal relationship to those functions be shown.²⁹³

The Seventh Circuit's opinion in *Ben-Shalom IV*, like Justice Rehnquist's

Court after *Goldman* would not defer to a military decision to racially segregate units justified as an effort to reduce racial tensions and thereby serve military discipline. See *Watkins I*, 847 F.2d at 1350 n.31.

289. *Goldman*, 475 U.S. at 508.

290. *Id.* at 507.

291. *Id.* (emphasis added).

292. The Court has never quantified the level of relationship necessary between the challenged governmental action and core military functions.

293. As Justice O'Connor pointed out in her dissent, *Goldman*, 475 U.S. at 528, the majority opinion provides no standards, such as those articulated here, for judging these issues. O'Connor proposed application in military cases of the same balancing test applied in civilian first amendment cases: "First, when the government attempts to deny a free exercise claim, it must show that an unusually important interest is at stake, whether that interest is denominated 'compelling,' 'of the highest order,' or 'overriding.' Second, the government must show that granting the requested exemption will do substantial harm to that interest, whether by showing that the means adopted is the 'least restrictive alternative' or 'essential' or that the interest will not 'otherwise be served.'" *Id.* at 530. The special role of the military should be considered in

in *Goldman*, stops just short of absolute deference. Dicta from *BenShalom IV* may express the Seventh Circuit's opinion that the Supreme Court requires almost absolute deference,²⁹⁴ however, the holding in *BenShalom IV* tells a very different story.

BenShalom IV involved two claims: a first amendment free speech claim and a fifth amendment equal protection claim.²⁹⁵ Judge Wood dispensed with the free speech claim simply by holding that "we find no First Amendment violation."²⁹⁶ Judge Wood's equal protection analysis involved summarily dismissing arguments that sexual orientation is a suspect classification,²⁹⁷ and then constructing a rational relationship between the classification and legitimate purposes with the "propensity argument."²⁹⁸

Absolute deference would be expressed in a holding that a challenged military action was constitutional exclusively because military officials or Congress felt the action was necessary to fulfill the military's obligation to prepare for and fight wars. Neither Judge Wood's opinion nor Justice Rehnquist's opinion so hold. In fact, both go to great lengths to offer alternative holdings.

Justice Stevens' concurrence in *Goldman*²⁹⁹ becomes especially important under this interpretation of the majority opinion in *Goldman*. Stevens viewed the case in terms broader than just a single Air Force officer and a single, insignificant variation from uniform dress regulations.³⁰⁰

The very strength of Captain Goldman's claim creates the danger that a similar claim on behalf of a Sikh or a Rastafarian might readily be dismissed as "so extreme, so unusual, or so faddish an image that public confidence in his ability to perform his duties will be destroyed." . . . For the difference between a turban or a dreadlock on the one hand, and a yarmulke on the other, is not merely a difference in "appearance" — it is also the difference between a Sikh or a Rastafarian, on the one hand, and an Orthodox Jew on the other.³⁰¹

the first branch of the analysis, with the need for military discipline serving as the especially important governmental interest. *Id.* at 531.

294. *See, e.g., BenShalom IV*, 881 F.2d at 460 ("We are directed to be careful not to circumscribe the authority of military commanders to an extent not authorized by Congress."); *see also id.* at 466 ("It would be difficult to think of a clearer example of the type of governmental action that was intended by the Constitution to be left to the political branches The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially military judgments, subject always to civilian control of the Legislative and Executive Branches.").

295. *Id.* at 457.

296. *Id.* at 462.

297. *Id.* at 464.

298. *See supra* text accompanying note 214.

299. *Goldman v. Weinberger*, 475 U.S. 503, 510 (1986) (Stevens, J., concurring).

300. "Captain Goldman has mounted a broad challenge to the prohibition on visible religious wear as it applies to yarmulkes. He has not argued the far narrower ground that, even if the general prohibition is valid, its application in his case was retaliatory and impermissible." *Id.* at 511 n.5 (Stevens, J., concurring).

301. *Id.* at 512-13 (Stevens, J., concurring) (citations omitted).

Stevens had two concerns. First, granting Goldman's requested variation of the military dress regulations would require granting similar variations for other religions resulting in a substantial disruption of military discipline. Second, the neutral and objective visibility standard applied by the military to variations on military dress requirements was the best method, in Stevens' view, for guaranteeing observance of the anti-establishment commands of the first amendment.³⁰²

Stevens' picture of a "rag-tag band of soldiers"³⁰³ clarifies the relationship between dress regulations and military discipline.³⁰⁴ There is unquestionably a closer relationship between Stevens' picture of chaotic disuniformity and the undermining of the military discipline necessary to prepare for and wage war than can be seen in Captain Goldman's isolated, *de minimis* violation. If the Court accepts, as it did in *Goldman* and earlier cases, that subordination of the individual's interests is necessary to maintaining military discipline, then diverse and personalized dress certainly threatens military discipline. Stevens' first amendment concerns about the preferential treatment of certain religious practices and groups inherent in granting exemptions to military dress codes³⁰⁵ add substantial weight to the state interests served by the uniform dress regulations.

Stevens wrote separately to describe the stronger relationship between the government's discharge of Captain Goldman and the core functions of the military which caused him to join in the majority's result. This relationship could be described as "reasonable" at the least, and could perhaps be analogized to the "substantial" relationship standard inferred from *Parker, Chappell*, and *Rostker*. That Stevens, joined by Justices White and Powell, felt it necessary to establish the existence of a stronger relationship, suggests that Rehnquist's "minimal relationship" is not the Supreme Court's new standard for the invocation of military deference. *Goldman* was a 5-to-4 decision. Only Chief Justice Burger and Rehnquist joined the majority opinion which found a "minimal relationship" between discharge and discipline sufficient to trigger military deference. Justices Stevens, White, and Powell, while voting with the majority (for the military and against Goldman) put forward a concurring opinion which required a "reasonable" or "substantial" relationship between Goldman's discharge and military necessity.

After *Goldman*, two possible military deference standards may be applied. Rehnquist's military deference doctrine is extremely solicitous to the military. It permits the government's definition of military necessity to stand

302. "Congress shall make no law respecting an establishment of religion" U.S. CONST., amend. I.

303. *Goldman*, 475 U.S. at 512 (Stevens, J., concurring).

304. *Cf. supra* text accompanying notes 239-40.

305. *But see* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (creating an exemption for the Amish from compulsory education above age 14); *Sherbert v. Verner*, 374 U.S. 398 (1963) (creating an exemption for Seventh-day Adventists from certain requirements of state unemployment laws).

with only limited judicial review. The Court, under Rehnquist's formulation, would require only that a "minimal" relationship between the challenged action and military discipline be shown. Stevens' military deference doctrine, consistent with the pre-*Goldman* cases, requires that at least a "reasonable" relationship be established between the challenged action and a core military function. It is unsettled which test is the precedent established by *Goldman*.

D. Deference and the Military's Exclusion of Lesbians and Gay Men

The test for determining the appropriateness of applying military deference in cases challenging the military's anti-gay and 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. The asserted core military function supporting these regulations is strict military discipline.³⁰⁶ Military discipline is inculcated and maintained by subordinating the individual serviceperson's interests to those of the military.³⁰⁷ Strict uniformity among servicepeople, the government has argued, is a means necessary to the maintenance of discipline; therefore, punishing or excising disuniformity, or disuniform servicepeople, is necessary to the core military function of strict discipline.

Only two theories can reasonably support the purported relationship between strict uniformity and military discipline. The first possible theory is that an individual serviceperson's disuniformity, even a minimal disuniformity, is an accurate proxy for that serviceperson's performance in the military or her willingness to submit to military discipline. Discharging a disuniform serviceperson therefore means discharging an individual who herself is a poor performer or likely to reject military discipline. The second possible theoretical relationship between strict uniformity and discipline is that a serviceperson's disuniformity has an effect on her peers which undercuts military discipline; therefore, she would be discharged to avoid the "external effect of disuniformity."

The first explanation, which might be called the "personal effect of disuniformity," has never been argued by the government and was not considered in *Goldman*. The argument would have to assert that any serviceperson different from the ideal serviceperson, assuming the characteristics of an ideal serviceperson could be articulated, is an inferior serviceperson. Of course, no such predictive or proxy relationship exists between these disuniformities and performance in the military or willingness to submit to military discipline. Disuniformity is at once an arbitrary, underinclusive, and overinclusive classification for the purpose of military performance or discipline.³⁰⁸

306. See *supra* text accompanying notes 269-72.

307. See *supra* note 240 and accompanying text.

308. The notable asserted exception is the exclusion of women from combat duties. See, e.g., 10 U.S.C. § 6015 (1988) (prohibiting women in the Navy from service on board ships engaged in combat). It is important to note that the ban on women in combat was a congressional enactment, not a military rule, unrelated to the enforcement of military discipline. Con-

The government cannot convincingly put forward the personal effect argument because of the difficulty, if not impossibility, of presenting empirical, or even theoretical, links between disuniformity and performance or discipline. Sexual orientation as a disuniformity poses an excellent example of the inherent difficulty with this argument. For example, if sexual orientation is a proxy for poor performance or likely insubordination, a lesbian or gay serviceperson could be discharged. But, the records of the numerous lesbians and gay men discharged by the military for their sexual orientation are consistently outstanding.³⁰⁹ The asserted link does not exist in these cases, and the military has offered no general evidence establishing the requisite link. Again, the essential requirement of the military deference doctrine is the establishment of some cognizable relationship between the action taken and the objective sought. Since no relationship can be shown between sexual orientation and performance or military discipline, the government cannot gain the benefits of the court's military deference thumb on the scale.

The government might suggest that disuniformities *freely chosen* by servicepeople are predictive of disciplinary problems or poor performance.³¹⁰ The government carries a heavy burden of proof. By arguing for absolute uniformity, and by suggesting that any disuniformity evidences a rejection of military discipline, the military must quash all differences in political ideology; religious belief; preference for sports teams; personal taste as to clothing, food, and heterosexual partners' physical characteristics; and a long list of other personal choices, as well as sexual orientation. This is not to suggest that these personal choices are analogous to sexual orientation. These examples are offered only to show how far a personal effect of disuniformity argument must reach to be valid. To justify reaching sexual orientation, but not all other personal choices, the military must articulate why sexual orientation is a proxy for performance or subordination to discipline while other disuniformities are not. It has not, and could not, offer such an argument. As a result, underinclusiveness necessarily destroys any argument for absolute uniformity.

The argument that freely chosen disuniformities are effective proxies for military discipline succeeds only if the individual's decision to be disuniform

gress adopted gender as a proxy for ability to perform in combat. *See Rostker v. Goldberg*, 453 U.S. 57 (1980). Women are not segregated from men in service units and, with the exception of combat duties, engage in the same work as military men without any suggestion of poorer performance or rejection of military discipline. In Congress' view, gender is a proxy only for the limited realm of combat performance.

309. *See supra* note 5; *accord* McCrary & Gutierrez, *The Homosexual Person in the Military and in National Security Employment*, in *HOMOSEXUALITY AND THE LAW* 120 (Knutson ed. 1980).

310. There is extensive debate, too lengthy for appropriate consideration in this Note, about whether sexual orientation is a "freely chosen" lifestyle or the result of environmental or organic factors unrelated to individual choice. *See generally* Halley, *supra* note 68, at 937-63 (discussing the questions of "choice" of orientation in strict terms and in the context of social constructs). For the purposes of this section, this Note assumes, without endorsing or discussing the possibility, that a court might find homosexual orientation to be a freely chosen disuniformity.

in some way represents a tendency to reject military discipline or to perform poorly. Such a manifestation can be proven only if the choice made by the serviceperson is itself a rejection of a military discipline. It must be insufficient for the military to argue that it can create any regulation and then judge the violation of the regulation to be evidence of a rejection of military discipline. This would be mere "bootstrapping," and would have the effect of invalidating every challenge to every regulation. Something more must be required. Willingness to ignore commanding officers' orders, for example, probably suggests a propensity to challenge the military command hierarchy. But, a personal decision which does not in any way implicate military discipline manifests nothing more than the individuality of a sovereign, autonomous human being. Reaching these personal choices means breaching the essential requirement of military deference that a cognizable relationship to core military functions be established. More importantly, however, it means abrogating every constitutional protection for individuals in the military.

The second explanation for the requirement of absolute uniformity is that one individual's rejection of absolute uniformity undercuts the force of military command and inspires others at least to doubt, and at worst to reject, military command hierarchy.³¹¹ The Seventh Circuit, in *BenShalom IV*, suggested this explanation.³¹²

Absolute uniformity can be absolute, of course, only if it is observed by all. That discipline which can be rejected with impunity loses its force is a powerful argument. A serviceperson who sees another serviceperson flaunting regulations is likely to doubt her commanders and question whether the rules apply or should apply to her. The effect on military preparedness and the ability to wage war, the military's undisputed core functions, would be debilitating.

This "external effect" justification can apply, however, only to those disuniformities which meet both of the following two tests. First, the disuniformity must be open and notorious. Second, the open and notorious disuniformity must manifest a rejection of a military discipline regulation sufficient to inspire others to reject military discipline. Openness and notoriety are necessary so that other servicepeople are aware that the transgressing serviceperson is disuniform. The effect on others of an unseen, unheard, unknown disuniformity is much like the sound made by a tree falling in a deserted forest. And to inspire others to doubt or reject military discipline, a disuniform serviceperson must undercut respect for regulations by herself rejecting military discipline. As noted earlier, to reject something unrelated to military discipline cannot convey an anti-discipline message.

For example, Captain Goldman could be disciplined for wearing a yar-

311. See *Goldman v. Weinberger*, 475 U.S. 503, 512-13 (1986) (Stevens, J., concurring).

312. 881 F.2d at 465. Unfortunately, Judge Wood did not feel obligated to offer supporting evidence for his conclusory assertion that Miriam BenShalom's sexual orientation was affecting other members of the Army Reserve.

mulke because he openly and notoriously violated a military uniform dress regulation.³¹³ Goldman could not, however, be punished for being Jewish. There is no military policy either *for* Protestantism or *against* Judaism. No serviceperson could be inspired by Goldman's status as a Jew to reject or doubt military discipline.

Applying the logic of the "external effect" justification to the military's exclusion of lesbians and gay men establishes that there is no relationship between the military's sexual orientation classification and military discipline or performance. Sexual orientation is not, in most cases, open and notorious. But more importantly, there is not and cannot be a military policy *for* heterosexuals or *against* lesbians and gay men; therefore, being lesbian or gay does not inherently reject a military discipline regulation. Upholding a military endorsement or rejection of a sexual preference would mean permitting the military to enforce one view of morality, a strictly proscribed activity for the military. The military's responsibility is to wage and prepare for war. To permit the military to usurp the civilian realm of choosing how or whether to enforce moral precepts as law, even those endorsed by a popular majority, would turn on its head the vital American principle of civilian control over the military. Such a proposition concerns even Judge Bork.³¹⁴

The military may classify based on sexual orientation only by establishing a relationship, at least minimal but more properly substantial, between that classification and military discipline. Because sexual orientation is not predictive of the lesbian or gay serviceperson's performance or respect for military discipline, and because it has no sanctionable "external effect" on the subordination to discipline of other servicepeople, there is no cognizable relationship between the classification and military discipline. Therefore, the military cannot gain the benefits of the military deference thumb-on-the-scale for a classification based on sexual orientation.

There may be, as the government fears, a reaction by some bigoted servicepeople to the presence of lesbians and gay men in the military. These prejudiced servicepeople may even breach military discipline. However, those breaches bear no relevant relation to the sexual orientation of the lesbians and gay men. They are related only to the bigotry and disrespect for military command festering within the prejudiced servicepeople.

313. An important but separate question not addressed in this Note is whether the facts of *Goldman* — Captain Goldman's wearing of a yarmulke — rose to the level of a rejection of military discipline such that others would be inspired to doubt the effectiveness of military dress regulations. Obviously, Rehnquist felt Captain Goldman's act did meet such a test. See *supra* text accompanying notes 287 and 289. However, a de minimis exception to regulations in service of a widely recognized religious observance probably does not convey an anti-military discipline message to others in the Air Force. Therefore, judicial deference was not due in *Goldman*. See *Goldman*, 475 U.S. at 513 (Brennan, J., dissenting).

314. See *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984) ("It may be argued, however, that a naval regulation, unlike the act of a legislature, must be rationally related not to morality for its own sake, but to some further end which the Navy is entitled to pursue because of the Navy's assigned function.").

CONCLUSION

This Note has argued that military regulations mandating the exclusion of lesbians and gay men from the armed services fail the modified rational basis test and therefore violate constitutional equal protection rights. This Note has also argued that the doctrine of special judicial deference in military affairs cannot be appropriately applied to these regulations because no cognizable relationship between the regulations and a core function of the military has been, or can be, articulated.

Only prejudice stands as a justification for the military's regulations, and as an argument for invoking military deference. To uphold this classification, the government and the courts would be forced to argue what was long ago rejected by the Supreme Court: that prejudice is a legitimate purpose for governmental classification.³¹⁵ Some may argue that prejudice against lesbians and gay men is a legitimate state purpose. Judge Wood's opinion in *Ben-Shalom IV*, although expressly arguing to the contrary, implied that the Seventh Circuit considers prejudice to be a sufficient justification for the military's classification.³¹⁶ This Note relies on the Supreme Court precedents and fundamental constitutional equal protection guarantees which dictate that prejudice cannot be a legitimate state purpose.

The only remaining question is whether military necessity is so compelling that it requires permitting the military to make a classification using prejudice as the only justification. To permit such a result would be to legitimize the use of *irrational* relationships to military necessity to outweigh the equal protection rights of individuals. The very purposes of the guarantees of equal protection — requiring rationality in governmental classifications and banning prejudice as a basis for governmental decisionmaking — would be eliminated for everyone within reach of the military. Servicepeople's constitutional rights, and perhaps those of other citizens, would have no protection, except at the whim of military commanders.

Are the needs of the military so great that they can justify abandoning the fundamental principle upon which the equal protection guarantees of the fifth and fourteenth amendments stand? Judge Wood seems to think so, but offers only conclusory statements to support his radical repudiation of existing law.

The Supreme Court has permitted prejudice to govern on only two occa-

315. See *supra* text accompanying notes 166-76.

316. At oral argument counsel for plaintiff stated that there was no basis for the Army's homosexual regulations, except prejudice. There no doubt is prejudice against homosexuals both in and out of the Army. That possibly may be abating to a degree. However, the Army should not be required by this court to assume the risk, a risk it would be assuming for all our citizens, that accepting admitted homosexuals into the armed forces might imperil morale, discipline, and the effectiveness of our fighting forces. . . . We, as judges, although opponents of prejudice of any kind, should not undertake to order such a risky change with possible consequences we cannot safely evaluate.

BenShalom IV, 881 F.2d at 461.

sions, both during the racist hysteria of extraordinary wartime conditions.³¹⁷ The trauma resulting from those two tragic decisions continued for forty years, and the decisions have subsequently been repudiated.³¹⁸ The answer in this case must be no. The goal of eliminating prejudice from government actions and requiring rationality in government decisionmaking cannot be abandoned even in the special context of the military.

Consideration of these issues also exposes serious flaws with the Supreme Court's standard-setting, both in equal protection jurisprudence and military deference jurisprudence. The absence of clear standards of review make corrupt and prejudiced political decisions ever more likely. At least three different views of the appropriate method for undertaking equal protection analysis now uncomfortably co-exist on the Supreme Court.³¹⁹ Even the modified rational basis test advocated in this Note represents a compromise between the mechanical application of the currently three-tiered equal protection analysis and case-by-case, idiosyncratic determination of appropriate standards of review. Genuine judicial supremacy to avoid self-interested manipulation of representative democracy by the majority probably requires a unique analysis of each case on its facts in a method similar to the "sliding scale" equal protection analysis stubbornly advanced by Justice Marshall.³²⁰ In the absence of such a method of analysis, the state must be required to establish the legitimacy of discriminatory classifications. Such is the operation of the modified rational basis test.

Military deference presents an even more troublesome lack of certainty in judicial analysis. The Supreme Court has never articulated exactly, or even approximately, what level of deference is due to military decisions and what areas may be consistently deemed within the scope of military necessity. The Rehnquist analysis in *Goldman* presents the deeply troubling possibility that the Supreme Court intends to give the military a free reign to abrogate the constitutional rights of all servicepeople. Such a result would invite irrational

317. *Korematsu v. United States*, 323 U.S. 214 (1944); *Hirabayashi v. United States*, 320 U.S. 81 (1943). The forced relocation and internment of Japanese-Americans during World War II was a dark period in American history. The military's action and the *Korematsu* case, which conferred the sanction of the Supreme Court, were harshly criticized, even at the time, as an unconscionable surrender to wartime hysteria and racism. See Rostow, *The Japanese American Cases — A Disaster*, 54 YALE L.J. 489 (1945); Dembitz, *Racial Discrimination and the Military Judgment: The Supreme Court's Korematsu and Endo Decisions*, 45 COLUM. L. REV. 175, 187-88 (1945); M. GRODZINS, AMERICANS BETRAYED, POLITICS AND THE JAPANESE EVACUATION 302 (1949).

318. After the wave of racism and paranoia had passed, the internment became the subject of an apologetic presidential proclamation, see Proclamation No. 4417, 3 C.F.R. 8 (1977), a federal commission report, see COMMISSION ON WARTIME RELOCATION AND INTERNMENT OF CIVILIANS, PERSONAL JUSTICE DENIED (1983), and, in 1988, legislation apologizing and providing reparations to the victims of the relocation and internment, see Japanese-American Civil Liberties Act, Pub. L. No. 100-383, 102 Stat. 903 (1988).

See generally L. TRIBE, *supra* note 27, at 1452.

319. See *supra* note 157.

320. *Id.*

decisions and undermine the effectiveness and legitimacy of the military.³²¹

This Note has argued that Justice Rehnquist's opinion did not represent the adoption of such an absolute deference standard, although it skirted the edges of such a standard. The most effective method for protecting against such judicial abdication of the necessity of reviewing constitutional claims by servicepeople is to continue to impose on the government the burden of articulating a substantial relationship between the challenged governmental action and the core military functions of the nation. Unless such a relationship is established, the challenged military action should face the same balancing against individual interests as would any other governmental action. As in modified rational basis analysis, the government must make a reasonable showing that a true military purpose, not mere prejudice, is motivating its actions.

321. The military is undercutting its own effectiveness by allowing prejudice to govern its decisionmaking in personnel matters rather than the skill and effectiveness of the individual being reviewed. *See supra* note 5.

